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Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing

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**STANDING FOR EVERYONE: *SIERRA CLUB V. MORTON*,
SUPREME COURT DELIBERATIONS, AND A SOLUTION
TO THE PROBLEM OF ENVIRONMENTAL STANDING**

*By Scott W. Stern**

The modern doctrine of environmental standing prevents many worthy environmental plaintiffs from presenting their cases in court; it allows those who would desecrate and despoil the environment for profit to do so with impunity. Considering the coming environmental catastrophe that climate change will almost certainly usher in, this restrictive doctrine has profound implications.

But as this Article shows, the modern environmental standing doctrine is an aberration. For most of American history, there were no standing requirements even approaching the severe demands of Lujan. Yet the Justices who created the modern doctrine claimed they were simply clarifying a “traditional requirement,” or they had “always” interpreted standing in this manner.

By delving deeply into the personal papers of Supreme Court Justices and the archives of environmental plaintiffs, this Article shows that the Justices’ invocation of tradition is blatantly incorrect. In so doing, it completely retells the story of how the less restrictive standing doctrine of the early twentieth century morphed into today’s demanding “injury-in-fact” requirement. This Article focuses especially on the seminal standing cases of the mid-1960s to the mid-

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1970s. By carefully reading the Justices' opinions in concert with the archival material, this Article shows that the nebulous injury requirement of yesteryear transformed into the demanding "injury-in-fact" requirement during this time because of the Justices' inadvertence, ignorance of history, and responsiveness to unimaginative arguments made by plaintiffs' lawyers. In fact, the Justices actually wanted to help the burgeoning environmental organizations that brought the seminal standing cases; but, in their quest to do so, the Justices accidentally created—pretty much out of whole cloth—the strict and punitive concept of injury-in-fact.

This Article pays especial attention to *Sierra Club v. Morton*. Though remembered now for liberalizing the standing doctrine, this Article shows that the case did no such thing. Though remembered now for Justice Douglas's bold dissent arguing that trees should have standing, this Article shows that the truly radical dissent belonged to Justice Blackmun.

Finally, this Article charts a path out of this mess, by arguing for a thorough rethinking of the doctrine of environmental standing. Drawing on two forgotten yet crucial insights from Blackmun's *Sierra Club* dissent, as well as another largely forgotten innovation of the 1960s and 1970s, this Article argues for the passage of state-level environmental standing statutes, granting standing even in the absence of an injury. In its conclusion, this Article proposes a model law.

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INTRODUCTION

Wednesday, November 17, 1971, was a clear, chilly day in Washington, D.C.¹ A crowd of people jostled to get into Cass Gilbert’s majestic Supreme Court building, the line extending out the huge, handsome doors, down the marble steps, and onto the street below.² This crowd had ventured to the Supreme Court that morning to hear the oral arguments for a case. But this was not just any case. The crowd had gathered to hear two lawyers do battle in what they believed to be perhaps the most important environmental lawsuit of the century: *Sierra Club v. Morton*.³ Two years earlier, the Sierra Club had sued the federal government in an attempt to stop a beautiful glacial valley from being turned into a ski resort, but the arguments before the Justices in 1971 barely reached the merits of the case. Rather, the lawyers’ arguments mostly concerned standing—should the Sierra Club have even been able to bring this lawsuit in the first place?

For decades, standing had been much discussed but little understood. Uncontroversial for most of American history,⁴ judges began restricting who had standing in the early twentieth century, and by the early 1970s the standing doctrine was muddled, confused, and strict: fewer and fewer plaintiffs had standing to sue.⁵ The standing

1. *Today’s Weather Report*, EVENING STAR (Nov. 17, 1971), C6.

2. M. Rupert Cutler, *Sierra Club v. Hickel*, at 94 (1972) (on file in Folder 12, Carton 6, Sierra Club Legal Defense Fund Records, University of California at Berkeley [hereinafter Sierra Club Legal Defense Fund Records]).

3. 405 U.S. 727 (1972).

4. *See infra* Part I.A.

5. *See infra* Part I.B.

doctrine was, as Justice John Marshall Harlan II had written a few years earlier, “a word game played by secret rules.”⁶

Seven months after hearing oral arguments, a closely divided Court ruled that the Sierra Club did not have standing to sue in this case. However, Justice Potter Stewart pointedly informed the Club that it could easily fix this. The Club had based its arguments for standing on its well-established interest and expertise in environmental matters; if the Club could prove that its members had suffered a personal “injury in fact,” then those members could have standing to sue.⁷ Such an injury did not have to be physical or economic; it could be the result of harm to the Club members’ “aesthetic and recreational” values.⁸ So if Club members enjoyed hiking or camping in the valley, the threatened destruction of that valley would be injury enough.⁹

This decision has long been celebrated as liberalizing standing, firmly expanding the definition of injury-in-fact to encompass non-economic injuries and thus opening the courthouse to environmental plaintiffs everywhere.¹⁰ Yet *Sierra Club v. Morton* is probably more famous for the dissent written by Justice William O. Douglas. Douglas argued that “environmental objects” should be able “to sue for their own preservation.”¹¹ Rivers, valleys, trees, beaches—all of these natural objects should be treated like other inanimate objects to which courts have given legal personhood, like ships or corporations.¹²

6. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

7. *Sierra Club*, 405 U.S. at 734-35.

8. *Id.* at 735.

9. *Id.*

10. See, e.g., Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1762 (2007); Robert V. Percival & Joanna B. Goger, *Citizen Suits and the Future of Standing in the 21st Century: From Lujan and Laidlaw and Beyond: Escaping the Common Law's Shadow: Standing in the Light of Laidlaw*, 12 DUKE ENVTL. L. & POL'Y F. 119, 119-20 (2001); Andrew C. Lillie, *Tenth Circuit Survey: Agency Law Barriers to Successful Environmental and Natural Resources Litigation: Tenth Circuit Approaches to Standing and Agency Discretion*, 78 DENV. U.L. REV. 193, 197 (2000); David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. LAND USE & ENVTL. LAW 451, 459 (2000); James L. Huffman, *Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow: Introduction and Overview: A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 546 n.82 (1989).

11. *Sierra Club*, 405 U.S. at 741-42 (Douglas, J., dissenting).

12. *Id.* at 742-43.

Douglas's powerful rhetoric immediately captured the popular imagination,¹³ but his colleague Harry Blackmun recognized at the time that it was not actually that radical a proposal. Practically speaking, according to Douglas, a river could appear in court just as ships or corporations did—that is, represented by “people who have a meaningful relation to that body of water.”¹⁴ This was not too far from Stewart's majority opinion, which also found a way to allow those with a meaningful connection to the valley (i.e. the Sierra Club) to sue for its protection. This led Blackmun and his clerks to conclude, “Douglas's analysis is just an imaginative and novel method of arriving at Stewart's result.”¹⁵

Rather, the more radical dissent belonged to Blackmun. “If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content,” he wrote.¹⁶

But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?¹⁷

Blackmun proposed two alternatives to Stewart's ruling. First, the Court could find for the Sierra Club “on condition that the Sierra Club forthwith amend its complaint to meet the specifications the Court prescribes for standing.”¹⁸ Second, Blackmun would “permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is,

13. See *infra* notes 306-07 and accompanying text.

14. *Sierra Club*, 405 U.S. at 743 (Douglas, J., dissenting).

15. George T. Frampton, Jr., *Re: Sierra Club No. 70-34*, at 6 (Mar. 30, 1972) (on file in Folder 7, Box 137, Harry Blackmun Papers, Library of Congress [hereinafter Blackmun Papers]).

16. *Sierra Club*, 405 U.S. at 755 (Blackmun, J., dissenting).

17. *Id.* at 755–56.

18. *Id.* at 756–57.

of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues.”¹⁹ This second option apparently would have allowed individuals or groups with a deep interest in the environment to have standing to bring environmental cases even in the absence of an injury-in-fact.

In the decades following *Sierra Club v. Morton*, the Supreme Court sharply restricted standing for environmental plaintiffs. In 1992, Justice Antonin Scalia wrote for the Court in *Lujan v. Defenders of Wildlife*,²⁰ articulating a new test, which, while still allowing for aesthetic or recreational injuries, made attaining standing considerably harder: a plaintiff must demonstrate that she has suffered (1) a concrete, particularized, and actual or imminent “injury in fact,” which is (2) “fairly traceable” to the defendant’s conduct, and (3) which can be redressed by a favorable court decision.²¹ In *Lujan*, the Court also ruled, for the first time ever,²² that an explicit congressional grant of standing to “citizens” to sue for a violation of an environmental statute was unconstitutional.²³ It is apparent that Scalia’s opinion was motivated, in part, by his “undisguised hostility toward the purposes of the environmental laws.”²⁴ Justice Blackmun, in the twilight of his career, accused Scalia of going on a “slash-and-burn expedition through the law of environmental standing.”²⁵

Today, environmental standing remains incredibly restrictive. This is a shame, for it prevents many worthy environmental plaintiffs from even presenting their cases in a court of law; it allows those who would desecrate and despoil the environment for profit to do so with impunity.²⁶ Considering the coming environmental catastrophe that climate change will almost certainly usher in, this is a shame indeed.

19. *Id.* at 757.

20. 504 U.S. 555 (1992).

21. *Id.* at 560–61.

22. Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 165 (1992).

23. *Lujan*, 504 U.S. at 573–79.

24. Percival & Goger, *supra* note 10, at 120; see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881, 896–97 (1983).

25. *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting).

26. See Holly Doremus, *The Persistent Problem of Standing in Environmental Law*, 40 ENVTL. L. REV. 10956 (2010).

Yet how to fix environmental standing? How to free ourselves from such a complicated, convoluted, conservative doctrine?

In this Article, I will advocate for the elimination of the injury-in-fact requirement, at least in environmental cases. To do so, I will thoroughly retrace the history of standing in general, and of environmental standing in particular. In Part I, I will show that Scalia's interpretation of standing is a stark departure from the way that courts interpreted standing for most of American history—and a bald-faced misrepresentation of history. From before the Founding until well into the twentieth century, parties needed only a cause of action to appear in court; there was no requirement that they demonstrate anything approaching the modern definition of standing. The Framers certainly never intended Article III to limit standing. Furthermore, individuals could always sue on behalf of the public, so long as they had a statutory or common law cause of action, or so long as they were attempting to compel the performance of a governmental obligation. This concept of “standing for the public” had deep roots in British common law, and it was explicitly affirmed by the Supreme Court in 1875.²⁷ Only in the early twentieth century did the Court begin demanding that plaintiffs show that they had suffered an injury, and even into the mid-twentieth century, the Court still accepted plaintiffs' ability to stand for the public.

Though many scholars have studied this earlier period,²⁸ I will pay especial attention to the period from the mid-1960s to the mid-1970s. By closely scrutinizing the Justices' personal papers, I will show that the nebulous injury requirement of the early twentieth century morphed into the demanding “injury-in-fact” requirement during this time because of the Justices' inadvertence, ignorance of history, and in response to unimaginative arguments made by plaintiffs' lawyers. Further, even in the standing cases of the late 1960s and early 1970s, it is clear from their papers that the Justices still intended to allow uninjured parties to be able to stand for the public, so long as these parties were enabled to do so by statutory causes of action. Yet the Justices repeatedly (and apparently unintentionally) failed to make this

27. *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 354–55 (1875).

28. See Sunstein, *supra* note 22; Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

clear, which enabled Scalia to rewrite the history of standing in the 1990s, claiming he was simply clarifying a “traditional requirement.”²⁹ In subsequent decisions, the Court claimed it had “always” treated standing in this way,³⁰ which one scholar has commented “is bad history or a blatant lie.”³¹

This history matters, because our collective ignorance of it is what allows the revisionists to so effectively neuter standing and claim they are acting conservatively—cautiously, in line with recent precedent—when they are, in fact, acting radically. Further, the history of environmental standing in the 1960s and 1970s reveals the profound danger of this historical amnesia. By charting exactly how the Justices of this period stumbled toward *Lujan*, I reveal how subtle is the damage wrought by sloppiness and uninspired arguments, and how the modern doctrine is distinctly contrary to prior Justices’ intentions. The Justices actually wanted to help the burgeoning environmental organizations that brought the seminal standing cases; but, in their quest to liberalize the doctrine, the Justices accidentally created—pretty much out of whole cloth—the strict and punitive concept of injury-in-fact.

This Article is the first to retell the complete history of the Supreme Court’s internal deliberations over the seminal standing cases of the mid-1960s and early 1970s. Though several scholars have devoted a page or two to examining individual Justices’ papers with regard to these cases—Robert V. Percival with Justices Marshall³² and Blackmun,³³ Peter Manus with Justice Douglas³⁴—none have delved deeply into this specific line of cases, or assembled the stories told by all of these archival documents in a single narrative, or, indeed, focused especially on standing. Doing so allows us to fully grasp how muddled and unintentional the transition toward “injury in fact” and

29. Scalia, *supra* note 24, at 881–82.

30. *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

31. Jeremy Patrick, *A Polemic Against the Standing Requirement in Constitutional Cases*, 41 *CAP. U. L. REV.*, 603, 622 (2013).

32. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights From the Marshall Papers*, 23 *ENVTL. L. REP.* 10606 (1993).

33. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 *ENVTL. L. REP.* 10637 (2005).

34. Peter Manus, *Wild Bill Douglas’s Last Stand: A Retrospective on the First Supreme Court Environmentalist*, 72 *TEMP. L. REV.* 111, 155–168 (1999).

away from “standing for the public” truly was. It also allows us to understand how closely linked the history of the modern standing doctrine is with the history of the modern environmental movement.

Using this history, I will argue that we must return to the older concept of allowing plaintiffs to stand for the public, at least in environmental cases. In so doing, I draw on two critical—though widely forgotten—insights from Blackmun’s *Sierra Club* dissent and other writings: first, that plaintiffs should be able to stand in environmental cases in the absence of an injury-in-fact, and second, that they should be able to do this because environmental cases are simply different. They are more urgent and more extreme than other cases. Though Blackmun himself was apparently unaware of the old doctrine of standing for the public, and though he inaccurately characterized the twentieth century standing doctrine as “traditional,”³⁵ he nonetheless realized something that has escaped modern judges and scholars: that restrictive notions of standing have no place in environmental cases.

In Part II, I will attempt to chart a path forward. To fix the problem of environmental standing, we must create a statutory grant of standing and cause of action for anyone acting to protect the environment. As I will argue, this is justified by the profound ahistoricism of the current environmental standing doctrine and by the extreme urgency of threats to the environment. Yet given the current makeup of the Supreme Court, it is highly unlikely the Justices would be willing to overturn *Lujan* directly. Therefore, the best strategy for moving forward is to pursue this goal at the state level: to seek either state laws or, ideally, amendments to state constitutions. As I shall demonstrate in the following, over the past several decades, a number of states liberalized environmental standing (at the same time that the Court was destroying the concept of standing for the public), often with encouraging results. Yet a close look at these state environmental standing statutes reveals that those drafting such statutes must be exceptionally careful with their phrasing. Courts have repeatedly found ways to poke holes in these statutes because of sloppy or ambiguous wording.

35. *Sierra Club v. Morton*, 405 U.S. 727, 755–56 (1972) (Blackmun, J., dissenting).

Therefore, in this Article's conclusion, I will propose a model statute. This is, however, just a draft, and I sincerely hope that other advocates revise it to make it as Scalia-proof, so to speak, as possible.

I: STANDING IN ENVIRONMENTAL CASES YESTERDAY: THE MISUNDERSTOOD HISTORY OF *SIERRA CLUB V. MORTON*

A. The Founding to the 1960s

Historically speaking, there was *no* requirement that litigants demonstrate standing. As many scholars have noted, the Framers of the Constitution said nothing to indicate that they wished to limit standing.³⁶ In fact, the only oblique reference to standing at the Constitutional Convention was James Madison declaring that matters overseen by judges should “be limited to cases of a Judiciary Nature.”³⁷ If, indeed, the Framers intended to follow the English model, they would have gazed across the pond to see a complete absence of the standing requirement.³⁸ Of course, this didn't mean that anyone could bring a lawsuit about anything, or on behalf of anyone else. Article III of the Constitution extends the “Judicial Power” to “Cases” (that is, civil and criminal disputes) and “Controversies” (that is, civil disputes).³⁹ The so-called “cases and controversies” requirement obviously demands a cause of action. For one individual suing another, there had to be a reason and there had to be a remedy. The legislature or the common law had to confer a right to sue in order for a case or controversy to exist.⁴⁰

What about an individual suing the state to remedy a harm greater than the one he himself suffered, or to force the state to perform (or stop performing) a particular act, even if that act didn't affect him, per

36. See, e.g., George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REV. 10028, 10034–35 (1999); Sunstein, *supra* note 22, at 173; Berger, *supra* note 28, at 818; Patrick, *supra* note 31, at 621; see also Percival & Goger, *supra* note 10, at 121.

37. Susan Bandes, *The Idea of a Case*, 42 STAN L. REV. 227, 231 (1990) (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 430 (Max Farrand ed., 1911)).

38. Van Cleve, *supra* note 36, at 10029–34; Berger, *supra* note 28, at 819–20; Jaffe, *supra* note 28, at 1270.

39. U.S. CONST. art. III, § 2. On the original meaning of “cases” and “controversies,” see Sunstein, *supra* note 22, at 168.

40. Sunstein, *supra* note 22, at 170–71.

se? The English had a well-established common law practice of allowing “strangers” to bring suit to challenge virtually any public action.⁴¹ And in the first century-and-a-half after the Constitutional Convention, American courts followed these precedents and rejected calls to limit them. In 1794, the New Jersey Supreme Court made this explicit when several electors questioned the vote-counting method prescribed in an election statute. The state argued that the court was without jurisdiction to hear the case, and that the legislature was the proper place to remedy such a statute. The court replied that it had general powers “to interfere in all cases, where either an individual, or a collection of persons have sustained any injury.”⁴² As the nineteenth century progressed, courts differed over whether citizens seeking to vindicate a public right could do so through actions to secure either injunctions or writs of mandamus, or both, or neither.⁴³ Yet, by and large, actions brought by private individuals “to vindicate the public interest in the enforcement of public obligations” were a hallmark of the American judicial system.⁴⁴ No individual had to establish his “standing” to bring such an action. The same was true, in many cases, for individuals “standing for the public” to sue a private party.⁴⁵

In 1875, the Supreme Court affirmed this broad right to bring actions on behalf of the public. A group of merchants who made use of the Union Pacific Railroad to transport their goods sought a writ of mandamus to compel Union Pacific to use a particular bridge linking Nebraska to Iowa (on the grounds of railroads’ statutory responsibility to operate “as one connected, continuous line”).⁴⁶ The railroad did not deny that this was its statutory duty, but challenged the merchants’ ability to secure a “writ to enforce the performance of a public duty, unless the non-performance of it works to them a special injury.”⁴⁷

41. See Berger, *supra* note 28, at 818–19, 824–25, 827; Jaffe, *supra* note 28, at 1274–75; R.J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1764 (1999); Jacob Reitz, *Standing to Raise Constitutional Issues*, 50 AM. J. COMP. L. SUPP. 437, 441 (2002).

42. *State v. Justices of Middlesex*, 1 N.J.L. 244, 247 (1794), cited in Jaffe, *supra* note 28, at 1275–76).

43. Jaffe, *supra* note 28, at 1275–78.

44. *Id.* at 1276–79.

45. See Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1134 (2009); Sunstein, *supra* note 22, at 175–78, 182.

46. *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 343 (1875).

47. *Id.* at 355.

