# Standing for Everyone: *Sierra Club v. Morton*, Justice Blackmun's Dissent, and Solving the Problem of Environmental Standing

by Scott W. Stern

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*Summary*

The modern doctrine of environmental standing prevents many worthy plaintiffs from presenting their cases in court. Especially in the context of climate change, this restrictive doctrine has profound implications. But the modern doctrine is an aberration; this Article shows that for most of American history there were no comparably severe standing requirements, that the Supreme Court Justices of the mid-20th century who transformed the doctrine did so inadvertently, and that Justices' invocation of "tradition" in justifying the modern doctrine is simply incorrect. The Article pays special attention to the seminal standing case of *Sierra Club v. Morton*. Though remembered now for Justice Douglas' bold dissent arguing that trees should have standing, the truly radical dissent belonged to Justice Blackmun. Drawing on two forgotten yet crucial insights from his dissent, this Article then charts a path forward, and argues for the passage of state-level environmental statutes that grant standing even in the absence of an injury. It concludes by proposing a model law.

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 U.S. 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 Court that morning to hear the oral arguments for a case. But not just any case: they 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?

Uncontroversial for most of American history, standing for decades had been much discussed but little understood. Judges began restricting who had standing in the early 20th century, and by the early 1970s, the standing doctrine was muddled, confused, and strict: fewer and fewer plaintiffs had standing to sue. Standing doctrine was, as Justice John Marshall Harlan II had written a few years earlier, "a word game played by secret rules."[4]

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.[5] 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.[6] So, if Club members enjoyed hiking or camping in the valley, the threatened destruction of that valley would be injury enough.[7]

This decision has long been celebrated as liberalizing standing, firmly expanding the definition of injury-in-fact to encompass noneconomic injuries and thus opening the

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1. *Today's Weather Report*, Evening Star, Nov. 17, 1971, at C6.
2. M. Rupert Cutler, *Sierra Club v. Hickel* 94 (1972) (unpublished report) (on file in Folder 12, Carton 6, Sierra Club Legal Defense Fund Records, Univ. of California, Berkeley).
3. 405 U.S. 727, 2 ELR 20192 (1972).
4. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).
5. *Sierra Club*, 405 U.S. at 734-35.
6. *Id.* at 735.
7. *