Relying on English precedent, the Court responded that they could. Though the merchants “had no interest other than such as belonged to others engaged in employment like theirs, and [though] the duty they seek to enforce by the writ is a duty to the public generally,” they could bring such a suit.⁴⁸

It wasn’t until several decades into the twentieth century—with the concomitant emergence of the modern administrative state; the statutory re-establishment of federal question jurisdiction, which flooded federal courts with cases; and the rise of a private rights model of liberalism wherein activists increasingly turned to courts—that those courts began demanding citizens bringing public actions have “standing” to sue.⁴⁹ The typical birthdate assigned to “standing” is 1923. That year, according to most narratives, the Supreme Court for the first time barred a citizen from bringing a suit not on the grounds that she lacked a cause of action, but rather because that she lacked standing to sue.⁵⁰ In *Frothingham v. Mellon*, the plaintiff—a taxpayer challenging the constitutionality of the Maternity Act of 1921 and seeking to enjoin federal expenditures under that Act—failed to demonstrate that she had “sustained . . . some direct injury . . . and not merely that [s]he suffers in some indefinite way in common with people generally.”⁵¹ Steven Winter identifies the birthdate as one year earlier; in 1922, in *Fairchild v. Hughes*, Justice Brandeis wrote an opinion that rejected a taxpayer suit because the “[p]laintiff’s alleged interest in the question submitted is not such as to afford a basis for

48. *Id.* at 354–55.

49. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1452–55 (1987).

50. See *Flast v. Cohen*, 392 U.S. 83, 91 (1968); Winter, *supra* note 49, at 1376 & n.21 (“Typically, contemporary casebooks on the law of federal courts and on constitutional law discuss *Frothingham* but fail altogether to note its predecessor, *Fairchild v. Hughes* . . .”); Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 DUKE ENVTL L. F. 347, 351 (2008).; Pierce, *supra* note 41, at 1765; Berger, *supra* note 28, at 819.

Note, however, that earlier cases had alluded to the requirement that citizens bringing public actions have some “interest” in the action. See, e.g., *Wilson v. Shaw*, 204 U.S. 24, 31 (1907) (“For the courts to interfere and at the instance of a citizen, who does not disclose the amount of his interest, stay the work of construction by stopping the payment of money from the Treasury of the United States therefor, would be an exercise of judicial power which, to say the least, is novel and extraordinary.”)

51. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

this proceeding.”⁵² Elizabeth Magill identifies the birthdate as 1923 but points to a different case: *Edward Hines Yellow Pine Trustees v. United States*, in which Justice Brandeis again rejected a lawsuit filed against an administrative agency because the plaintiffs had not suffered any “legal injury, actual or threatened.”⁵³

Notably, none of these cases used the word “standing” and none cited any precedent supporting their conclusions.⁵⁴ Yet over the next several decades, the Court built upon these cases to develop the foundations of the modern standing doctrine. “The crucial cases involved efforts by citizens at large to invoke the Constitution to invalidate democratic outcomes,” wrote Cass Sunstein.⁵⁵ “In such cases, the Court held that there was no personal stake for the invocation of judicial power.”⁵⁶ As Sunstein and Magill note, in each of these proto-standing cases from the early part of the century, no common law right was at stake, and neither a statute nor a constitutional provision had created a private right of action.⁵⁷ Likewise, in none of the opinions did the Court state that standing was required by Article III.⁵⁸ Rather, in all of these opinions the Court denied standing when plaintiffs (or their “interests”) were not injured (or threatened with

52. *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922), cited in Winter, *supra* note 49, at 1376.

53. *Edward Hines Yellow Pine Trustees v. United States*, 263 U.S. 143, 148 (1923), cited in Magill, *supra* note 45, at 1137. Magill makes the point that the standing cases evolved along two lines: *Frothingham* and its progeny, and *Edward Hines* and its progeny. *Id.* at 1135. *Edward Hines* was followed by *The Chicago Junction Case*, 264 U.S. 258 (1924) and *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930), which elaborated on what was a “legal right.”

54. See Winter, *supra* note 49, at 1376.

55. Sunstein, *supra* note 22, at 180.

56. *Id.* (citing *Massachusetts v. Mellon*, 20 U.S. 447, 479–80 (1923); *Ashwander v. TVA*, 297 U.S. 288, 341–45 (1936) (Brandeis, J., concurring); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *FCC v. CBS*, 311 U.S. 132 (1940); *Switchmen’s Union v. National Mediation Bd.*, 320 U.S. 297 (1943); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154–55 (1951) (Frankfurter, J., concurring)).

57. Sunstein, *supra* note 22, at 180; Magill, *supra* note 45, at 1135–38.

58. Benzoni, *supra* note 50, at 353. Sunstein likewise writes, “It is especially notable that Justice Brandeis’ great opinion in *Ashwander*—the modern source of justiciability doctrine—does not refer to Article III at all.” Sunstein, *supra* note 22, at 180 n.83.

injury). Such was apparently the requirement—in the absence of a statutory or common law right of action.

Liberal justices like Brandeis and Frankfurter created this basic “standing” doctrine in part to “preclude any dissatisfied private citizen from invoking the Constitution in the courts to challenge the progressive programs enacted by the polity.”⁵⁹ The Court as a whole also used the standing doctrine to safeguard itself. In a per curiam decision from 1937, the justices denied a motion filed by a private attorney seeking to challenge Hugo Black’s appointment to the Court. “The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court,” wrote the Justices.⁶⁰

“That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.”⁶¹

This principle was, in fact, only recently and only partially “established,” but by the late 1930s the Justices had precedent on which to rely.

The first case to specifically state that “standing” was a requirement and limitation under Article III was decided in 1944 (and the Court didn’t state this again until 1952).⁶² What exactly Article III required, however, was still unclear. In 1952, Justice Frankfurter, for one, apparently believed that the Article had two (admittedly vague) requirements for standing: (1) the plaintiff’s interest in the matter must be of “material significance,” and (2) the plaintiff’s interest must be

59. Winter, *supra* note 49, at 1457; *see also* Sunstein, *supra* note 22, at 179.

60. *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam).

61. *Id.* at 633–34.

62. *See Stark v. Wickard*, 321 U.S. 288, 310–11 (1944); *Adler v. Board of Education*, 342 U.S. 485, 501 (1952) (Frankfurter, J., dissenting) (“jurisdiction o[f] this Court [is] limited . . . by the construction of Article III of the Constitution”). Both are cited in Sunstein, *supra* note 22, at 169.

“differentiated from the mass of his fellow citizens.”⁶³ These “material significance” and differentiation requirements were not as rigorous as the modern “injury-in-fact” requirement. (The latter term was not even coined until 1958.)⁶⁴ Most notably, they did not necessarily demand an injury (nor did they specify that such an injury be imminent).⁶⁵ “Though now elevated to constitutional requirements,” wrote Francisco Benzoni, “this position is consistent with the claim that standing is conferred so long as the law—either common law or statute—has conferred upon the plaintiff a cause of action, giving her the required interest.”⁶⁶

This view, reflecting the previous quarter-century of judge-made standing law, was codified in 1946 in the Administrative Procedure Act (APA).⁶⁷ Section 10 of the APA specifically enabled a person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute” to seek redress in the courts.⁶⁸ As Cass Sunstein noted, the “adversely affected or aggrieved” language was in fact “congressional authorization of actions by people lacking legal injuries.”⁶⁹ Section 10 intentionally codified the citizen standing regime that had existed prior to the APA’s passage—which held, in short, that citizens had standing to challenge agency action within the meaning of the statute governing the relevant agency. Some statutes allowed “any person” to challenge agency action, while others were more restrictive. The APA maintained them all, while requiring *nothing* resembling an injury.⁷⁰

Indeed, in a 1940 case called *FCC v. Sanders Bros.*, the Court had already specifically approved language identical to that in Section 10

63. *Adler*, 342 U.S. at 501 (Frankfurter, J., dissenting); Benzoni, *supra* note 50, at 353. It is worth noting that Frankfurter’s test for standing was far less restrictive than the current *Lujan* test.

64. 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02 (1958) (interpreting the APA’s statement that a person who is “adversely affected or aggrieved” by agency action has standing to sue).

65. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (requiring imminence as part of injury-in-fact).

66. Benzoni, *supra* note 50, at 353–54.

67. Sunstein, *supra* note 22, at 181.

68. Administrative Procedure Act, 5 U.S.C. § 702 (1988).

69. Sunstein, *supra* note 22, at 182.

70. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 255–56 (1988).

(contained in the Federal Communications Act).⁷¹ As Elizabeth Magill observed, *Sanders Bros.* also allowed public actions based on that language; “courts and commentators read *Sander Bros.* to allow those without legal rights to sue on behalf of the public.”⁷² Thus, as the country—and the Court—entered the 1960s, individuals suffering a “legal wrong” had standing to sue the government; so too could those who suffered no legal wrong but were simply empowered by a statutory right of action to bring suit on behalf of the public. There was no requirement even approaching a strict “injury in fact.”⁷³

B. The Swingin’ Sixties

The pivotal decade in the emergence of the modern standing doctrine was the mid-1960s to the mid-1970s. This was also the pivotal decade in the emergence of the modern environmental movement. This was no coincidence. The birth of modern environmentalism and the so-called Big Green environmental organizations was in large part spurred by highly public battles over standing; and several of the most important standing cases from this period were environmental cases. This shared history attests to the centrality of environmental litigation in the shaping of the modern standing doctrine. The Justices’ papers, as well as other sources, make clear that they intended to liberalize injury-in-fact in large part to assist these environmental organizations. However, in so doing, they inadvertently concretized the demand for injury-in-fact, killing off the doctrine of standing for the public in the process.

1. Scenic Hudson Preservation Conference v. Federal Power Commission

In the conventional narrative of modern American environmental history, the starting point is often placed at 1962, with the publication of Rachel Carson’s epic anti-pesticide manifesto, *Silent Spring*.⁷⁴ The book called for a government agency independent from the Department of Agriculture to regulate pesticides and other toxic

71. 309 U.S. 470, 476–77 (1940).

72. Magill, *supra* note 45, at 1141.

73. See Sunstein, *supra* note 22, at 181–82; Magill, *supra* note 45, at 1150.

74. RACHEL CARSON, *SILENT SPRING* (1962). On its impact, see PATRICIA H. HYNES, *THE RECURRING SILENT SPRING* 3–9 (1989).

chemicals; this demand led directly to the 1970 establishment of the Environmental Protection Agency (“EPA”).⁷⁵ Yet at the same time, a grassroots uprising in upstate New York led to the first significant court decision on standing in environmental cases; according to one writer, this uprising also “inaugurated the birth of the modern environmental movement.”⁷⁶ The residents of Hudson Valley had been fighting to protect and preserve Storm King Mountain for decades.⁷⁷ When, in 1962, Consolidated Edison (“ConEd”)—New York City’s utility company—announced that it was going to build a pumped-storage hydroelectric plant near the mountain—and, in the process, create a lake and chop off the top of the mountain—several residents formed the Scenic Hudson Preservation Conference to save Storm King.⁷⁸ Though Scenic Hudson struggled initially, by 1964 the group was benefiting from what historian Robert Lifset calls the “zeitgeist” of the mid-1960s.⁷⁹ The Sierra Club’s campaign a year earlier, to stop the federal government from flooding part of the Grand Canyon, had generated public sympathy for conservation, and Scenic Hudson capitalized on that energy.⁸⁰

In 1965, an ascendant Scenic Hudson challenged the decision of the Federal Power Commission (FPC) to issue a license to ConEd, on the grounds that the FPC had not adequately considered the environmental impact of ConEd’s activity. When the FPC predictably ruled against Scenic Hudson, the group appealed to the Second Circuit.⁸¹ In their brief to the Second Circuit, ConEd and the FPC argued that Scenic Hudson lacked standing: “no one has ‘standing to sue’ if the only injury of which he complains is injury common to the public at

75. See HYNES, *supra* note 74, at 46–48, 148–63.

76. WILLIAM N. RON, ENVIRONMENTAL POLICY AND PUBLIC HEALTH: AIR POLLUTION, GLOBAL CLIMATE CHANGE, AND WILDERNESS 280 (2011).

77. ROBERT LIFSET, POWER ON THE HUDSON: STORM KING MOUNTAIN AND THE EMERGENCE OF MODERN AMERICA 21–34 (2014).

78. *Id.* at 37–65; RON, *supra* note 76, at 280.

79. LIFSET, *supra* note 77, at 75.

80. *Id.* at 75–76.

81. *Id.* at 93–98.

large.”⁸² This assertion was contrary to Supreme Court precedent⁸³ and centuries of common law,⁸⁴ yet Scenic Hudson’s attorneys felt they were almost certain to lose; their only chance was “that some of the judges would be familiar with the beauty of Storm King Mountain.”⁸⁵

Remarkably, Scenic Hudson won. Perhaps its attorneys were correct, for the Second Circuit decision opened by invoking Storm King’s “unique beauty and major historical significance” and noting that it was home to “one of the finest pieces of river scenery in the world.”⁸⁶ The opinion then moved to the issue of standing, dwelling on language in the Federal Power Act similar to that in the APA, granting judicial review to any party “aggrieved” by an order of the FPC.⁸⁷ “The ‘case’ or ‘controversy’ requirement of Article III, § 2 of the Constitution does not require that an ‘aggrieved’ or ‘adversely affected’ party have a personal economic interest,” wrote the court, rejecting one of ConEd/FPC’s contentions.⁸⁸

The Federal Power Act seeks to protect non-economic as well as economic interests In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of ‘aggrieved’ parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.⁸⁹

82. Motion to Dismiss and Brief for Respondent, *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608 (2d Cir. 1965). ConEd/FPC also argued that giving Scenic Hudson standing would encourage “literally thousands” to intervene in similar matters, clogging up the courts. *Scenic Hudson*, 354 F.2d at 617.

83. *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 343 (1875).

84. *See supra* section I.A.

85. LIFSET, *supra* note 77, at 99.

86. *Scenic Hudson*, 354 F.2d at 613.

87. *Id.* at 615 (citing Federal Power Act § 313(b), 16 U.S.C. § 8251(b)).

88. *Id.*

89. *Id.* at 615–16.

This decision would later be hailed as *expanding* standing for those seeking to protect the environment.⁹⁰ It did no such thing. In fact, as Elizabeth Magill has noted, *Scenic Hudson* created a precedent that justified *contracting* standing for those seeking to represent the public.⁹¹ Whereas centuries of precedent had allowed those with a statutory right of action but no personal injury to bring suit on behalf of the public, the Second Circuit allowed those with a statutory right of action to bring suit only because they had suffered a personal injury—harm to their “special interest.”⁹² This injured interest could be “aesthetic, conservational, and recreational,” but still—there must be an interest and an injury. No longer was an uninjured party standing for the public enough. Thus, the victory for Hudson Valley environmentalists would one day be a defeat for the environmental movement as a whole.

Magill asks why the Second Circuit ruled this way. She writes, “There is no evidence, it should be said, that [the Second Circuit] intended to narrow standing law—indeed, just the opposite seems true.”⁹³ Magill concludes that the Second Circuit’s motivation is “unclear.”⁹⁴ Lifset’s analysis provides one compelling answer. The Second Circuit’s prosaic opening language indicates that the judges were apparently motivated in part by a desire to find a rationale to allow *Scenic Hudson* to protect the environment.⁹⁵ A place of such “unique beauty and major historical significance” must be defended. Yet the eloquence of the judges’ paeon to conservation obscured the sloppiness of their standing analysis.

The battle over Storm King continued to rage until late 1980, when ConEd finally agreed to drop the plan for its hydroelectric plant in the Hudson Valley. Yet the battle had lasting effects on the environmental movement as a whole. It generated headlines and attention. It

90. Magill, *supra* note 45, at 1156 (“Both these lower court decisions were widely hailed and analyzed at the time they were decided and even more so later. They were viewed as innovative and ushering in a new and more enlightened era of expanded”).

91. *Id.* at 1156–59.

92. As Magill noted, this was the Second Circuit essentially stating, “The parties were aggrieved because they alleged that the agency had disregarded their interests . . .” *Id.* at 1156.

93. *Id.* at 1159.

94. *Id.*

95. LIFSET, *supra* note 77, at 99–100.

popularized a fairly new tactic for environmentalists: impact litigation.⁹⁶ It generated important new organizations. In 1970, for instance, Scenic Hudson lawyers and activists founded a public interest litigation firm focused on the environment: the Natural Resources Defense Council (NRDC).⁹⁷ Finally, it influenced a series of cases in the late 1960s and early 1970s in which courts recognized that non-economic, or aesthetic, injuries were sufficient to support standing.⁹⁸

2. *Flast v. Cohen*

The Supreme Court denied certiorari to ConEd and the FPC in *Scenic Hudson*,⁹⁹ yet courts immediately began citing the Second Circuit's decision.¹⁰⁰ In *United Church of Christ v. FCC*, decided just one year later, the D.C. Circuit held that two Mississippi civil rights activists had standing to challenge the FCC's broadcast license renewal for a radio station that broadcast racist reports because they had "a genuine and legitimate interest"—as actual listeners of that radio station—which was being injured by the racist reports.¹⁰¹ The year after that, in 1967, the Southern District of New York held that residents of Bedford, New York, had standing to challenge the state's siting of an interstate along a route that would harm their local environment. The residents had a statutory right of action through the Administrative Procedure Act, and their "conservation interests" were being injured by New York's decision.¹⁰² Both of these decisions cited

96. *Id.* at 103.

97. *Id.* at 144–145.

98. *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970); *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967); *Powleton Civic Home Owners Assoc. v. HUD*, 284 F. Supp. 809 (E.D. Pa. 1968); *Izaak Walton League of Am. v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970); *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 889 (1972).

99. 384 U.S. 941 (1966).

100. *See United Church of Christ*, 359 F.2d at 1002 n.16; *Nashville I-40*, 387 F.2d at 182; *Road Review League*, 270 F. Supp. at 660.

101. *United Church of Christ*, 359 F.2d at 1002.

102. *Road Review League*, 270 F. Supp. at 660–61.

Scenic Hudson and affirmed its holding—that a party had to have suffered an injury to have standing; even when the party had a statutory right of action, they could not stand for the public, but only to vindicate their own injured interest.

The next year, this trend reached the Supreme Court. In 1968, the Court decided a case involving several federal income taxpayers who challenged the appropriation of federal funds for religious schools to purchase textbooks and other materials; they claimed this violated the Establishment Clause of the First Amendment.¹⁰³ The government claimed that the taxpayers didn't have standing to sue, but the Court disagreed. Rather, Chief Justice Warren, writing for an eight-justice majority, used the case, *Flast v. Cohen*,¹⁰⁴ to somewhat qualify *Frothingham v. Mellon*, the seminal 1923 case that held that a taxpayer who failed to demonstrate that she had “sustained . . . some direct injury” could not claim standing “merely [because s]he suffers in some indefinite way in common with people generally.”¹⁰⁵ For 45 years, Warren wrote, *Frothingham* had stood “as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers.”¹⁰⁶ Yet no longer. Since the Establishment Clause “does specifically limit [Congress’s] taxing and spending power . . . a taxpayer will have a clear stake as a taxpayer in assuring [this limitation is] not breached by Congress [because] his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.”¹⁰⁷ Such a holding was consistent with *Frothingham*, Warren wrote, because in that case Mrs. Frothingham brought suit under the Fifth Amendment’s Due Process Clause,¹⁰⁸ which “does not protect taxpayers against increases in liability,” while the Establishment Clause “operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power.”¹⁰⁹

Thus, *Flast* was a partial embrace of *Scenic Hudson* by the Supreme Court. In both cases, the plaintiffs had a right of action (an implicit

103. U.S. CONST. amend. I.

104. 392 U.S. 83, 91 (1968).

105. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

106. *Flast*, 392 U.S. at 85.

107. *Id.* at 105–06.

108. U.S. CONST. amend. V.

109. *Flast*, 392 U.S. at 104–05.

constitutional right of action in the former, and an explicit statutory right of action in the latter); in both cases, the plaintiffs were standing not for the public but rather to vindicate an injury they had suffered (the misuse of their tax money in the former, and the destruction of an area in which they were especially interested in the latter). The difference was that the injury in *Flast* was economic in nature, while *Scenic Hudson* had explicitly granted standing because of “aesthetic, conservational, and recreational” injuries. Whether a plaintiff suffering only the latter kind of injury would have standing was still up for debate.

Some quickly heralded *Flast* as “greatly contribut[ing] to the liberalization of the law of standing.”¹¹⁰ Yet in a prescient dissent, Justice Harlan recognized that this was not entirely the case. “This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits,” Harlan wrote.¹¹¹ “I would adhere to that principle.”¹¹² The majority, Harlan recognized, had liberalized standing for someone who had only suffered a tiny economic injury, yet it demanded there be an injury; an uninjured plaintiff could no longer stand for the public. The majority had not explicitly addressed standing for the public.

Justice Douglas concurred in *Flast*, in a compelling and confusing opinion. He boldly wrote that it would be wise “to be rid of *Frothingham* here and now.”¹¹³ “The States have experimented with taxpayers’ suits and with only two exceptions now allow them,” he continued.¹¹⁴

A few state decisions are frankly based on the theory that a taxpayer is a private attorney general seeking to vindicate the public interest. Some of them require that the taxpayer have more than an infinitesimal financial stake in the problem. At the federal level, Congress can of course define broad categories of ‘aggrieved’ persons who have standing

110. Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 *UNIV. OF CHI. L. REV.* 450, 452 (1970).

111. *Flast*, 392 U.S. at 131 (Harlan, J., dissenting).

112. *Id.*

113. *Id.* at 107 (Douglas, J., concurring).

114. *Id.* at 108 (Douglas, J., concurring).

to litigate cases or controversies Taxpayers can be vigilant private attorneys general. Their stake in the outcome of litigation may be *de minimis* by financial standards, yet very great when measured by a particular constitutional mandate I would be as liberal in allowing taxpayers standing to object to these violations of the First Amendment as I would in granting standing to people to complain of any invasion of their rights under the Fourth Amendment or the Fourteenth or under any other guarantee in the Constitution itself or in the Bill of Rights.¹¹⁵

This concurrence is hard to parse because Justice Douglas did not clarify whether the “rights” on which he would grant standing were purely economic or not. He consistently referred to “taxpayers” and “taxpayers’ suits” throughout his opinion, suggesting that perhaps the injury had to be economic; but he concluded that he would grant standing to anyone suffering an invasion of rights under any provision of the Constitution or Bill of Rights, where injuries are often non-economic. Nonetheless, however, his opinion seemed to suggest that there had to be *some* injury. Notably, he did not join in Justice Harlan’s dissent.

It appears from his surviving papers that Douglas already saw himself as something of an iconoclast on the issue of standing. He had originally planned not to concur but to dissent.¹¹⁶ He had gone against the advice of his clerks, who felt that *Frothingham* was “sound and should be affirmed.”¹¹⁷ Douglas apparently believed that President Kennedy agreed with his take.¹¹⁸ And his opinion inspired some strong reactions. Justice Byron White, upon receiving a copy of Douglas’s

115. *Id.* at 108–14 (Douglas, J., concurring).

116. Draft opinion, *Flast v. Cohen* (Douglas, J., concurring) (on file in Typed Draft, Penciled Draft, Riders Folder, Box 1421, William O. Douglas Papers, Library of Congress [hereinafter Douglas Papers]).

117. Carl J. Seneker II, *Motions to file amicus briefs* (Feb. 12, 1968) (on file in Misc. Memos, Cert Memos, Vote of Ct. Folder, Box 1421, Douglas Papers).

118. Letter from William A. Reppy, Jr., to William O. Douglas (June 3, 1968) (on file in Law Clerk Folder, Box 1421, Douglas Papers).

concurrence in *Flast*, scrawled across the top, “Substantive due process—Boo! Judicial Activism Hurrah!”¹¹⁹

Douglas’s distinctive take on standing would be integral to reshaping the doctrine in the years to come—in a way that, counterintuitively and tragically, would ultimately do a great deal to damage the environmental movement he so cherished.

3. *Association of Data Processing Service Organizations, Inc. v. Camp* and *Barlow v. Collins*

Late in 1969, two cases reached the Court that allowed the Justices to elaborate on the doctrine of standing. And though these cases were, like *Flast*, heralded for liberalizing the doctrine¹²⁰ and paving the road to *Sierra Club*, they also paved the road to *Lujan* and beyond. An examination of the justices’ personal papers reveals that the true originator of the pivotal “injury in fact” language was more complicated than any scholar has previously asserted. Further, it is apparent that the Justices were at most only vaguely aware of how sharp their break from pre-twentieth century standing doctrine was, or that they were inadvertently killing off the old concept of standing for the public. Finally, there is a tantalizing hint that at least some of the Justices’ votes were motivated in part by a concern for protecting the interests of environmentalists.

The more important of the two cases, and the first to be argued, was *Association of Data Processing Service Organizations, Inc. v. Camp*.¹²¹ In that case, several data processing service providers objected to a rule promulgated by the Comptroller of the Currency that allowed banks to begin offering competing data processing services. Claiming that this rule violated the Bank Service Corporation Act (which banned banks from doing anything other than banking), the data processing merchants sued. To the district court in Minnesota and the Eighth Circuit, *Data Processing* was open-and-shut. “There is a

119. Copy of opinion, *Flast v. Cohen* (Douglas, J., concurring) (on file in Folder 10, Box 125, Byron R. White Papers, Library of Congress [hereinafter White Papers]).

120. See Davis, *supra* note 110, at 450; Mark Hardin, Comment, *Conservationist’s Standing to Challenge the Actions of Federal Agencies*, 1 *ECOLOGY L.Q.* 305, 305 (1971).

121. 397 U.S. 150 (1969).

long and well established line of judicial authority holding that plaintiffs whose only injury is loss due to competition lack standing to maintain legal action to redress their economic injury,” wrote the district court, citing three Supreme Court cases and six lower court cases.¹²² The Eighth Circuit agreed, but added a significant passage: “Unless a relevant statute provides for a ‘party in interest’ to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a ‘private attorney general’ to represent the public interest.”¹²³ This articulated the older, pre-*Scenic Hudson* doctrine, opening the door for the Supreme Court to return there if it wished.

In the second case, *Barlow v. Collins*,¹²⁴ a group of tenant farmers from Alabama (who relied on cash advances and other payments from the federal government for their cotton crop) asserted standing to challenge the Secretary of Agriculture’s decision to amend a regulation in a way that they argued would compel them to finance much of their work by borrowing from their landlords, who charged very high rates of interest. The lower courts again ruled that the farmers did not have standing; as the Fifth Circuit wrote, “in the absence of an express or implied statutory grant of standing, mere economic harm to an appellant made possible by government action (even if allegedly illegal) does not give standing to sue to restrain such action.”¹²⁵ This phrasing likewise seemed to leave the Supreme Court the option of reviving the old doctrine of standing “for the public.”

The Court heard oral arguments for *Data Processing* on November 18, 1969, and for *Barlow* the next day. The Association of Data Processing Service Organizations’ attorney praised *Flast* and asked the court to “overrule” *Frothingham*.¹²⁶ Barlow’s attorney argued that Barlow had a statutory right of action and had suffered an economic

122. Ass’n of Data Processing Service Orgs., Inc. v. Camp, 279 F. Supp. 675, 678 (D. Minn. 1968), cited in Davis, *supra* note 110, at 452.

123. *Data Processing*, 406 F.2d 837, 843 (8th Cir. 1969).

124. 397 U.S. 159 (1970).

125. *Barlow v. Collins*, 398 F.2d 398, 400 (5th Cir. 1968) (internal quotation marks omitted) (citing *REA v. Central La. Elec. Co.*, 354 F.2d 859, 863 (5th Cir. 1966), *cert. denied*, 385 U.S. 815)).

126. Transcript of Oral Argument at 11–12, Ass’n of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150 (1969) (No. 69-85).

injury; thus, this case was just like *Flast* and other recent precedents.¹²⁷ Neither attorney challenged the notion that their client had to suffer some sort of injury in order to have standing.

At conference on November 24, the justices discussed both cases. Only eight justices sat around the table—Chief Justice Warren and Associate Justice Abe Fortas had both recently resigned—the first because of advanced age, the second because of scandal—and the just-elected President Nixon had only had time to replace one of them so far. With regard to *Data Processing*, the newly appointed Chief Justice Warren Burger said he leaned toward voting to reverse, and every other justice declared himself definitely on the side of reverse, except Potter Stewart, who said he would affirm.¹²⁸ The same was true for *Barlow*, except that Burger was squarely in the reverse camp.¹²⁹ Burger assigned Douglas to write the opinion for *Data Processing* and Brennan to write the opinion for *Barlow*.

In his first draft, Douglas wrote, “We have no doubt in the present case that there is an actual controversy in which petitioners have a direct interest and that it is affected by the challenged regulation.”¹³⁰ This was a proper basis for standing, because the petitioners’ interests were under the “penumbra” of the APA.¹³¹ A little later in the opinion, he had language about cases that “involve the public interest,” in which a “private attorney general [can] tender the questions on the merits.”¹³² Douglas added that someone who is “likely to be financially injured” may be “the best” private attorney general,¹³³ but nonetheless this passage at least left open the possibility that an uninjured party could stand for the public. His first draft made no reference to *Scenic Hudson*. Neither his initial draft, nor his second draft, contained either

127. Transcript of Oral Argument at 9–10, *Barlow v. Collins*, 397 U.S. 159 (1969) (No. 69-249).

128. Conference Notes, *Ass’n of Data Processing Service Orgs., Inc. v. Camp*, No. 69-85 (Nov. 24, 1969) (on file in Misc. Memos, Cert Memos, Vote of Court Folder, Box 1475, Douglas Papers).

129. Conference Notes, *Barlow v. Collins*, No. 69-249 (Nov. 24, 1969) (on file in Misc. Memos, Cert Memos, Vote of Court Folder, Box 1478, Douglas Papers).

130. William O. Douglas, Draft Opinion at 2, *Ass’n of Data Processing Service Orgs., Inc. v. Camp*, No. 69-85 (Dec. 1969) (Galley Proofs – Final Galley Folder, Box 1474, Douglas Papers).

131. *Id.* at 4.

132. *Id.*

133. *Id.* (quoting *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940)).

of the phrases for which *Data Processing* would later be famous: “zone of interests” and “injury in fact.”

Many scholars would later take the “injury in fact” requirement, and Douglas’s creation of it, to task for being “remarkably sloppy,”¹³⁴ for being an “unredeemed disaster,”¹³⁵ and for doing “[m]ore damage to the intellectual structure of the law of standing . . . than . . . any other decision.”¹³⁶ Yet Douglas was not its original author. Rather, it was William Brennan who wrote those revolutionary words. In the first draft of his opinion in *Barlow*, Brennan wrote that the test for standing “is satisfied when the plaintiff alleges, as petitioners’ complaint alleged here, that the challenged action has caused him substantial injury in fact.”¹³⁷ The term “injury in fact” had apparently been coined by the scholar Kenneth Culp Davis a decade earlier,¹³⁸ in what Cass Sunstein has called a “misreading” of the APA.¹³⁹

On January 5, 1970, Brennan wrote to Douglas, sharing a copy of his *Barlow* draft and telling Douglas that he wouldn’t circulate it to the rest of the Justices until they decided how they coordinate their respective opinions in these very similar cases.¹⁴⁰ Brennan’s draft was read by Douglas’s sole clerk that term, Thomas C. Armitage, a recent graduate of UCLA Law School. Armitage concluded that Brennan’s analysis was “a useful addition to the law of standing.”¹⁴¹ He summarized Brennan’s opinion as asking the question of whether the defendant’s conduct caused the plaintiff “substantial injury in fact.”¹⁴² “As long as such an allegation is made,” Armitage continued, “there is standing to sue, regardless of whether or not (a) the allegation of injury

134. Sunstein, *supra* note 22, at 185.

135. Richard Stewart, *Standing for Solidarity*, 88 YALE L.J. 1559, 1569 (1979) (reviewing JOSEPH VINING, *LEGAL IDENTITY: THE COMING AGE OF PUBLIC LAW* (1978)).

136. Fletcher, *supra* note 70, at 229.

137. William Brennan, Draft Opinion at 6, *Barlow v. Collins*, No. 69-249 (Jan. 1970) (on file in Folder 4, Box I:215, William Brennan Papers, Library of Congress [hereinafter Brennan Papers]).

138. DAVIS, *supra* note 64, at 211–13.

139. Sunstein, *supra* note 22, at 185–86.

140. Letter from William Brennan to William O. Douglas (January 5, 1970) (on file in Misc. Memos, Cert Memos, Vote of Ct. Folder, Box 1478, Douglas Papers).

141. Letter from Thomas C. Armitage to William O. Douglas (on file in Law Clerk Folder, Box 1478, Douglas Papers).

142. *Id.*

is true, or (b) the injury invades a legally protected interest.”¹⁴³ “If you agree to the present structure of Justice Brennan’s opinion,” Armitage wrote to Douglas, the Justice should add the question of whether the petitioner alleged “a substantial injury in fact.”¹⁴⁴ “Discussions as to whether pet[itione]r was within the class or persons which the statute was designed to protect, etc., should be entirely excluded from this section, as that goes to the merits (i.e. whether there is a legally protected interest).”¹⁴⁵

Yet Douglas did not agree with Brennan’s structure. He felt it was important in a standing analysis to consider whether the injured interest fell “within the purview of the federal statute whose application is in question.”¹⁴⁶ He wrote a brief letter to this effect to Brennan, also suggesting that Brennan modify “injury in fact” to specify harm that is “economic or otherwise.”¹⁴⁷ Douglas then dispatched Armitage to talk to Brennan’s clerks. After a “long talk,” Armitage returned on January 9 to report that the Brennan clerks felt their boss would be amenable to revising his opinion accordingly.¹⁴⁸ Armitage also suggested that Douglas recommend to Brennan dropping the word “substantial” before “injury in fact.”¹⁴⁹ Armitage felt that the word “substantial” modified Brennan’s opinion such that it might

not adequately allow for the bringing of suits by plaintiffs with revolutionary ideas (previously unaccepted by courts), especially in the area of non-economic injuries The difficulty with the word ‘substantial’ is that it opens the door to a judge to say that an alleged non-economic injury is not ‘substantial’ and therefore the plaintiff has no standing to sue. This would preclude a decision of the non-economic

143. *Id.*

144. *Id.*

145. *Id.*

146. Letter from William O. Douglas to William Brennan (Jan. 8, 1970) (on file in Misc. Memos, Cert Memos, Vote of Ct. Folder, Box 1478, Douglas Papers).

147. *Id.*

148. Letter from Thomas C. Armitage to William O. Douglas (Jan. 9, 1970) (on file in Law Clerk Folder, Box 1475, Douglas Papers).

149. *Id.*

claim on the merits, and could give conservative (and lazy) judges an easy way out.¹⁵⁰

On January 10, Armitage revised Douglas's *Data Processing* draft, in an effort to get it in line with Brennan's "injury in fact" test and Douglas's statutory penumbra language.¹⁵¹ Douglas's opinion now read:

As in *Barlow v. Collins* . . . the first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise the [second] question [is] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Those interests, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values.¹⁵²

Armitage cited *Scenic Hudson* to support this last proposition. Brennan, meanwhile, had written to Douglas to tell him that he liked the addition of "economic or otherwise," but he couldn't abide by the second part of Douglas's analysis: what was now the "zone of interests" test.¹⁵³ The two eventually decided that their views on the matter were "irreconcilable" and that they should "both circulate to see what reaction we get from the conference."¹⁵⁴ The other Justices received the drafts and promptly handed them to their clerks. From surviving correspondence, it appears that the clerks did not understand the significance of the dispute. One of Marshall's clerks agreed with both opinions and felt the whole disagreement was semantic and

150. *Id.*

151. Letter from Thomas C. Armitage to William O. Douglas (January 10, 1970) (on file in Law Clerk Folder, Box 1475, Douglas Papers).

152. William O. Douglas, Draft Opinion, at 2 & rider 3, *Ass'n of Data Processing Service Orgs., Inc. v. Camp*, No. 69-85 (Jan. 10, 1970) (on file in Galley Proofs – Final Galley Folder, Box 1474, Douglas Papers).

153. Letter from William Brennan to William O. Douglas (Jan. 8, 1970) (on file in Folder 4, Box I:215, Brennan Papers).

154. Letter from William O. Douglas to William Brennan (Jan. 13, 1970) (on file in Folder 4, Box I:215, Brennan Papers).

“really just shows the stupidity (did I say that) of assigning the two opinions to different people I would recommend that you let the two writers battle it out for a while.”¹⁵⁵ One of White’s clerks, on the other hand, felt Brennan was closer to the mark but worried that either opinion would result in “[r]elaxation of the standing requirement—allowing the litigation to proceed one more stage—[which] must tend to encourage consumer suits. Such suits are a complete economic waste; they enrich nobody but the lawyers and divert resources from true economic competition.”¹⁵⁶

Both Brennan and Douglas also wrote lengthy memos to the conference, further explaining their respective rationales.¹⁵⁷ Douglas illustrated his “zone of interests” test with a remarkably prescient example: “That zone will differ from statute to statute. A zoning ordinance or an order of the Forest Service respecting a wilderness area might bring into focus a group of people who would have no possible standing under either of the statutes that we are considering in the present cases.”¹⁵⁸

In the end, the Justices agreed with Douglas. Brennan informed Burger that he’d decided to turn his majority opinion in *Barlow* into an opinion concurring in part, dissenting in part.¹⁵⁹ (Burger responded by lightheartedly mocking Brennan, referring to him as “vice Justice Brennan” in a memo sent to the whole conference.)¹⁶⁰ Had the Justices been convinced in part by Douglas’s environmental example? Except timing—the memo with the example was sent shortly before the Justices chose Douglas’s approach over Brennan’s—there is no evidence one way or the other. Douglas took over writing the *Barlow*

155. Letter from Gary D. Wilson to Thurgood Marshall (Jan. 19, 1970) (on file in Folder 18, Box 59, Thurgood Marshall Papers, Library of Congress [hereinafter Marshall Papers]).

156. Letter from George Marshall Moriarty to Byron White (Jan. 20, 1970) (on file in Folder 11, Box 160, White Papers).

157. Memorandum from William Brennan to Supreme Court Conference (Jan. 20, 1970) (on file in Folder 4, Box I:215, Brennan Papers); Memorandum from William O. Douglas to Supreme Court Conference (Jan. 21, 1970) (on file in Misc. Memos, Cert Memos, Vote of Court Folder, Box 1475, Douglas Papers).

158. Douglas, *supra* note 157.

159. Letter from William Brennan to Warren Burger (Jan. 26, 1970) (on file in Folder 4, Box I:215, Brennan Papers).

160. Letter from Warren Burger to William Brennan (Feb. 4, 1970) (on file in Misc. Memos, Cert Memos, Vote of Court Folder, Box 1478, Douglas Papers).

opinion, and over the next couple weeks refined his *Data Processing* opinion further. In one of the final revisions, Armitage cut the line from the original draft about cases that “involve the public interest,” in which a “private attorney general [can] tender the questions on the merits.”¹⁶¹ “Since there is no express statutory standing provision in the statute in this case,” Armitage scrawled in the margin, “the ‘private atty general’ theory does not seem applicable.”¹⁶²

Because of Armitage’s influence, Douglas’s final language in *Data Processing* made no explicit reference to the old concept of “standing for the public.” Instead, he articulated what would become the structure of standing inquiries for years to come:

The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise [T]he [second] question [is] whether the interest to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question That interest, at times, may reflect ‘aesthetic, conservational, and recreational’ as well as economic values.¹⁶³

If the answer to both questions was yes, then the plaintiff had standing.¹⁶⁴ Douglas’s brief opinion in *Barlow* relied on *Data Processing*’s two-part test.¹⁶⁵ Yet in a footnote in *Data Processing*, Douglas did add language heavily drawn from Armitage’s handwritten comment: another test for standing, “which rests on an explicit provision in a regulatory statute conferring standing and . . . commonly referred to in terms of allowing suits by ‘private attorneys general,’ is inapplicable to the present case.”¹⁶⁶ He did not pass judgment on this test, but seemed to implicitly affirm it.

161. William O. Douglas, Draft Opinion at 4, *Ass’n of Data Processing Service Orgs., Inc. v. Camp*, No. 69-85 (Feb. 1970) (on file in Law Clerk Folder, Box 1475, Douglas Papers).

162. *Id.*

163. *Ass’n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 151–54 (1970) (citing, among other cases, *Scenic Hudson*).

164. *Id.*

165. *Barlow v. Collins*, 397 U.S. 159, 164 (1970).

166. *Data Processing*, 397 U.S. at 153 n.1.

Brennan (joined by White)¹⁶⁷ concurred in the result in both cases yet dissented from the Court's reasoning. "My view is that the inquiry in the Court's first step is the only one that need be made to determine standing," he wrote.¹⁶⁸ So long as there is an "injury in fact, economic or otherwise," there is standing;¹⁶⁹ the second step should not be part of the standing analysis, but rather "to determine an aspect of *reviewability*, that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff."¹⁷⁰ Toward the end of his discussion of standing, Brennan included a footnote elaborating on his definition of injury in fact. This injury "has generally been economic in nature," he wrote, "but it need not be."¹⁷¹ He cited *Scenic Hudson*.¹⁷² Brennan then continued:

The plaintiffs in the present cases alleged distinctive and discriminating harm, obviously linked to the agency action. Thus, I do not consider what must be alleged to satisfy the standing requirement by parties who have sustained no special harm themselves but sue rather as taxpayers or citizens to vindicate the interests of the general public.¹⁷³

Thus, though they both mentioned it, neither Brennan nor Douglas outright affirmed the old concept of standing for the public. Such silence, and Douglas's new "injury in fact" plus "zone of interests" test would be the old concept's undoing.

Douglas's *Data Processing* opinion (heavily influenced by Brennan's first draft) did, in the opinion's aftermath, expand "the class of persons who had standing to challenge administrative action," wrote Elizabeth Magill.¹⁷⁴ Yet the opinion also "butchered the prior law"; plus, "[i]t was in the aftermath of *Data Processing* that the standing

167. I have found no records to explain White's motive for joining Brennan's opinion.

168. *Barlow*, 397 U.S. at 168 (Brennan, J., dissenting).

169. *Id.* at 172 (Brennan, J., dissenting).

170. *Id.* at 169 (Brennan, J., dissenting).

171. *Id.* at 172 n.5 (Brennan, J., dissenting).

172. *Id.*

173. *Id.*

174. Magill, *supra* note 45, at 1162.

for the public principle died in the Supreme Court.”¹⁷⁵ It is apparent from the Justices’ papers that they did not consider how drastically their decision departed from the way courts (including the Supreme Court) thought of standing prior to the mid-twentieth century; it is equally apparent that they had given little thought to how *Data Processing* and *Barlow* would affect standing for the public. They had both almost affirmed the concept, but then both (somewhat inexplicably) backed away.

As America entered the 1970s, some were already tired of debating standing. “There is already an enormous and adequate literature on the law of standing,” lamented Louis L. Jaffe in 1971.¹⁷⁶ But the true fights were still to come.

C. Blackmun’s Forgotten Fight: Sierra Club v. Morton

Barely six months after the Court announced its decisions in *Data Processing* and *Barlow*, the Sierra Club filed a petition for certiorari.¹⁷⁷ The Club had challenged the U.S. Forest Service’s decision to grant a permit to the Walt Disney Company to turn Mineral King Valley into a huge commercial ski resort. Now it was appealing a Ninth Circuit ruling that had denied the Club standing to sue.¹⁷⁸ The Club made two arguments to the Justices. The first was that the Club deserved standing because it had suffered an injury in fact—an injury based on the Club’s profound interest in preserving Mineral King. The second was more implicit, yet ultimately it would hold more sway with the Justices: that the Court had to rule in the Club’s favor because of the “crucial significance” of this case to the conservation movement; this was about protecting the environment.¹⁷⁹

In the end, neither argument would prevail. The Sierra Club had erred in failing to clearly make an argument that fragmentary evidence suggests might have worked: that the Club had standing to sue not because it had suffered an injury, but because it was standing for the

175. *Id.* at 1163.

176. Louis L. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 633 (1971).

177. Administrative Docket Book, *Sierra Club v. Morton* (on file in Case File O.T. 1971 Folder, Box 1522, Douglas Papers).

178. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

179. Petition for Writ of Certiorari at 18, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34) (on file in Legal Papers 1969 Folder, Box 3, Mineral King Collection, Fresno State University [hereinafter Mineral King Collection]).

public. Nonetheless, the deeper story of this case and the Justices' deliberations remain instructive to us in the present. This story reveals that the Justices still did not intend to eliminate the concept of standing for the public, and that Blackmun may have been ignorant of its basics. Nonetheless, he supported it using other words, in a subtly radical if sadly forgotten dissent, and also articulated a key reason why we must revisit the current standing doctrine: environmental cases are simply different.

1. The Case

In 1965, the U.S. Forest Service invited private investors to develop “an extensive winter and summer recreation site” at Mineral King Valley, a seven-mile-long glacial valley bordering Sequoia National Park.¹⁸⁰ The winning bid—\$35 million, twice the cost of Disneyland—came from the Walt Disney Company, which proposed to build an “American Alpine Wonderland”—a massive ski resort.¹⁸¹ Walt Disney himself had been quietly buying property around Mineral King for years and had donated generously to Governor Ronald Reagan's campaign in an effort to ensure California's support for the project.¹⁸² For three years following the Forest Service's initial nod, the Disney Company worked to create a final plan. It did not anticipate that fierce opposition would arise.¹⁸³ Yet arise it did, with a vengeance, when, in 1965, the Sierra Club began militating against the project.

Founded in 1892, the Sierra Club was one of the oldest and most venerated environmental organizations in the country. By the 1950s, the Club was beginning to expand its reach beyond California and to fight more forcefully to protect public lands.¹⁸⁴ Whereas in the 1940s the Club had actually voted to support development in Mineral King, and in the 1950s the Club had made Walt Disney an honorary life member, now it would have to rethink things.¹⁸⁵ Club members had carefully tracked Walt Disney's land acquisitions in the early 1960s,

180. See Alexandra K. Vicknair, *Mindsets, Motivations, Mickey Mouse, and the Mountains: The Social, Political, and Intellectual Foundations of the Mineral King Controversy, 1965–1978*, 15 (June 2013) (M.A. thesis, Cal. State Univ., Stanislaus).

181. *Id.*

182. *Id.* at 69–70.

183. *Id.* at 73–74.

184. *Id.* at 82–87.

185. Tom Turner, *Who Speaks for the Future*, *SIERRA*, July/August 1990, 31–34.

and shortly after Disney won a preliminary permit to begin developing the land in 1965, the Sierra Club voted to oppose any development at Mineral King—a “magnificent area” where many Club members loved to hike and camp.¹⁸⁶ Club officials wrote to the Park Service to object to plans to build a highway into Mineral King.¹⁸⁷ When that didn’t work, they proposed that Mineral King be annexed to Sequoia National Park and requested a public hearing from the Forest Service.¹⁸⁸ When that didn’t work, the Club launched a full-scale media campaign to raise awareness.¹⁸⁹ Still, the plan moved forward.

At a meeting on January 21, 1968, the Sierra Club’s Board of Directors discussed “legal action” for the first time. It seemed the only way forward, and Club members had been inspired by the success of the Scenic Hudson litigation three years before.¹⁹⁰ Club officials considered the Forest Service to be “openly obsessed with development.”¹⁹¹ And in the Forest Service’s zeal to allow Disney to develop Mineral King, they believed, the government had failed to perform a thorough assessment of the environmental impacts the project would have.¹⁹²

So, on June 5, 1969, the Club sued several federal officials to stop the project from going forward, including Interior Secretary Walter Hickel, the named defendant. (He would later be replaced as named defendant following the confirmation of a new Interior Secretary, Rogers Morton.) In its complaint, the Club alleged that the government’s issuance of permits to Disney was “not in accordance with law, [was] arbitrary and capricious and constitute[s] an abuse of discretion.”¹⁹³ The project, the Club continued, would cause irreparable harm to Mineral King.¹⁹⁴ Aware of the holding of *Scenic Hudson*, the Club anticipated that standing would be an issue in this

186. Vicknair, *supra* note 180, at 98–99; JOHN L. HARPER, MINERAL KING: PUBLIC CONCERN WITH GOVERNMENT POLICY 76–85 (1982).

187. Vicknair, *supra* note 180, at 106.

188. HARPER, *supra* note 186, at 91.

189. *Id.* at 107–15.

190. Vicknair, *supra* note 180, at 110–12.

191. HARPER, *supra* note 186, at 164.

192. *Id.*

193. Complaint, *Sierra Club v. Hickel* (June 5, 1969) (on file in Legal Papers 1969 Folder, Folder, Box 3, Mineral King Collection).

194. *Id.*

case. So the Club wrote, “For many years the SIERRA CLUB by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested.”¹⁹⁵

At the hearing, federal attorneys argued (among other things) that the Sierra Club did not have standing to sue.¹⁹⁶ In its brief to the trial court, recounted Club member Tom Turner:

“the Sierra Club had argued it should be granted standing simply because its very purpose for existence was the preservation of the Sierra Nevada. The plaintiff asked rhetorically: ‘If the Sierra Club may not be heard, then who speaks for the future generations for whose benefit Congress intended the fragile Sierra bowls and valleys to be preserved? If the Sierra Club does not have standing, then who may question the threatened illegal acts of the secretaries to whom this unique and irreplaceable natural resource has been entrusted?’”¹⁹⁷

Later, in a brief replying to the government’s arguments at the hearing, the Club cited Justice Harlan’s dissent in *Flast*, though this was more in service of a rhetorical point than it was a clear invocation of standing for the public.¹⁹⁸

District Court Judge William Sweigert ruled against the government, enjoining the issuance of the permit to Disney and of a right-of-way permit to California for routing a highway through Sequoia National Park (which was necessary for the Mineral King project).¹⁹⁹ “Judge Sweigert was not at all bothered by the Club’s broad claim of standing,” recalled Turner.²⁰⁰ Sweigert cited *Scenic*

195. *Id.* For more on the Club’s filings, see Cutler, *supra* note 2, at 70.

196. HARPER, *supra* note 186, at 169; *see also* Sierra Club v. Hickel, 1 ENVTL L. REP. 20,010 (N.D. Cal. 1969); Cutler, *supra* note 2, at 73–74.

197. Turner, *supra* note 185, at 38.

198. *See* Cutler, *supra* note 2, at 79.

199. Preliminary Injunction, Sierra Club v. Hickel (July 23, 1969) (on file in Legal Papers 1969 Folder, Box 3, Mineral King Collection); HARPER, *supra* note 186, at 169–70.

200. Turner, *supra* note 185, at 38.

Hudson to support his ruling.²⁰¹ On February 9, 1970, federal attorneys appealed Judge Sweigert's decision to the Ninth Circuit. Their main contention was that the defendants had not exceeded the limits of their discretionary authority, but they also challenged the Club's standing to sue, on the grounds that the Club "fails to establish infringement of any legally protected interest belonging to it."²⁰²

On September 16, 1970, six months after the Supreme Court's rulings in *Data Processing* and *Barlow*, a Ninth Circuit panel voted 2-to-1 that the Sierra Club did not have standing to sue. In its analysis of the current standing doctrine, the Ninth Circuit first quoted from a 1943 Second Circuit decision affirming that "Congress can constitutionally enact a statute" giving a person or class of persons standing to sue "even if the sole purpose is to vindicate the public interest."²⁰³ "More recently," however, a "profusion of cases . . . have developed new precedents on the law of standing."²⁰⁴ These included *Flast*, *Data Processing*, and *Barlow*.²⁰⁵ The Ninth Circuit then ran through the "injury in fact" analysis (the Ninth Circuit considered the "zone of interests" test to be "not entirely clear" and pretty much ignored it), concluding that, in spite of *Data Processing*'s language about "aesthetic, conservational or recreational" injuries, no members of the Sierra Club "would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them."²⁰⁶ This was not enough for standing. As to the concept of standing for the public, the Ninth Circuit accepted it, but wrote that "that rule is limited . . . to cases where Congress has enacted a statute conferring on any non-official person, or on a group of non-official persons, authority to bring a suit to prevent unauthorized official action We find no indication in any federal statute that Congress has conferred on the Sierra Club or any group like it,

201. Cutler, *supra* note 2, at 81.

202. Brief for Appellants, *Sierra Club v. Hickel* (Feb. 9, 1970), *cited in* HARPER, *supra* note 186, at 171–72.

203. *Sierra Club v. Hickel*, 433 F.2d 24, 28–29 (9th Cir. 1970) (quoting *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943)).

204. *Id.* at 29.

205. *Id.*

206. *Id.* at 32–33.

authority to bring suits to challenge official action.”²⁰⁷ Somewhat confusingly, the Ninth Circuit dismissed the notion that Section 10 of the APA could confer such authority on the Club, citing *Data Processing*’s demand of an injury in fact.²⁰⁸

The Sierra Club immediately announced its intention to appeal to the Supreme Court, and the Ninth Circuit agreed to keep Judge Sweigert’s injunction in place until the Court ruled.²⁰⁹ In its petition for certiorari, the Club articulated two theories to support its bid for standing: first, it passed the *Data Processing* test, and second, the Club was acting in the public interest. The Club dismissed the idea, proposed by the Ninth Circuit (and later embraced by the Court), that it might have standing if it joined its claim with “local residents and users.”²¹⁰ “A viable rule cannot rest upon such a fragile distinction,” wrote the Club.²¹¹ “Either the Sierra Club has standing in its own right, or it does not. The question is an important one, and this court should decide it.”²¹² Yet the Club added that this case was of “crucial significance” because it was in the “conservation field”: “If left unreversed, this case will cripple efforts of conservation groups to represent the public interest.”²¹³ However, other than name-checking “the public interest” several times,²¹⁴ the Club did not expound upon the old concept of standing for the public. This was odd, considering the fact that the Ninth Circuit had embraced this concept in a footnote.

Later, in its reply brief to the Court, the Club repeated this tactic. Its argument primarily relied on *Data Processing*, which “said that injury to aesthetic, conservational, and recreational values may be advanced by an appropriate litigant as a basis for standing. In opposing the Sierra Club’s standing in this case, the Government necessarily challenges that decision.”²¹⁵ Yet the Club went perhaps too far in its embrace of

207. *Id.* at 33 n.9. The Ninth Circuit also found that Judge Sweigert had abused his discretion by enjoining all work on the development. *Id.* at 34.

208. *Hickel*, 433 F.2d at 32–33.

209. HARPER, *supra* note 186, at 173.

210. Petition for Writ of Certiorari, *supra* note 179, at 14.

211. *Id.*

212. *Id.*

213. *Id.* at 18

214. *See also id.* at 12.

215. Reply brief for the Petitioner at 1, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34).

Data Processing's "injury in fact" and "zone of interests" analysis. The Club noted that it was "not merely claiming the right, possessed by every citizen, to require that the Government be administered according to the law," but rather was asserting that it had "a plain, direct, and adequate interest" that the government was harming.²¹⁶ In arguing to expand the definition of injury in fact to include aesthetic and other non-economic concerns, the Club strategically embraced the Court's apparent leaning and moved away from its earlier argument for the old concept of standing for the public.²¹⁷ Yet this tactic may have been a mistake, given the language in both Douglas's and Brennan's *Data Processing* and *Barlow* opinions that pointedly stated that they were not ruling on the old concept.

In its filings to the Court, the Club's approach to the standing issue was deliberate and calculated—if ultimately misguided. In a 1975 interview, Club attorney Richard Leonard maintained:

Now, it should be clearly understood that the Sierra Club had deliberately not stated its own personal harm—the fact that it had taken trips into the area and its members personally used the area—because it felt that it was much more important to state the general principles that the Park Service and the Forest Service were violating acts of Congress and somebody had to have the right to protest. The Court of Appeals held that the secretaries of Agriculture and Interior are supposed to take care of the public interest. But they weren't. So the Sierra Club felt that somebody in the public had to have the right to request corrective action²¹⁸

216. *Id.* at 4 (internal quotations and punctuation omitted) (citing *Baker v. Carr*, 369 U.S. 186, 208 (1962))

217. Here the Club also departed to some extent from its initial brief, where it included a sentence accusing the Ninth Circuit of "ignor[ing] the cases which define 'adversely affected or aggrieved' in the precise legal context here in issue—citizens' groups championing conservation interests." Brief for Petitioner Sierra Club v. Morton at 13, 405 U.S. 727 (1972) (No. 70-34). Oddly, the Club did not include a citation after this sentence. Later in the brief, the Club noted that the Ninth Circuit rejected "the 'private attorney' general theory." *Id.* at 15.

218. Quoted in Susan R. Schrepfer, *Perspectives on Conservation: Sierra Club Strategies in Mineral King*, 20 J. FOREST HIST. 176, 188 (Oct. 1976).

Yet it must be understood that the Club was not invoking the old concept of standing for the public; rather, it was claiming that it had suffered an injury, on account of its interest in Mineral King, and that the Club (more than any ordinary member of the public) was uniquely well suited to bring this suit. The Club's legal strategy, Leonard maintained, was "to test the general principle, that the Sierra Club as a responsible organization, eighty years old, experienced in the field of environmental matters, could raise questions as to environmental judgment of the Forest Service or Park Service or others"²¹⁹

At this time, the Club was also launching a broader legal campaign to protect the environment. Even as Club members appealed to the Supreme Court, other Club attorneys approached the Ford Foundation to apply for funds to establish the Sierra Club Legal Defense Fund. After receiving a \$98,000 grant in the spring of 1971, this Fund became a reality.²²⁰ It still exists today, known as Earthjustice.

In its filings to the Court, the Sierra Club made two arguments: it claimed that this case was of "crucial significance" because it was an environmental case, and it claimed that it had suffered a unique injury in fact, on account of its long-standing interest in Mineral King. The first argument would ultimately end up carrying more weight with the Justices than the second argument. Yet neither argument would prove persuasive enough to secure the victory the Club wanted. And, in the end, neither argument was the most powerful one the Sierra Club could have made: that it was standing for the public, not because of any injury, not because of its expertise, but simply because of the "crucial significance" of protecting the environment.

2. The Deliberations

The case of Mineral King had resonated deeply with many members of the public, especially young people. This was surely not because of their avid interest in the intricacies of the standing doctrine. Rather, it was because this was an environmental case—one about protecting a beautiful and wild piece of land. "I myself feel that if Disney does

219. *Id.*

220. Turner, *supra* note 185, at 67.

build this resort, he will destroy the area,” one young man wrote to Justice Douglas in the fall of 1971.²²¹

If you have ever been to Yosemite National Park, you would know what tourists do to a place as that. The natural ecology of the Yosemite Valley has been ruined Now I’m 18 years old and I’m sorry to say that if big business keeps on having its way that by the time I get older and have kids there will not be any place such as this to vacation. Please think of people like me when you vote on this issue [K]eep Mineral King primitive so others can enjoy its natural beauty²²²

Months earlier, Douglas had received another letter from another young man, this one a second-year law student at the University of California, Santa Clara. “Knowing that you have long been concerned about our environment,” he wrote, “I feel that you, perhaps more than your fellow Justices, realize the importance of standing for environmental litigants.”²²³

Several of the Justices’ clerks, too, were apparently moved by environmental concerns. “There is no doubt in my mind that the large scale development planned here would change the wilderness to such an extent that the natural state could not be restored for quite some time,” Blackmun clerk Michael A. LaFond wrote in a memo arguing that the Sierra Club had standing.²²⁴ “This case is of great importance in light of the growing concern about the quality of our natural environment,” added Marshall clerk Paul Gewirtz.²²⁵ “The effect of the [Ninth Circuit’s] decision below is to make it impossible for

221. Letter from Jim Hanson to William O. Douglas (Oct. 17, 1971) (on file in Folder 1, Box 552, Douglas Papers).

222. *Id.*

223. Letter from Peter Heiser, Jr., to William O. Douglas (Jan. 13, 1971) (on file in Misc. Memos, Cert Memos, Vote of Ct. Folder, Box 1545, Douglas Papers).

224. Michael A. LaFond, Bench Memo (Nov. 13, 1971) (on file in Folder 7, Box 137, Harry A. Blackmun Papers, Library of Congress [hereinafter Blackmun Papers]).

225. Memorandum from Paul Gewirtz (on file in 70-34 Sierra Club v. Morton Folder, Box 81, Marshall Papers).

environmental interests to be represented in court. (Who will represent them?) There is no reason for the Court to want this result.”²²⁶

The Justice that environmental activists believed would be their most natural ally was William O. Douglas. There had never been as ardent a conservationist as Douglas on the Court. A hiker and lover of nature since early childhood, the author of books on the wonders of the outdoors and an activist (even in his later years) for preserving wild places, Douglas had been a Sierra Club member for decades. In 1959, after two decades on the Court, he had been voted a life member; two years later, he was elected to its board of directors. As a Supreme Court Justice, Douglas advocated for stronger public control over public lands; sought to have the Court condemn DDT; and generally pushed to have the Court address matters through the lens of environmentalism.²²⁷ Yet in late 1962, Douglas resigned from the board—“because,” as a clerk later summarized, “Sierra Club [is] now engaging in litigation”—but he remained a member of the Club until December 1970, by which time he gave up his life membership, worried it could delegitimize his environmental votes.²²⁸

As *Sierra Club* neared oral arguments, Douglas dispatched his clerks to research both the case and his history with the Club.²²⁹ Clearly, he was concerned about the appearance of bias. His vote in the case itself would prove to be far less complicated. Kenneth R. Reed, Douglas’s clerk assigned to look into the arguments, concluded that the Sierra Club had a slam-dunk case for standing. “The standing question is not much in issue before this Court,” he wrote.²³⁰ Reed also noted the environmental harm that would occur if the Club lost. “The construction [of the ski resort] would require extensive bulldozing of heretofore wilderness land, it would necessitate blasting and rock removal, and alterations of mountain slopes,” he wrote.²³¹

226. *Id.*

227. Manus, *supra* note 34, at 155–68.

228. Memo on WOD and the Sierra Club (on file in Law Clerk Folder, Box 1545, Douglas Papers).

229. *See id.*; *see also* Internal Memorandum from Kenneth R. Reed (Nov. 5, 1971) (on file in Misc. Memos, Cert Memos, Vote of Ct. Folder, Box 1545, Douglas Papers).

230. Reed, *supra* note 229.

231. *Id.*

The Justice that few expected to be a secret crusader for the environment was Harry Blackmun. Only appointed to the Court a year earlier, Blackmun had been personally very close to the conservative Chief Justice Burger since kindergarten, and in his first years on the Court his voting record mirrored Burger's: Blackmun voted like the lifelong Republican that he was. Yet unbeknownst to most, Blackmun was struggling with his ideology, as well as his perception that several of his colleagues—Douglas above all—didn't respect him.²³² When it came to *Sierra Club*, Blackmun concluded that the Club did have standing—apparently largely because of the depth of its interest in the environment. “Ten years ago Sierra would have had no recognizable standing,” Blackmun wrote in a memo to himself a few days before oral arguments.²³³

On the other hand, I think this Court in the [D]ata [P]rocessing and related cases has gone far down the road to uphold standing in a litigant. If it can be shown that there is some [e]ffect upon the litigant, then it seems he has standing. This, of course, can be carried too far. On the other hand, with the broad environmental purposes of Sierra and with the members of Sierra enjoying the particular region in which this project is to be placed, it seems to me that there ought to be enough here for standing. Furthermore, if an organization of this kind does not have standing, who does? It would be hard to find someone else other than a resident in the immediate vicinity. These are probably few, if any exist at all, because of the wilderness character of the area and the substantial reach of federal lands. Certainly Sierra is a responsible representative.²³⁴

Yet it also appears that Blackmun may have been unaware that, quite apart from *Data Processing* injury in fact requirement, there was another way litigants had historically gotten standing: by suing on

232. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 119, 163–64 (1979).

233. Harry Blackmun, *No. 7034 – Sierra Club v. Morton, Secretary* (Nov. 15, 1971) (on file in Folder 7, Box 137, Blackmun Papers).

234. *Id.*

behalf of the public, enabled by a statutory right of action (in this case, Section 10 of the APA).²³⁵ In a bench memo one of Blackmun's clerks had written, "In the absence of special legislation, a party whose only interest is in having the law obeyed should have no standing to sue."²³⁶ The clerk's first clause was obliquely dismissing the legitimacy of statutory grants of standing for the uninjured, to stand on behalf of the public. Yet Blackmun wrote a question mark in the margin next to that sentence, possibly indicating he was unfamiliar with this doctrine or confused by the clerk's comment.²³⁷

Oral arguments took place on November 17, 1971. According to Blackmun's hastily scrawled notes, the Sierra Club's attorney, Leland R. Selna, Jr.—a tall young man, nice-looking and with a good voice, in Blackmun's eyes—began at 11:07 am.²³⁸ He attempted to make a number of points: demonstrate that the Club satisfied the "injury in fact" and "zone of interests" test; argue that organizations (and even individuals) should have standing in their area of "special expertise" because of that expertise; and, finally, that the environmental stakes in this case were very high.²³⁹ Selna noted early on that the Disney Company itself had described Mineral King as "unsurpassed in natural splendor, perhaps more similar to the European Alps than any other area in the United States and generously endowed with lakes, streams, cascades, caverns and matchless mountain visitors."²⁴⁰ Yet Selna also suggested that its view of standing based on "special expertise" and demonstrated interest was not limited to the environment. As the scholar Peter Manus noted, "The Sierra Club's attorney . . . did not consistently assert that the private attorneys general he urged the Court to recognize were limited to environmental advocates able to convince a court of their genuine dedication to the public's interest. Nor did the

235. See Administrative Procedure Act, 5 U.S.C. § 702 (1988).

236. LaFond, *supra* note 224.

237. *Id.*

238. Harry Blackmun, Notes on Oral Argument, *Sierra Club v. Morton* (No. 70-34) (Nov. 17, 1971) (on file in Folder 7, Box 137, Blackmun Papers).

239. See generally Transcript of Oral Argument, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34).

240. *Id.* at 5.

Sierra Club's attorney clearly assert why the Court should logically limit its expansion of standing to such advocates."²⁴¹

In his statements to the Justices, Selna invoked the language of standing for the public, but he did so without embracing the old doctrine. Rather, he seemed to use this language to bolster his argument that the Club had sustained an injury in fact, and that it was within the zone of interests. For instance, when discussing *Data Processing* and *Scenic Hudson*, Selna said, "Those were cases in which organizations' aesthetic or conservational or recreational interests were sufficiently aggrieved, to permit them to represent the public interest."²⁴² Thus, while the Club was arguing to expand the definition of injury in fact, it situated its argument squarely in those terms.

This is perplexing, because there were indications to suggest that some Justices might have been open to the older concept of standing for the public. For instance, in his only questions during oral arguments, Douglas asked Solicitor General Erwin Griswold (arguing for Interior Secretary Morton) about Michigan's recently passed law, which automatically gave standing to anyone to bring suit "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction,"²⁴³ and asked if Congress could do the same.²⁴⁴ Griswold replied that it could, and made reference to the government's brief. There, the government had noted that the Club could have claimed standing for the public if Congress had enacted a statute creating a private right of action—"indeed, there are bills presently pending in Congress which would confer standing on citizens and groups such as the Sierra Club with respect to a broad range of environmental-public interest issues"—yet such was not before the Court.²⁴⁵ (This last assumption reflected a misunderstanding of the APA, the framers of which had intended it to

241. Peter Manus, *The Blackbird Whistling—The Silence Just After Evaluating the Environmental Legacy of Justice Blackmun*, 85 IOWA L. REV. 429, 506 (2000).

242. Transcript of Oral Argument, *supra* note 239, at 9.

243. Michigan Environmental Protection Act, MICH. COMP. LAWS ANN. § 691-1201(2)(1) (West 1970). This will be discussed in greater depth at *infra* Part II.B.

244. Transcript of Oral Argument, *supra* note 239, at 25–26.

245. Brief for Respondent, *Sierra Club v. Morton* at 26, 405 U.S. 727 (1972) (No. 70-45). The government positively cited Brennan's reference to this in his *Barlow* dissent. 397 U.S. at 172 n.5.

do just that: assure a private right of action when agencies shirk their duties.)²⁴⁶

Yet if Douglas and Griswold were aware of this possibility, Blackmun again gave no such indication. His questions were focused on defining the limits of the standing requirements the Club wanted the Court to embrace. Blackmun asked Selna whether “a broad general interest [in] the problems of ecology” was enough for standing in this case?²⁴⁷ Surely that interest had to be more specific to give a plaintiff standing? Selna replied that an organization “would have to have competence in the area in which it sought to represent the public interest or it would not be able to do it.”²⁴⁸ Crucially, Selna framed his answer in terms of *Data Processing* and its injury in fact requirement.

“Now, because the Sierra Club represents not only itself but the public interests, the Government is wrong in its argument that injury to the public demands a special statutory grant of—in order to permit standing [*sic*]. But [the] *Data Processing* case already answered that argument when it recognized that widely held aesthetic conservational and recreational values which by their nature affect the public could be a basis for standing.”²⁴⁹

Once again, the Sierra Club chose to frame its argument in terms of an injury (albeit an aesthetic one), not true standing for the public.

Two days later, on November 19, 1971, the Justices met to discuss the case. Chief Justice Burger went first. According to Douglas’s and Blackmun’s scrawled notes, he told the other Justices that he simply could not accept standing here—if the Sierra Club had standing, where would it stop? How much judicial surveillance of administrative actions could they allow? The end result would be the immobilization of the government. Yet he would not be opposed to signing on to a narrow opinion—for instance, one affirming standing based on the

246. Sunstein, *supra* note 22, at 185–86.

247. Transcript of Oral Argument, *supra* note 239, at 13.

248. *Id.*

249. *Id.* at 14.

injury to Club members who could no longer hike on trails in Mineral King.²⁵⁰

Next it was Douglas's turn to speak. He passed.²⁵¹ Brennan dwelt on the injury-in-fact requirement from *Data Processing*—he hadn't been convinced that the Club had suffered an injury based on the evidence presented, but he agreed with Burger that this might be different had the Court seen evidence of the Club members' use of the area. He was not set in his conclusions, though. Brennan finished by expressing his hope that the Court would clarify that injuries could be aesthetic as well as economic. White went next, and said he hoped the Court would not do that in this case. Perhaps more than his colleagues, White was opposed to what the Club was trying to do—not everyone in the United States could be a private attorney general, he said. Stewart largely agreed. He began by saying he simply couldn't agree with the district court; he thought the Ninth Circuit had gotten it right. Unlike Burger, he saw no need to issue a narrow ruling.²⁵²

According to Douglas's notes, Marshall spoke next and did not say much. He would vote to affirm the Ninth Circuit. Blackmun—the most junior justice, and thus the last to vote—professed himself to be at roughly the same place as Brennan—there might be standing based on the interests of environmentally-minded Club members.²⁵³ Finally attention turned back to Douglas, who was the last to speak. Again, Douglas would not vote one way or the other; he told the other Justices that he may end up not participating, as he'd been a member of the Sierra Club for years, and spent time on its Board of Directors, even though he'd resigned his membership the year before.²⁵⁴

After the conference ended, Blackmun jotted down some notes to himself. They express his profound uncertainty about what to do. In his messy shorthand, he wrote, “Standing—I feel Data P & other cases have opened the way. I see the open door, but what is it . . . [?] If

250. Harry Blackmun, Conference Notes, *Sierra Club v. Morton* (Nov. 19, 1971) (on file in Folder 7, Box 137, Blackmun Papers); William O. Douglas, Conference Notes, *Sierra Club v. Morton* (Nov. 19, 1971) (on file in Misc. Memos, Cert Memos, Vote of Ct. Folder, Box 1545, Douglas Papers).

251. Blackmun, *supra* note 250.

252. *Id.*; Douglas, *supra* note 250.

253. Douglas, *supra* note 250.

254. Blackmun, *supra* note 250.

standing is apparent, injunctive relief is less important. But I would grant injunctive relief.”²⁵⁵

With Burger, White, Stewart, and Marshall voting to affirm the Ninth Circuit, there was an outright majority prepared to deny the Sierra Club standing (since only seven Justices were voting). Chief Justice Burger assigned Potter Stewart to write the majority opinion. Stewart’s first draft was nearly identical to his final one.²⁵⁶ In both, he began by recognizing Mineral King’s “great natural beauty.”²⁵⁷ He then reviewed the standing doctrine—the “injury in fact” and “zone of interests” test.²⁵⁸ Crucially, Stewart clarified that harm to one’s “[a]esthetic and recreational” values could count as interests that could be injured, but he added “the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.”²⁵⁹ The only fact revealed in Stewart’s papers is that he added one of the most critical lines of his opinion—the footnoted sentence clarifying, “[o]ur decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint . . . “—in a later draft.²⁶⁰ This footnote was to a section lamenting that the Club had “failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members used Mineral King for any purpose, much less that they used it in any way that would be significantly affected by the proposed actions of the respondents.”²⁶¹ This was the section that none-too-subtly told the Club how it could acceptably gain standing.

In both his original and final drafts, Stewart also directly addressed the possibility of standing for the public:

255. *Id.*

256. Potter Stewart, Draft Majority Opinion, *Sierra Club v. Morton* (on file in Folder 693, Box 79, Potter Stewart Papers, Yale University [hereinafter Stewart Papers]).

257. *Id.*; *Sierra Club*, 405 U.S. at 728.

258. *Sierra Club*, 405 U.S. at 733.

259. *Id.* at 734–35.

260. See handwritten comment at the bottom of Potter Stewart, Draft Majority Opinion at 8, *Sierra Club v. Morton* (on file in Folder 694, Box 79, Stewart Papers).

261. *Sierra Club*, 405 U.S. at 735.

The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a ‘public’ action involving questions as to the use of natural resources, and that the Club’s longstanding concern with and expertise in such matters were sufficient to give it standing as a ‘representative of the public.’ This theory reflects a misunderstanding of our cases involving so-called ‘public actions’ in the area of administrative law.²⁶²

The Club, according to Stewart, had misstated precedent. According to the Justice, the line of cases allowing plaintiffs to stand for the public had established the following proposition: “the fact of economic injury is what gives a person standing to seek judicial review”²⁶³

Stewart’s account of doctrine was blatantly ahistorical. “Actually, no,” wrote Elizabeth Magill of Stewart’s “revisionist version of the history of standing doctrine.”²⁶⁴ “Prior to 1970,” a statutory provision alone, without an individualized injury (economic or otherwise), could permit “aggrieved parties to challenge administrative action.”²⁶⁵ In *Sierra Club*, Stewart used his framing of history to justify expanding injury-in-fact to include non-economic injuries while demanding an injury in all cases.²⁶⁶ Stewart’s account of the Sierra Club’s arguments was also incorrect. In its briefs and during oral argument, the Club had made the tactical decision to frame its argument in terms of “injury in fact” and the Club’s unique expertise in environmental matters. This implicitly rejected the idea that an uninjured party or an ordinary member of the public would have the ability to stand for the public if enabled by a statutory right of action (such as Section 10 of the APA). Stewart and the majority readily accepted this *Data Processing* injury requirement, even as it rejected the Club’s more prosaic arguments.

Stewart’s opinion would be the one embraced by a majority of Justices, but Douglas’s opinion would be the one to go down in history. The origin of this famous opinion has been well documented. Christopher Stone, a young law professor at the University of Southern

262. *Id.* at 736.

263. *Id.* at 737.

264. Magill, *supra* note 45, at 1165.

265. *Id.*

266. *Id.* at 1166–67.

California, had been toying around the idea of whether “natural objects”—forests, rivers, lakes, and the like—could have rights of their own. Could a polluted river, say, sue its polluter? In October 1971, in USC’s library, Stone read the Ninth Circuit opinion in *Sierra Club v. Hickel*, which immediately struck him as “the ready-made vehicle to bring to the Court’s attention the theory that was taking shape in my mind.”²⁶⁷ Stone knew he had to act quickly. He wanted to write an article in the *Southern California Law Review*, but it wouldn’t be published in time. Yet in a stroke of extraordinary luck, Justice Douglas was scheduled to write the preface for the *Review*’s next issue; if he hurried, Stone could write his article and have it sent with all of the other drafted articles for that issue to Douglas in December. Writing at breakneck speed, Stone managed to finish his now-legendary article, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*,²⁶⁸ in a matter of weeks.²⁶⁹

The article traced the evolution of legal rights for those who formerly lacked them—women, children, the elderly, imprisoned people, the mentally ill, “Blacks, fetuses, and Indians,” as well as corporations—to conclude, “I am quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called ‘natural objects’ in the environment—indeed, to the natural environment as a whole.”²⁷⁰ Practically speaking, of course, a tree cannot sue on its own. Thus, “when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship,” and then sue on its behalf.²⁷¹ This would be similar to legal guardianship for children or the mentally “incompetent.” The Sierra Club could be such a guardian for Mineral King.²⁷² This article was mailed off to Douglas in December.²⁷³

Should Trees Have Standing? impressed the environmentally-minded Justice very deeply. It is possibly what convinced him not to

267. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT* xi-xiii (2010)

268. Christopher D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 *SO. CAL. L. REV.* 450 (1972).

269. STONE, *supra* note 267, at xiv.

270. Stone, *supra* note 268, at 450–56.

271. *Id.* at 464–65.

272. *Id.* at 464, 468.

273. STONE, *supra* note 267, at xiv.

recuse himself. In the first draft of his dissent, handwritten on a yellow legal pad, Douglas wrote that the “problem” of standing “would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled or whose despoilment is the subject of public outrage. This suit would therefore be more properly labeled as *Mineral King v. Morton*.”²⁷⁴ Inanimate objects like ships and corporations, he noted, are sometimes parties in litigation, and they have legal personhood for “purposes of the adjudicatory processes”—“So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swamplands, or even air that feels the destructive pressures of modern technology and modern life.”²⁷⁵ Practically speaking, nature could be represented by “those people who have so frequented the place as to know its values and wonders”²⁷⁶ Douglas stressed that this would simply allow natural objects to have their day in court. “Perhaps they will not win. Perhaps the bulldozers of ‘progress’ will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?”²⁷⁷

In the months that followed, Douglas’s opinion changed only slightly, yet the changes were significant. He and his clerks revised the first several paragraphs so that they more directly credited Stone, and they revised the language to make it somewhat more prosaic. For instance, “the inanimate object about to be despoiled or whose despoilment is the subject of public outrage” became “the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.”²⁷⁸ Note, however, that this addition also introduced the word “injury” into Douglas’s opinion. This was not accidental. Douglas and his clerks considered Mineral King’s standing to hinge on “a showing of ‘injury

274. William O. Douglas, First Draft at 1, *Sierra Club v. Morton* (on file in Typed Draft, Penciled Draft, Riders Folder, Box 1545, Douglas Papers).

275. *Id.* at 1–2.

276. *Id.* at 7.

277. *Id.* at 6.

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

in fact' (to the Valley)."²⁷⁹ And Douglas appears to have been wary of the notion of standing for the public, at least as it was presented to him. "[P]ublic interest' has so many differing shades of meaning as to be quite meaningless on the environmental front," he wrote.²⁸⁰

Douglas circulated a draft of his dissent to the other Justices on February 14, 1972—Valentine's Day.²⁸¹ The next day, one of Blackmun's clerks wrote to his boss that Stewart had "resolved the standing issue correctly," but "Justice Douglas'[s] opinion is delightful. No doubt he enjoyed writing it. While I would prefer to join the opinion of Justice Stewart, the suggestion of Justice Douglas should not be discarded or given no recognition."²⁸² Blackmun had been wrestling with the case for months, and he waited to read Douglas's and Stewart's opinions before writing his own. "I concur in much of my brother Stewart's opinion which, as I understand it, acknowledges that the Sierra Club can maintain standing . . . if it can establish the (extensive?) use by its members of Mineral King," he began his first draft.²⁸³

But I cannot agree to a disposition of the case that in effect sanctions the Disney Development without our even considering the strength of petitioner's substantive claims of illegality, simply on account of the peculiar history and posture of the case.

I might feel differently were this obviously a test case on a narrow issue of standing, and it was clear that the merits

279. Letter from William H. Alsup to William O. Douglas (Feb. 21, 1972) (on file in Law Clerk Folder, Box 1545, Douglas Papers).

280. *Sierra Club*, 405 U.S. at 745 (Douglas, J., dissenting); see also Manus, *supra* note 34, at 144–45 ("The distinction between the outraged public Justice Douglas admired and the propaganda-led flock he disdained is foggy at best, leaving a reader unclear about whether Justice Douglas supported, rejected, or merely disregarded the Sierra Club's argument that environmental claims are public claims that may be brought by private parties.")

281. William O. Douglas, Draft Dissent, *Sierra Club v. Morton* (Feb. 14, 1972) (on file in Law Clerk Folder, Box 1545, Douglas Papers).

282. Letter from Michael A. LaFond to Harry Blackmun (Feb. 15, 1972) (on file in Folder 7, Box 137, Blackmun Papers).

283. Harry Blackmun, First Draft Dissent at 1, *Sierra Club v. Morton* (on file in Folder 7, Box 137, Blackmun Papers).

could be pursued in an orderly fashion following this Court's decision on the narrow issue. But the background of this suit, and the Sierra Club's historic involvement in fighting to preserve the natural beauty and character of Mineral King Valley, demonstrate that the issues the Court today does not reach are the heart of this case. Not only are these issues, many of which plow new ground, crucial to the future of Mineral King. Several raise important ramifications for the quality of public land management throughout the Nation.²⁸⁴

Blackmun wrote that where a "traditional interest analysis" would give standing (say, based on Club members' interest in keeping a valley where they hiked and camped from being spoiled), such an analysis is "quite appropriate."²⁸⁵ But where such an analysis would not work, "I would not hesitate to look more directly to the purposes on which the traditional analysis was founded: the existence of a real dispute and important interests at stake; the assurance of genuine adversariness; and some guarantee that the party whose standing is challenged will adequately represent the interests he asserts."²⁸⁶

In subsequent drafts, Blackmun would clarify his prose and his thinking. His dissent would eventually read, in part:

If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content.

But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

....

284. *Id.*

285. *Id.* at 4.

286. *Id.* at 5.

Rather than pursue the course the Court has chosen to take by its affirmance of the judgment of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgment and, instead, approve the judgment of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the specifications the Court prescribes for standing.

....

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues.²⁸⁷

Thus, there would be standing in environmental cases for those who have “a provable, sincere, dedicated, and established status” as interested and qualified environmentalists, even—apparently—in the absence of a personal injury.²⁸⁸

Blackmun and his clerks privately felt this disposition was superior, practically speaking, to Stewart’s and to the dissents. While Stewart’s opinion “would not be objectionable if this were really a test case on the legal doctrine of standing . . . this isn’t just a legal test case on a procedural issue, it goes to the entire project.”²⁸⁹ They also recognized that Douglas’s dissent was not as radical as it seemed from its bold rhetoric:

Justice Douglas’s approach could lead to some strange results. But read carefully, the opinion is carefully structured to offer merely another route (another route of analysis) by which the Court could reach the same result Justice Stewart reaches: ‘standing for users.’ The thrust of the Douglas

287. *Sierra Club*, 405 U.S. at 756–57 (Blackmun, J., dissenting).

288. *Id.* at 757–58.

289. Frampton, *supra* note 15, at 1.

opinion is not that somebody ought to start appointing guardians ad litem for trees, but that where a natural environmental ‘system’ is about to be substantially altered the courts should begin their standing inquiry from the system itself, and then ask whether the plaintiffs asserting standing have a sufficient connection with the system to assert a ‘litigable interest’ in it So viewed from this perspective, Douglas’s analysis is just an imaginative and novel method of arriving at Stewart’s result.²⁹⁰

Only Blackmun’s opinion would allow for standing for environmental organizations in the absence of an injury in fact.

In the weeks after the opinions were circulated, the other Justices decided which they would sign on to. White’s and Burger’s votes were never in question; they went with Stewart. Marshall’s vote seems less logical to a modern observer. As Robert V. Percival has noted, in spite of his clerk’s pleading, Marshall joined Stewart’s opinion just three days after it was circulated.²⁹¹ (Douglas’s dissent was circulated the same day.) Marshall’s sparse papers do not reveal his rationale, but future opinions make clear that Marshall was surprisingly conservative when it came to standing.²⁹² Brennan was apparently quite incensed by Stewart’s opinion, and on March 30, 1972, he circulated a draft dissent that began, “In my view this case should have been dismissed as improvidently granted.”²⁹³ Noting that “the Sierra Club and its members are in fact users of Mineral King,” he wrote that the Court should simply have remanded the case back to district court so the Club could frame its injury in those terms (as Blackmun suggested), rather than reaching a broader conclusion.²⁹⁴ Just days before the Court’s decision was announced, however, Brennan scrapped this dissent and replaced it with a much shorter one.²⁹⁵ In an opinion just

290. *Id.* at 6.

291. Percival, *Marshall Papers*, *supra* note 32, at 10619–20.

292. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973).

293. William Brennan, First Draft Dissent at 1, *Sierra Club v. Morton* (on file in *Sierra Club v. Morton* Folder, Box 81, *Marshall Papers*).

294. *Id.* at 2–3.

295. Memorandum from William Brennan, to the Supreme Court Conference (Apr. 11, 1972) (on file in *Misc. Memos, Cert Memos, Vote of Ct. Folder*, Box 1545, *Douglas Papers*).

three sentences long, he wrote that he believed the Club had standing based on the second reason articulated by Blackmun.²⁹⁶

Even after putting the finishing touches on his passionate dissent, Harry Blackmun remained disturbed by the case. Early on the morning of April 19, the day the Court's decision was to be announced, he dispatched a clerk to Douglas's chamber, stating, "Mr. Justice Blackmun desires to deliver his dissent orally from the bench, but . . . he will not do so unless you also deliver your dissent orally. He therefore requests that you dissent orally today."²⁹⁷ Douglas agreed, and they both read their dissents in open court.²⁹⁸

All flowery rhetoric aside, Douglas's dissent suggested that environmental organizations should have standing to sue when a "natural object" suffers an injury in fact; Blackmun's dissent suggested that anyone with a "provable, sincere, dedicated and established status" as interested in the environment should have standing to "litigate environmental issues."²⁹⁹ Neither opinion was truly radical. Douglas's opinion embraced the injury in fact requirement that he had first written into law in *Data Processing*.³⁰⁰ Even Blackmun's opinion did not elaborate at length on just what he meant by "litigate environmental issues," and it is worth noting that Blackmun framed his opinion as "no more progressive than was the decision in *Data Processing* itself."³⁰¹

None of the dissenting Justices unequivocally stated that the Sierra Club could have had standing in the absence of an injury. None mentioned the old doctrine of standing for the public.³⁰² Blackmun

296. *Sierra Club*, 405 U.S. at 755 (Brennan, J., dissenting).

297. Letter from Kenneth R. Reed to William O. Douglas (Apr. 19, 1972) (on file in Law Clerk Folder, Box 1545, Douglas Papers); WOODWARD & ARMSTRONG, *supra* note 232, at 164–65.

298. WOODWARD & ARMSTRONG, *supra* note 232, at 165.

299. *Sierra Club*, 405 U.S. at 757 (Blackmun, J., dissenting).

300. For a powerful defense of Douglas's dissent, see Manus, *supra* note 34, at pt. III.

301. *Id.*

302. Certainly, Justice Burger would have disagreed with such a theory based on the APA. As a District of Columbia Circuit Judge in 1969, he wrote, "Appellees also assert that § 702(a) (Supp. II, 1967), embodies an independent and self-sufficient statutory basis for standing. I do not feel that the APA was meant to arrest the development of the law of standing as of the date of its passage: '[W]e would certainly be prepared to hold in an appropriate case that one who complains of

came the closest, but it appears he may not have even grasped the possibility or the history of the Court's approach to standing.

Rather, Blackmun's truly innovative language came toward the end of his brief dissent. There, he discussed the changes that Disney's development of Mineral King would bring and asked, "Do we need any further indication and proof that all this means that the area will no longer be one 'of great natural beauty' and one 'uncluttered by the products of civilization?' Are we to be rendered helpless to consider and evaluate allegations and challenges of this kind because of procedural limitations rooted in traditional concepts of standing? I suspect that this may be the result of today's holding."³⁰³ To Blackmun, what was different about *Sierra Club*, compared to most other standing cases, was that it was an *environmental* case. The dangers presented by the "world's deteriorating environment" and the "resulting ecological disturbances"³⁰⁴ were so great that it justified casting aside the "procedural limitations rooted in traditional concepts of standing."

Blackmun underscored this belief in the uniqueness of environmental cases, and the necessity of allowing standing in them, by concluding his dissent with a quotation from John Donne:

"No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee."³⁰⁵

In other words, we are all affected by environmental degradation; no one is an island, immune from such destruction.

administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption" Nat'l Ass'n of Securities Dealers, Inc., v. SEC, 420 F.2d 83, 101 (D.C. Cir. 1969), *cert. granted*, 397 U.S. 986 (1970) (quoting *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 933 (1955)).

303. *Sierra Club*, 405 U.S. at 759 (Blackmun, J., dissenting).

304. *Id.* at 755 (Blackmun, J., dissenting).

305. *Id.* at 760 n.2.

D. The Aftermath

In the weeks after the Court announced its decision in *Sierra Club v. Morton*, Douglas was inundated with correspondence, praising his eloquence.³⁰⁶ “To me, as obviously to you,” one man from California wrote on April 23, 1972, “the central question is not the technical interpretation of who has or has not ‘standing’ before the Supreme Court but the basic welfare of each human being in relation to his increasingly despoiled surrounding.”³⁰⁷ Blackmun received fewer notes of praise.³⁰⁸ Meanwhile, back in California, the Sierra Club did just as the Court recommended and amended its complaint to assert standing based on the injury suffered by Club members who hiked and camped in Mineral King.³⁰⁹ As the case dragged on through the 1970s, the state of California withdrew its support and in 1978 Congress added Mineral King to Sequoia National Park, officially protecting it from development.³¹⁰

Sierra Club’s effect on the doctrine of standing was immediate and significant. Within weeks, lower courts across the country began citing it.³¹¹ Legal philosophers ran with Douglas’s dissent and began debating legal rights for nature.³¹² And the Court continued to hear standing cases, giving the Justices the opportunity to refine the doctrine even further—especially Lewis Powell, who joined the Court just after *Sierra Club* was decided and who worried about the dangers

306. See correspondence in Club Memberships, Sierra Club, 1972-1977 Folder, Box 1765, Douglas Papers; and Misc. Memos, Cert Memos, Vote of Ct. Folder, Box 1545, Douglas Papers.

307. Letter from Clarence N. Anderson to William O. Douglas (Apr. 23, 1972) (on file in Club Memberships, Sierra Club, 1972-1977 Folder, Box 1765, Douglas Papers).

308. See correspondence in Folder 7, Box 137, Blackmun Papers.

309. Vicknair, *supra* note 180, at 124.

310. *Id.* at 125–36.

311. See, e.g., *Edelstein v. Ferrell*, 295 A.2d 390, 395 (N.J. Super. Ct. 1972); *State ex rel. Pruitt-Igoe Dist. Community Corp. v. Burks*, 382 S.W.2d 75, 78 (Mo. Ct. App. 1972); *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1053 (Cal. 1972); *Soap & Detergent Ass’n v. Chicago*, 56 F.R.D. 423, 425 (N.D. Ill. 1972); *Akron Bd. of Education v. State Bd. of Education*, 56 F.R.D. 385, 389 (N.D. Ohio 1972).

312. See RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* 130–40 (1989).

of liberalizing standing.³¹³ In 1973, Marshall wrote an opinion introducing the requirements that, in order to have standing, a plaintiff must demonstrate that the defendant's conduct had *directly* caused his injury and that the court had the ability to *redress* that injury (later, two central components of the *Lujan* test).³¹⁴ In 1975, Powell wrote for the Court that standing must be based on one's own "distinct and palpable" injury, not that of any third party; Powell's opinion also affirmed Marshall's demands of causation and redressability, introduced two years earlier.³¹⁵ In 1976, Powell wrote another standing opinion, this one clarifying that, even when Congress created a specific statutory right of action, "the requirements of Article III remain"—including an injury in fact.³¹⁶ Elizabeth Magill has argued that when the Court handed down this decision, it "erased the standing for the public principle."³¹⁷ Justice Brennan wrote separately, calling the apparent elimination of standing for the public "most disturbing."³¹⁸ Meanwhile, the Court did repeatedly affirm that environmental and aesthetic injuries did count as injuries in fact, so long as they could be directly traced to the defendant's activity.³¹⁹

In 1983, a rising star judge named Antonin Scalia wrote an influential article entitled, "The Doctrine of Standing as an Essential Element of the Separation of Powers." In it, he called standing 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 process of self-governance."³²⁰ Scalia boldly suggested "that courts need to accord greater weight than they have in recent times to the traditional

313. *United States v. Richardson*, 418 U.S. 166, 188–93 (1974) (Powell, J., concurring), *cited in* Magill, *supra* note 45, at 1174–75). I am indebted to Magill's analysis on the subject of Powell.

314. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–18 (1973).

315. *Warth v. Seldin*, 422 U.S. 490, 499–501 (1975), *aff'd*, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

316. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 60 (1976).

317. Magill, *supra* note 45, at 1180.

318. *Simon*, 426 U.S. at 64 (Brennan, J., concurring).

319. *Duke Power Co. v. Carolina Envtl. Study Group* 438 U.S. 59, 74–75 (1978); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688–89 (1973).

320. Scalia, *supra* note 24, at 881–82.

requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large."³²¹ Scalia's "traditional requirement" was a blatant misrepresentation of history, but it was nonetheless a harbinger of what was to come. Scalia feared that broad standing gave the judiciary too much power and thus threatened the separation of powers. Scalia also specifically mocked standing for environmental plaintiffs: "ensuring strict environmental laws . . . met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia."³²²

In 1992, now ensconced on the Supreme Court, Scalia got the chance to realize his dream. That year, the Court decided *Lujan v. Defenders of Wildlife*, a case in which an environmental nonprofit sued the government to challenge the validity of federal action. The Endangered Species Act held that federal agencies had to consult the Secretary of the Interior or Commerce before carrying out actions that are likely to threaten "the continued existence of any endangered species."³²³ Originally, the Fish and Wildlife Service and the National Marine Fisheries Service promulgated a joint resolution stating that this extended to actions taken in foreign nations; when, after the two agencies revised this regulation in 1986, requiring consultation only for domestic actions, Defenders of Wildlife sued. Members of the group had visited foreign places where endangered species were found and feared for their survival.³²⁴ Scalia, writing for a divided court, held that the Defenders did not have standing. The Defenders had failed to show that the threats to endangered species caused it an injury in fact, or that the court could redress its alleged injuries.³²⁵

Scalia articulated a three-part test for standing, which he claimed "[o]ver the years, our cases have established."³²⁶ First, "the plaintiff must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b)

321. *Id.*

322. *Id.* at 897.

323. 16 U.S.C. §1536(a)(2).

324. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558–59 (1995).

325. *Id.* at 560–72.

326. *Id.* at 560.

actual or imminent, not conjectural or hypothetical.”³²⁷ This injury “must affect the plaintiff in a personal and individual way.”³²⁸ Second, “there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly traceable” to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.”³²⁹ Finally, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”³³⁰

Yet Scalia’s opinion went even further than establishing this test. For the first time,³³¹ the Court held that Article III required invalidation of an explicit congressional grant of standing. The Court struck down the Endangered Species Act’s grant of a right of action to any person suing to stop a violation of the Act.³³² “We have consistently held,” wrote Scalia, “that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”³³³ This was based on Scalia’s concern about separation of powers: “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.’”³³⁴

This flagrantly disregarded and misstated history. It completely ignored centuries of standing for the public. It reflected a view of standing that was, in the words of Cass Sunstein, “surprisingly

327. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (internal quotations omitted).

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

329. *Id.* at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1975)) (internal quotations and punctuation omitted).

330. *Id.* at 561 (quoting *Simon*, 426 U.S. at 41) (internal quotations and punctuation omitted).

331. Sunstein, *supra* note 22, at 165.

332. 16 U.S.C. § 1540(a).

333. *Lujan*, 504 U.S. at 573–74.

334. *Id.* at 577 (quoting U.S. CONST. Art. II, § 2).

novel.”³³⁵ Sunstein, for one, was clear about how he felt about this ahistorical innovation: “It has no support in the text or history of Article III. It is essentially an invention of federal judges, and recent ones at that. Certainly it should not be accepted by judges who are sincerely committed to the original understanding of the Constitution and to judicial restraint. Nor should it be accepted by judges who have different approaches to constitutional interpretation.”³³⁶

Harry Blackmun, well over 80 and just two years from retirement, despaired at this desecration of his hopes from *Sierra Club*. He accused Scalia and the majority of going on a “slash-and-burn expedition through the law of environmental standing.”³³⁷ As Robert V. Percival has shown, Scalia’s draft opinion in *Lujan* had been slow to win acceptance. Souter and Kennedy convinced Scalia to make small changes in order to get their votes, much to Scalia’s annoyance. Blackmun’s clerks also believed Scalia had revised his majority opinion in response to pointed criticisms in Blackmun’s draft dissent.³³⁸ Blackmun’s final dissent angrily denounced Scalia’s opinion as departing from and mischaracterizing precedent.³³⁹ He rejected the majority’s invalidation of the Endangered Species Act’s conferral of standing, but he did not invoke the long history of standing for the public.³⁴⁰

Blackmun viewed this case, at its core, as an attack on not just the law of standing, but on “the law of environmental standing” in particular.³⁴¹ And he was not alone. One of the losing attorneys in *Lujan* later told the press that the Court was putting environmental attorneys “out of business.”³⁴²

Yet it is a shame that Blackmun did not fight harder, or more specifically, for the old doctrine of statutorily created standing even in the absence of an injury. The invalidation of a statutory right of action

335. Sunstein, *supra* note 22, at 166.

336. *Id.*

337. *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting).

338. Percival, *Blackmun Papers*, *supra* note 33, at 10658–60.

339. *Lujan*, 504 U.S. at 592–94 (Blackmun, J., dissenting).

340. *Id.* at 601–05.

341. *Id.* at 606.

342. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 *DUKE ENVTL. L. & POL’Y F.* 39, 40 (2001).

did indeed go against precedent.³⁴³ And it went against the wisdom and intentions of past Justices. As recently as 1970, for instance, William O. Douglas had written in a memo to his colleagues: “Congress in a regulatory statute could give standing explicitly to some and deny it to all others. Such a statute would not be unconstitutional as I understand it.”³⁴⁴ The Court has strayed far from that view, and the public and the environment are the worse because of that.

E. Standing in Environmental Cases Today

For the most part, Scalia’s three-part test from *Lujan* remains the law of the land when it comes to standing in environmental cases (and standing in general): a plaintiff must demonstrate that she has suffered (1) a concrete, particularized, and actual or imminent “injury in fact,” which is (2) “fairly traceable” to the defendant’s conduct, and (3) which can be redressed by a favorable court decision.³⁴⁵ The meaning of “injury-in-fact” is perhaps the most debated term in the environmental context, but the Court in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, clearly separated injury-to-the-plaintiff from injury-to-the-environment, demanding only the former be shown. To have suffered an injury-in-fact in the environmental context, a plaintiff must: (1) produce evidence that environmental harm, or “reasonable concerns” about the effects of environmental harm, “directly affected [the plaintiffs’] recreational, aesthetic, and economic interests”; (2) this evidence must “present dispositively” more than mere “general averments” and “conclusory allegations” or “‘some day’ intentions”; (3) it must be “undisputed” that the defendant’s “unlawful conduct . . . was occurring at the time the complaint was filed”; and (4) there must be “nothing ‘improbable’ about the proposition” that such would cause the plaintiffs harm.³⁴⁶

343. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940); *Scripps-Howard Radio, Inc. v. FCC* 316 U.S. 4, 11–15 (1942).

344. Memorandum from William O. Douglas to the Supreme Court Conference (Jan. 21, 1970) (on file in Misc. Memos, Cert Memos, Vote of Court Folder, Box 1475, Douglas Papers).

345. *Lujan*, 504 U.S. at 560.

346. 528 U.S. 167, 181–84 (2000).

Plaintiffs can still assert that the injury-in-fact that they've suffered is non-physical and non-economic,³⁴⁷ but the hurdle is somewhat higher for asserting an injury-in-fact to one's health.³⁴⁸ Courts have issued mixed messages on whether rising sea levels and other climate harms constitute actual, imminent, and traceable injuries-in-fact.³⁴⁹ And the Supreme Court recently affirmed Scalia's decidedly anti-originalist move of striking down a statutory grant of standing on separation-of-powers grounds. "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right," wrote Justice Alito.³⁵⁰ "Article III standing requires a concrete injury even in the context of a statutory violation."³⁵¹

II. STANDING IN ENVIRONMENTAL CASES TOMORROW: A SEPARATE RULE OF STANDING FOR ENVIRONMENTAL CASES

A. The Lessons of History

So why does this this history matter? How is it relevant to us, today?

A close look at the arguments and deliberations that led us to today's standing regime reveals the sheer unlikeliness of it. For centuries, standing was no bar at all to a plaintiff with a cause of action; for decades into the twentieth century, congressional grants of standing were unquestionably constitutional and standing for the public

347. *See, e.g.*, *Summers v. Earth Island Institute*, 555 U.S. 488, 494 (2009); *Laidlaw*, 528 U.S. at 180–84; *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 656–58 (7th Cir. 2011); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152–60 (4th Cir. 2000); *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*, 701 F.2d 784, 787 (9th Cir. 1983); *Neighborhood Development Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21 (6th Cir. 1980).

348. *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006).

349. *Compare Massachusetts v. EPA*, 549 U.S. 497, 521–23 (2007); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1242–46 (Dist. Or. 2016) *with* *Wash. Envtl. Council v. Bellon*, 741 F.3d 1075, 1077 (9th Cir. 2014); *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 868 (9th Cir. 2012) (Pro, J., concurring).

350. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

351. *Id.*

remained a viable option. A journey through the Justices' papers discloses that, even as they wrote the seminal standing decisions of the 1960s and 1970s, the Justices did *not* intend to abandon the twentieth century status quo. The "injury-in-fact" requirement is a modern one, an ahistorical one, and, apparently, a largely accidental creation.

The Justices' ignorance, and the inadvertent errors made by the Club's attorneys, and by Douglas and Brennan in their earlier decisions (eliding mention of standing for the public), caused the death of the old doctrine. There is no smoking gun—no letter or memo indicating that the Justices were biased or bigoted in some way that should obviously be reversed. Rather, a close examination of the historical record inescapably leads one to the conclusion that several of the advocates and jurists involved knew not what they did—there is plenty of evidence that Douglas, Brennan, Harlan, and Blackmun never intended to abandon standing for the public.³⁵² This is reason enough to reexamine what was, for centuries, the accepted doctrine. The Supreme Court has revisited its novel and ignorant precedents before, and it should do so in this context.

Further, Blackmun's tortured deliberations in *Sierra Club* reveal two crucial insights. First, plaintiffs should have standing to sue to protect the environment, even in the absence of an injury to themselves or their interests. Blackmun called this (ahistorically, but sincerely) "an imaginative expansion of our traditional concepts of standing."³⁵³ And second, they should have this automatic standing because environmental cases are simply different. "The Nation's and the world's deteriorating environment with its resulting ecological disturbances,"³⁵⁴ in Blackmun's words, represent *the* most pressing danger ever faced by humanity and human civilization.

352. *See, e.g.*, *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 64 (1976) (Brennan, J., concurring).

353. *Sierra Club v. Morton*, 405 U.S. 727, 757 (1972) (Blackmun, J., dissenting).

354. *Id.* at 755–56.

In recent years, leaders from United Nations Secretary General António Guterres³⁵⁵ to President Barack Obama³⁵⁶ have reiterated that climate change, driven by anthropogenic pollution and environmental degradation, is the single greatest threat to future generations. In 2013, the Intergovernmental Panel on Climate Change (IPCC) released its *Fifth Assessment*, summing up the latest research on man-made climate change.³⁵⁷ The *Fifth Assessment* used stronger language than any previous report to connect human activity (primarily the burning of fossil fuels) to climate change—upgrading the connection from “very likely” to “extremely likely.”³⁵⁸ It emphasized the threat of “irreversible impacts,” including mass extinction events, increased risk of fires, pest, and disease outbreaks,³⁵⁹ immense deforestation, and huge numbers of climate refugees.³⁶⁰ “Science has spoken. There is no ambiguity,” declared then-United Nations Secretary General Ban Ki-moon, announcing the *Fifth Assessment*. “Leaders must act; time is not on our side.”³⁶¹

In October 2018, the IPCC released a special report titled, *Global Warming of 1.5°C*. Prepared by nearly 100 authors from 40 countries, and synthesizing thousands of scientific studies, the new report concluded that catastrophic drought, flooding, heat, and cold were likely as soon as 2040—far sooner than previously forecasted—all as a result of rising global temperatures; this, in turn, would expose

355. António Guterres, Speech to the United Nations (Mar. 28, 2018), *quoted in* Somini Sengupta, *Biggest Threat to Humanity? Climate Change, U.N. Chief Says*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/29/climate/united-nations-climate-change.html> [<https://perma.cc/3BXR-KQVG>].

356. *Remarks by the President in State of the Union Address* (Jan. 20, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015>.

357. IPCC, Fifth Assessment Report (AR5) (2013), <https://www.ipcc.ch/report/ar5/> [<http://perma.cc/WG6J-ACCU>].

358. IPCC, Climate Change 2014: Synthesis Report 4, http://www.climatechange2013.org/images/uploads/SYR_AR5_LONGERREPOR T_Corr2.pdf [<https://perma.cc/YBM7-BY5E>].

359. See also Jonathan A. Patz, ET AL., *Climate Change: Challenges and Opportunities for Global Health*, 312 J. AM. MED. ASS'N 1565, 1566 (2014).

360. *Id.* at 13, 74, 76.

361. Elizabeth Shogren, *5 Key Takeaways From the Latest Climate Change Report*, NAT'L GEOGRAPHIC (Nov. 2, 2014), <https://news.nationalgeographic.com/news/2014/11/141102-ipcc-synthesis-report-climate-change-science-environment/> [<http://perma.cc/9V8G-JZNT>].

hundreds of millions of people to poverty, displacement, and death.³⁶² Limiting global warming to merely 1.5°C (which would still wreak global havoc, though far less than, say, 2°C) would require a transformation of the world economy at a scale that has “no documented historic precedent.”³⁶³ Climate policy scholar Nathan Hultman wryly commented, “An equally accurate but more evocative title could have been, ‘We’re almost out of time.’”³⁶⁴ To say that environmental cases are simply different is not to diminish the great importance of other issues. It is simply to say that no other potential problem poses as serious and imminent a threat to the survival of human civilization as we know it, and to humanity itself, as climate change.

Unfortunately, the modern standing doctrine is remarkably poorly suited for species-wide and far-away injuries.³⁶⁵ “Projections of future climate change are not like weather forecasts. It is not possible to make deterministic, definitive predictions of how climate will evolve over the next century and beyond as it is with short-term weather forecasts,” wrote the IPCC.³⁶⁶ Furthermore, environmental damage is cumulative—it builds on other damage, interacts with it, and combines in ways that have far-reaching effects we cannot fully understand. Therefore, even apparently small-scale and localized pollution contributes to global devastation. This is difficult—perhaps impossible—to reconcile with the modern standing doctrine’s demand for a concrete, particularized, and actual or imminent “injury in

362. IPCC, *Global Warming of 1.5°C: Summary for Policymakers B1.1-5.7* (2018), http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf [<https://perma.cc/86MV-93AE>].

363. *Id.* at C2.1.

364. Nathan Hultman, *We’re Almost Out of Time: The Alarming IPCC Climate Report and What to Do Next*, BROOKINGS (Oct. 16, 2018), <https://www.brookings.edu/opinions/were-almost-out-of-time-the-alarming-ipcc-climate-report-and-what-to-do-next/> [<http://perma.cc/87N7-W3HD>].

365. Niran Somasundaram, *State Court Solutions: Finding Standing for Private Climate Change Plaintiffs in the Wake of Washington Environmental Council v. Bellon*, 42 *ECOLOGICAL* L.Q. 491, 506 (2015).

366. IPCC, *Climate Change 2013: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 1034* (2013), <https://www.ipcc.ch/report/ar5/wg1/> [<https://perma.cc/TQ4Z-5NBY>].

fact.”³⁶⁷ It is particularly difficult given the 1983 case of *City of Los Angeles v. Lyons*, in which the Court wrote, “Abstract injury is not enough [T]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical.”³⁶⁸

It is useless to strain and stretch to fit the harms caused by climate change into the Court’s *Lujan*-based view of standing. That test simply is not designed to consider injuries of this scope or kind—injuries that have billions of contributors, that affect billions in difficult-to-discern ways, and that will affect billions in ways that we can only speculate about. The only way for climate plaintiffs to consistently obtain standing is to throw the *Lujan* framework out entirely.

B. The Remedy

The Supreme Court’s environmental standing doctrine is uniquely, punitively restrictive in an ahistorical and illogical way. Because of this, the Court should overturn *Lujan* and alter earlier precedents to return to a standing regime that accepts legislative grants of standing and allows plaintiffs to stand for the public—at least in environmental matters. However, given the current makeup of the Court, it would be folly to bring a case to this effect to Washington. Until a more favorable collection of Justices is seated, it would be best to turn to state-level reforms. Since the purported requirements of Article III only apply in federal court, states can provide favorable venues for reform to environmental standing. Examples of attempted reforms from the past half-century indicate that progress is certainly possible, but that drafters of statutes or amendments to this effect must be exceptionally careful with their language.

The story of modern state statutes to broaden environmental standing begins in 1970, when Michigan passed the Michigan Environmental Policy Act (MEPA).³⁶⁹ MEPA allowed the state attorney general “or any person” to bring suit “for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.”³⁷⁰ Notably, the law did not

367. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

368. 461 U.S. 95, 101–02 (1983) (internal quotations omitted).

369. Mich. Comp. Laws Ann. §§ 324.1701-1706 (West 2005).

370. *Id.* § 324.1701(1).

define pollution, environmental quality, or the public trust—it was meant to be “flexible, innovative, and responsive.”³⁷¹

MEPA was the brainchild of Joseph Sax, a young law professor at the University of Michigan who had spent the 1960s considering creative ways of increasing citizen participation in promoting environmental quality³⁷² and was influenced by the environmental movement that was exploding during that turbulent decade.³⁷³ In the late 1960s, Sax was approached by the West Michigan Environmental Action Council, which gave him \$1,000 to develop legislation that would “give the citizen much greater rights to a livable environment.”³⁷⁴ Sax decided to draft a bill that would recognize a public right to a decent environment and make that right enforceable by the public.³⁷⁵ He felt about environmental standing the same way Blackmun had: it was simply different. “[T]he Mineral King decision suggests that environmental controversies are really nothing more than struggles between developers and birdwatchers,” he would write after the Court decided *Sierra Club*.³⁷⁶

The Court majority seems oblivious to the central message of the current environmental literature—that the issues to engage our serious attention are risks of long-term, large scale, practically irreversible disruptions of ecosystems. By denying to persons who wish to assert those issues the right to come into court, and granting standing *only* to one who has a stake in his own present use and enjoyment, the Court

371. JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 248 (1971).

372. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

373. Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 353 (1998).

374. *Biography*, Joseph L. Sax Papers, 1943-2013, BENTLEY HISTORICAL LIBRARY, UNIV. OF MICH., <https://quod.lib.umich.edu/b/bhlead/umich-bhl-85292?byte=140234841;focusrgn=bioghist;subview=standard;view=reslist> [http://perma.cc/WH2V-Z6GD].

375. SAX, *supra* note 371, at 248.

376. Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 Nat. Resources J. 76, 88 (1973).

reveals how little it appreciated the real meaning of the test case it had before it.³⁷⁷

Over three-and-a-half days in 1969, Sax drafted the bill and sent it to the Action Council. “It discourages me to think that we can only be protected by having the right to sue,” an Action Council member wrote in response, “yet I agree that there doesn’t seem to be any other way. The fact that we might have that right then becomes terribly exciting and important!”³⁷⁸ State Representative Thomas Anderson introduced H.B. 3055 on April 1, 1969; over the next several months, the state legislature debated whether the judiciary could properly perform the duties the bill was entrusting to it.³⁷⁹ Though legislators and citizens expressed fears that the law could flood the state courts with nuisance suits, the law passed in July 1970 and was signed by the governor shortly thereafter.³⁸⁰

In the first 13 years after MEPA’s passage, 185 actions were filed under the law (coming from more than half of Michigan’s 83 counties).³⁸¹ Contrary to the predictions of many critics of looser standing, these actions resulted in considerable success.³⁸² As one observer noted years later:

“Citizens used MEPA to produce such public interest victories as halting Shell Oil’s plan to indiscriminately drill for oil and natural gas in the Pigeon River Country State Forest in the late 1970s. Other MEPA-based victories include blocking Mason County from dredging damaging new channels in a river in 1975, and forcing developers to

377. *Id.*

378. *Biography, supra* note 374.

379. *Id.*

380. *Id.*

381. Daniel K. Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits in the 1980s*, 12 *ECOLOGY L.Q.* 271, 273–76 (1985).

382. See Joseph L. Sax & Roger L. Conner, *Michigan’s Environmental Protection Act of 1970: A Progress Report* 70 *MICH. L. REV.* 1003 (1971); Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suit: Three Years’ Experience Under the Michigan Environmental Protection Act*, 4 *ECOLOGY L.Q.* 1 (1974); Jeffrey K. Haynes, *Michigan’s Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 *J. URBAN L.* 589 (1976).

comply with environmental standards in building condominiums along Lake Michigan in Manistee in the late 1990s.”³⁸³

Courts found that MEPA applied quite broadly, allowing for citizen actions in the areas of “toxic substances control, sand dune mining, wetlands protection, park management and leasing of Great Lakes bottomlands.”³⁸⁴ And, as one scholar of the law wrote in 1985, “statistics indicate that frivolous neighborhood disputes have not flooded the Michigan court system.”³⁸⁵ Suits filed under MEPA in its first five years constituted less than 0.02 percent of all civil suits filed.³⁸⁶

Sax was deeply distressed by the Court’s ruling in *Sierra Club*.³⁸⁷ He wanted other states to copy MEPA, and in 1971 he published an influential book that included a “model law” as an appendix.³⁸⁸ Over the next decade, eight states adopted statutes closely modeled on MEPA: Connecticut,³⁸⁹ Florida,³⁹⁰ Maryland,³⁹¹ Minnesota,³⁹²

383. Laura Bishop, *High Court Diminishes Reach of Michigan Environmental Statute*, MICH. LAND USE INSTITUTE (Sep. 11, 2006), http://www.mlui.org/mlui/news-views/articles-from-1995-to-2012.html?archive_id=731#.WtUHp5PwZE5 [<http://perma.cc/M5WD-85M3>].

384. Alexandra Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 724 (2006); see also, *New Growth in Michigan’s Environmental Protection Act: State Supreme Court Enjoins Oil Development in Wilderness*, 9 ENVTL. L. REP. 10144 (1979).

385. Slone, *supra* note 381, at 272; see also Sax & DiMento, *supra* note 382, at 5–8.

386. Robert H. Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as Model of a Minimal Requirement*, 7 HARV. ENVTL. L. REV. 107, 118 (1983).

387. See Sax, *supra* note 372.

388. SAX, *supra* note 371, at 249–52.

389. Environmental Protection Act of 1971, CONN. GEN. STAT. §§ 22a-14 to 20 (2017).

390. Environmental Protection Act of 1971, FLA. STAT. § 403.412 (2018).

391. Maryland Environmental Standing Act of 1978, MD. CODE ANN. NAT. RES. § 1-503 (2018).

392. Minnesota Environmental Rights Act of 1971, MINN. STAT. § 116B.01 (2018).

Nevada,³⁹³ New Jersey,³⁹⁴ North Dakota,³⁹⁵ and South Dakota³⁹⁶ (while two states—Hawaii³⁹⁷ and Illinois³⁹⁸—amended their constitutions to the same effect).³⁹⁹ In 1970, bills modeled after MEPA were also introduced in the U.S. Senate and House of Representatives, but neither passed.⁴⁰⁰ Two additional states, Indiana⁴⁰¹ and Iowa,⁴⁰² passed similar laws in subsequent decades, while two other states, Louisiana⁴⁰³ and Wyoming,⁴⁰⁴ passed laws in the 1970s granting standing to protect the environment, but only (in the words of both statutes) to “any person having an interest, which is or may be adversely affected.”⁴⁰⁵

As Susan George summarized in 1997, these fourteen states, as well as Michigan, all “solidif[ied] the standing of citizens to sue for environmental regulations,” but the laws and amendments differed in the kind of relief they offered (injunctive, declaratory, monetary) and whether they forced the state to act.⁴⁰⁶ Only half of these provisions enabled a citizen suit in the absence of a violation of the law, which is a “powerful tool.”⁴⁰⁷ Thus, standing alone is not enough. An ideal statute enabling a citizen to stand for the public to protect the environment would enable all kinds of relief, force the state to act, and enable citizens to sue even in the absence of a violation of the law.

Further, standing alone is sometimes not even sufficient. After decades of successful use (without an onslaught of nuisance suits),

393. NEV. REV. STAT. ANN. § 41.540 (2017) (enacted 1971 (Acts of 1971, p. 861)).

394. Environmental Rights Act of 1974, N.J. Stat. §§ 2A:35A-1 to -14 (2018).

395. North Dakota Environmental Law Enforcement Act of 1975, N.D. CENT. CODE § 32-40-01 to -11 (2017).

396. South Dakota Environmental Protection Act of 1973, S.D. CODIFIED LAWS ANN. §§ 34A-10-1 to -17 (2018).

397. HI. CONST. art. XI, § 9 (amended 1978, current through 2018).

398. ILL. CONST. art. XI, § 2 (amended 1977, current through 2018).

399. See Susan George et al., *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity*, 6 U. BALT. J. ENVTL. L. 1, 30 app. A (1997).

400. SAX, *supra* note 371, at 247 n.1.

401. IND. CODE ANN. § 13-30-1-1 to -12 (2018) (enacted 1996 (Pub. L. No. 1-1996, § 20)).

402. IOWA CODE § 455B.111 (2017) (enacted 1986 (86 Acts, ch 1245, § 1888)).

403. LA. REV. STAT. § 30:2026 (2017) (enacted 1979 (Acts 1979, No. 449, § 1)).

404. Wyo. Stat. § 35-11-904 (2018) (enacted 1973 (Laws 1973, ch. 250, § 1)).

405. George et al., *supra* note 399; see also Ariz. Rev. Stat. § 49-264 (2018).

406. George et al., *supra* note 399, at 14, 17–20.

407. *Id.* at 15, 17.

Michigan courts begin ruling that the “any person” provision of MEPA violated the separation of powers enshrined in Michigan’s constitution.⁴⁰⁸ “When a broadening and redefinition of the ‘judicial power’ comes not from the judiciary itself, usurping a power that does not belong to it, but from the Legislature purporting to confer new powers upon the judiciary, the exercise of such power is no less improper,” wrote the court in a 4-3 decision in 2004.⁴⁰⁹ Further, the “judicial power,” as the justices understood it, demanded a “plaintiff who has suffered real harm Absent a ‘particularized’ injury, there would be little that would stand in the way of the judicial branch becoming intertwined in every matter of public debate.”⁴¹⁰ The next year, the Michigan Court of Appeals relied on the 2004 case, as well as *Lujan*, to deny standing to citizen and organizational plaintiffs because they could not show that they used the particular areas to be affected by pollution, and thus “they cannot demonstrate that they have suffered or would suffer a concrete and particularized injury distinct from that of the public generally.”⁴¹¹ In 2010, however, the Michigan Supreme Court repudiated its own latter-day restriction of standing, explicitly rejecting the “*Lujan* test” for standing in federal court and instead “restored . . . a limited, prudential doctrine that is consistent with Michigan’s long-standing historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action.”⁴¹² The 2010 decision was not in the MEPA context, and though it appears to encompass MEPA actions, certain members of the Michigan Supreme Court have expressed a desire to return to the more restrictive *Lujan* text.⁴¹³

Courts in other states have retained broad standing, even in the absence of an injury. Minnesota courts, for instance, continue to recognize standing for “any person” and citizens have used the

408. MICH. CONST. art. III, § 2.

409. Nat’l Wildlife Fed’n v. Cleveland Cliffs Iron Co., 684 N.W.2d 800, 808 (Mich. 2004).

410. *Id.* at 806.

411. Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 709 N.W.2d 174, 210–11 (Mich. Ct. App. 2005).

412. Lansing Sch. Educational Ass’n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010).

413. *See, e.g.,* MCNA Ins. Co. v. Dep’t of Tech., Mgmt., and Budget, 913 N.W.2d 653, 653–54 (Mich. 2018) (Markman, C.J., dissenting).

Minnesota Environmental Rights Act (MERA) for decades with considerable success.⁴¹⁴ One commentator writes that this is because of MERA's "exhaustive list of definitions, including a definition of the term 'person,'" which has "provided critical guidance to the Minnesota courts"⁴¹⁵ Thus, the specific language in the law matters a great deal. As another example, consider the Maryland Environmental Standing Act (MESA). "The General Assembly of Maryland, in promulgating MESA, aspired to relieve Maryland citizens of the hardships associated with overly-strict environmental standing," wrote Daniel W. Ingersoll IV.⁴¹⁶ The legislature drafted MESA specifically to give standing to people who had not suffered an injury.⁴¹⁷ "However, the poor drafting and contradictory language of the Act prevent Marylanders from enjoying the same rights as the states listed above [i.e. Minnesota, South Dakota, etc.] because they have no right to judicial review of alleged violations of the Act."⁴¹⁸ Apparently because of sloppiness, "MESA's broad standing requirements apply to an incredibly limited field of remedies that does not include judicial review of an agency action."⁴¹⁹

Sadly, MERA too has been undermined. Because Minnesota courts have not interpreted MERA to grant attorneys' fees to successful plaintiffs,⁴²⁰ "the statute effectively provides standing only to those with considerable financial resources, or for those who use it as a

414. *See* *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club*, 624 N.W.2d 796, 806 (Minn. Ct. App. 2001); *White v. Minn. Dep't of Nat. Res.*, 567 N.W.2d 724 (Minn. Ct. App. 1997); *State ex rel. Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake*, Case No. C-01-05286 (Scott County Dist. Ct., Nov. 22, 2002); Klass, *supra* note 384, at 723.

415. Andrew J. Piela, *A Tale of Two Statutes: Twenty Year Judicial Interpretation of the Citizen Suit Provision in the Connecticut Environmental Protection Act and the Minnesota Environmental Rights Act*, B.C. ENVTL. AFF. L. REV. 401, 417 (1994).

416. Daniel W. Ingersoll IV, *Impediments to Environmental Justice: The Inequities of the Maryland Standing Doctrine*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 491, 499 (2006).

417. *Id.* at 502.

418. *Id.* at 499.

419. *Id.* at 502.

420. *See, e.g., State ex rel. Friends of the Riverfront v. City of Minneapolis*, 751 N.W.2d 586 (Minn. Ct. App. 2008) (declining to address the question).

shield of last-resort.”⁴²¹ The same is true of MEPA.⁴²² Indeed, according to George, only half of the state statutes provide for the award of fees and costs.⁴²³ An ideal statute, then, would define as many terms as possible, as comprehensively as possible, and would allow for the granting of attorneys and litigation fees.

Administrative procedures can also present roadblocks. Indiana’s Environmental Policy Act, for instance, forces plaintiffs to exhaust all administrative remedies, and allow the state agency to hold a hearing and make a determination (which it has 180 days to do) before they can sue.⁴²⁴ “These barriers to suit have prevented the Indiana act from being used very frequently,” writes Peter H. Lehner.⁴²⁵ Similarly onerous administrative requirements also hinder citizen actions enabled by Florida’s Environmental Protection Act.⁴²⁶ Thus, an ideal law would not make a plaintiff jump through these hoops.

Even when the guarantee of standing was part of the state constitution, judges could still find loopholes. Article XI, section 2 of the Illinois constitution allowed any person to sue “any party, governmental or private” to enforce their “right to a healthful environment.”⁴²⁷ However, in 2012, the state supreme court held that while this section “does away with the ‘special injury’ requirement typically employed in environmental nuisance cases,” it “does not create any new causes of action Therefore, although [a] plaintiff need not allege a special injury to bring its environmental claim, there

421. Michael Wietzecki, *True Access to the Courts for Citizens Working to Protect Natural Resources: Incorporating Attorney’s Fees into the Minnesota Environmental Rights Act*, 14 MO. ENVTL. L. & POL’Y REV. 147, 149 (2006).

422. See *Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641, 651–54 (Mich. 1998).

423. George et al., *supra* note 399, at 18.

424. *Sekerez v. U.S. Reduction Co.*, 344 N.E.2d 102 (Ind. Ct. App. 1976); *Sekerez v. Youngstown Sheet & Tube Co.*, 337 N.E.2d 521, 524 (Ind. Ct. App. 1975); IND. CODE ANN. § 13-30-1-1; Jeffrey L. Carmichael, Note, *The Indiana Environmental Policy Act. Casting a New Role for a Forgotten Statute*, 70 IND. L.J. 613, 642-44 (1995).

425. Peter H. Lehner, *The Efficiency of Citizen Suits*, 2 ALB. L. ENVTL. OUTLOOK 4, 10 (1995).

426. *Fla. Wildlife Fed’n v. State Dep’t of Env’tl. Regulation*, 390 So. 2d 64, 66 (Fla. 1980).

427. ILL. CONST. art. XI, § 2.

must nevertheless still exist a cognizable cause of action.”⁴²⁸ Thus, a group of citizens did not have standing to sue a coal company and state agency because its permits were not in compliance with state law, as they had no statutory or common law cause of action.⁴²⁹ Furthermore, the state supreme court ruled that a plaintiff did not have standing under this section to bring a private cause of action for violation of the Endangered Species Protection Act, because the section’s right to a “healthful environment” was not intended to include the protection of endangered species.⁴³⁰

Hawaii’s constitution’s Article XI, section 9, approved by voters in 1978,⁴³¹ was somewhat more specific than Illinois’s, but, crucially, it did not specify that environmental plaintiffs could sue in the absence of an injury. Section 9 states:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.⁴³²

Hawaiian courts have ruled that, because section 9 is part of the constitution, it allows for a “less rigorous standing requirement,”⁴³³ and “where the interests at stake are in the realm of environmental concerns, we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.”⁴³⁴ However, Hawaiian courts have also stated that this less rigorous, less restrictive analysis still demands that

428. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 962 N.E.2d 956, 967 (Ill. 2012).

429. *Id.*

430. *Glisson v. City of Marion*, 720 N.E.3d 1034, 1045 (Ill. 1999).

431. David Kimo Frankel, *Enforcement of Environmental Laws in Hawai’i*, 16 HAWAII L. REV. 85, 134 (1994).

432. HAW. CONST. art. XI, § 9.

433. *Sierra Club v. Dep’t of Transp.*, 167 P.3d 292, 313 (Haw. 2007).

434. *In re Maui Elec. Co.*, 408 P.3d 1, 22 (Haw. 2017) (citations and punctuation omitted).

plaintiffs show an injury-in-fact, “although there will be no requirement that their asserted injury be particular to the plaintiffs, and the court will recognize harms to plaintiffs environmental interests [*sic*] as injuries that may provide the basis for standing.”⁴³⁵ The court defined this injury as a harm to “some legally protected interest,”⁴³⁶ and under section 9 individuals do have an interest in “a clean and healthful environment,”⁴³⁷ which is fairly generous, as far as injury-in-fact tests go. However, plaintiffs still must go through a three-part analysis based on *Lujan*: “a plaintiff must have suffered an actual or threatened injury; the injury must be fairly traceable to the defendant’s actions; and a favorable decision would likely provide relief for the plaintiff’s injury.”⁴³⁸

In sum, a brief overview of the statutes attempting to broaden environmental standing for citizens indicates that, for these statutes to succeed, specificity and comprehensiveness are key. Provisions for litigation fees, elimination of administrative roadblocks, and the articulation of comprehensive definitions must all be considered. State constitutional amendments would be ideal, for then courts could not get in the way by invoking Scalia-esque separation of powers concerns, but such an ideal amendment would have to specify that citizens can bring actions in the absence of an injury, in the absence of a violation of the law, and it would articulate several specific causes of action.

CONCLUSION

My hope is that this Article has demonstrated the urgent necessity of fundamentally reforming the American environmental standing doctrine. In the following, I propose a model law to accomplish this; it builds upon the wisdom of other such laws, and assessments of these laws by scholars. I have borrowed liberally, and often verbatim, from the language of several of these laws.⁴³⁹ Ideally, this would be enacted

435. *Sierra Club*, 167 P.3d at 313, *aff’d*, *In re Maui Elec. Co.*, 408 P.3d at 22.

436. *Sierra Club*, 167 P.3d at 314.

437. HAW. CONST. art. XI, § 9.

438. *In re Maui Elec. Co.*, 408 P.3d at 22, *affirming Sierra Club*, 167 P.3d at 312.

439. *See, especially*, MD. CODE ANN. NAT. RES. § 1-503; MINN. STAT. §§ 116B.01-02; N.D. CENT. CODE §§ 32-40-03-11; S.D. CODIFIED LAWS ANN. §§ 34A-10-1; SAX, *supra* note 371, at 249–52; George, et. al., *supra* note 399, at 28.

as a state constitutional amendment. And certainly, I hope others interested in such a model law would improve it. This, then, should be thought of as a modest attempt at constructing a mere foundation.

MODEL ENVIRONMENTAL PROTECTION AND STANDING ACT

Purpose:

AN ACT to provide for actions for declaratory relief, mandamus relief, equitable relief (including injunctive relief and specific performance), civil penalties, and restoration damages, for the protection of the environment. The legislature finds and declares that each person, and future generations, is entitled by right to the protection, preservation, and enhancement of air, water, land, flora, fauna, and all other natural resources located within the state. The legislature further declares its policy to create and maintain within the state conditions under which human beings, non-human animals, and nature can exist in harmony, in order that present and future generations of humans and non-human animals may enjoy clean air and water, productive and healthy land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land, flora, fauna, and other natural resources located within the state from pollution, impairment, or destruction.

Definitions:

For the purposes of this Act, the following terms have the meanings given them in this section.

Person: “Person” means any natural person, any state, municipality or other governmental or political subdivision or other public agency or instrumentality, any public corporation, any not-for-profit partnership, firm, association, or other not-for-profit organization, any receiver, trustee, assignee, agent, or other legal representative of any of the foregoing. “Person” does not mean any for-profit corporation, partnership, firm, association, organization, or entity.

Environment: “Environment” shall include, but not be limited to, all natural resources, all flora and fauna, and all natural and artificial habitats thereof, within the state.

Natural resources: “Natural resources” shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational, and historical resources. Scenic and aesthetic

resources shall also be considered natural resources when owned or officially protected by any governmental unit or agency.

Pollution, impairment, or destruction: “Pollution, impairment, or destruction” is any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof that was issued prior to the date the alleged violation occurred or is likely to occur; or any conduct—whether or not it is in violation of any law, regulation, rule, or order—which materially adversely affects or is likely to materially adversely affect the environment.

State agency: “State agency” is any state agency, board, commission, council, officer, office, department, or division.

Standing:

The following persons have standing to bring and maintain an action provided for in this section in the courts of equity of this State:

- (1) The State of _____, or any agency or officer of the State, acting through the Attorney General;
- (2) Any political subdivision of the State of _____, or any agency or officer of it acting on its behalf;
- (3) Any other person, regardless of whether they possess a special interest different from that possessed generally by the residents of _____, or whether any personal or property damage to them is threatened, or whether they have suffered any injury whatsoever, or whether they are a citizen of _____ or of the United States.

Civil Actions:

Parties: Any person, the attorney general, any political subdivision of the estate, and any instrumentality or agency of the state or of a political subdivision thereof, may maintain a civil action in the district court for declaratory relief, mandamus relief, equitable relief (including injunctive relief and specific performance), civil penalties, or restoration damages, for the protection of the air, water, land, flora, fauna, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction. Any person, the attorney general, any political subdivision of the estate, and any instrumentality or agency of the state or of a political subdivision thereof, may maintain such action against any person, including state, municipal, and other government agencies, and

any partnership, public or private corporation, firm, association, organization, or other entity, whether it is for-profit or not-for-profit. Any person, the attorney general, any political subdivision of the state, and any instrumentality or agency of the state or of a political subdivision thereof, may do so regardless of whether said defendant has violated any law, ordinance, regulation, rule, or order of this state, or of any municipality therein, or of the United States. This section does confer a right of action to challenge the issuance and receipt of a permit or license.

Service: Within seven days after commencing such action, the plaintiff shall cause a copy of the summons and complaint to be served upon the defendant. Within 21 days after commencing such action, the plaintiff shall cause written notice thereof to be published in a legal newspaper in the county in which suit is commenced, specifying the names of the parties, the designation of the court in which the suit was commenced, the date of filing, the act or acts complained of, and the declaratory or equitable relief requested. The court may order such additional notice to interested persons as it may deem just and equitable.

Other parties: In any action maintained under this section, the attorney general is not permitted to intervene on behalf of the defendants. The same is true of any political subdivision of the state, and any instrumentality or agency of the state or of a political subdivision thereof.

Venue: Any action maintained under this section may be brought in any county of the state.

Subsequent actions: Where any action maintained under this section results in a judgment that a defendant has not violated an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by any political subdivision of the state, and any instrumentality or agency of the state or of a political subdivision thereof, the judgment shall not in any way estop the subdivision, instrumentality, or agency from relitigating any or all of the same issues with the same or other defendant unless in the prior action the subdivision, instrumentality, or agency was either initially or by intervention a party. Where the action results in a judgment that the defendant has violated an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by any political subdivision of the state,

and any instrumentality or agency of the state or of a political subdivision thereof, the judgment shall be res judicata in favor of the agency in any action the subdivision, instrumentality, or agency might bring against the same defendant.

Burden of Proof:

In any action maintained under this Act, where the subject of the action is conduct governed by any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the government, whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant violates or is likely to violate said environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit, the defendant may rebut the prima facie showing by the submission of evidence to the contrary; provided, however, that where the environmental quality standards, limitations, rules, orders, licenses, stipulation agreements, or permits of two or more of the aforementioned agencies are inconsistent, the most stringent shall control.

In any other action maintained under this Act, whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land, flora, fauna, or other natural resources located within the state, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

Relief:

The court may grant declaratory relief, mandamus relief, temporary or permanent equitable relief (including injunctive relief and specific performance), civil penalties, or restoration damages, or may impose such conditions upon a defendant as are necessary or appropriate to protect the air, water, land, flora, fauna and other natural resources located within the state from pollution, impairment, or destruction. This is true for all defendants. When the court grants temporary

equitable relief, it shall not require the plaintiff to post a bond sufficient to indemnify the defendant for damages suffered because of the temporary relief if permanent relief is not granted.

Litigation Fees:

The court shall award the full costs of litigation, including but not limited to reasonable witness and attorney's fees, to a prevailing plaintiff in any action brought pursuant to this Act. The court may also award actual damages to the prevailing plaintiff.

Litigation Fees Fund:

The state shall establish a fund to award costs of litigation, including but not limited to reasonable witness and attorney's fees, to a losing plaintiff in an action brought pursuant to this Act. A court may award costs of litigation to a losing plaintiff from this fund if the court determines that this would be in the service of justice, and if such action was brought in good faith.

Intervention: Except as otherwise provided in this Act, in any administrative, licensing, or other similar proceeding, and in any action for judicial review thereof, and in any civil legal proceeding, any person, the attorney general, any political subdivision of the state, and any instrumentality or agency of the state or of a political subdivision thereof, shall be permitted to intervene as a party upon the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct that has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state.

Grounds: In any such administrative, legal, licensing, or other similar proceedings, the agency shall consider the alleged impairment, pollution, or destruction of the air, water, land, or other natural resources located within the state and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land, and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

Judicial review: In any action for judicial review of any administrative, licensing, or other similar proceeding as described in this section, the court shall, in addition to any other duties imposed upon it by law, grant review of claims that the conduct caused, or is

likely to cause pollution, impairment, or destruction of the air, water, land, or other natural resources located within the state, and in granting such review it shall act in accordance with the provisions of the state Administrative Procedure Act.

Long-Arm Statute:

Personal jurisdiction: As to any cause of action arising under this Act, the district court may exercise personal jurisdiction over any foreign corporation or any nonresident individual in the same manner as if it were a domestic corporation or the individual were a resident of this state. This section applies if, in person or through an agent, the foreign corporation or nonresident individual:

(a) Commits or threatens to commit any act in the state which would impair, pollute or destroy the air, water, land, flora, fauna or other natural resources located within the state, or

(b) Commits or threatens to commit any act outside the state which would impair, pollute or destroy the air, water, land, flora, fauna or other natural resources located within the state, or

(c) Engages in any other of the activities specified in this Act.

Service of process: The service of process on any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the summons upon the defendant outside this state with the same effect as though the summons had been personally served within this state.

Other ways to serve unaffected: Nothing contained in this section shall limit or affect the right to serve any process in any other manner now or hereafter provided by law or the Rules of Civil Procedure.

This Act shall be supplementary to existing administrative and regulatory procedures provided by law. This Act is ordered to take immediate effect.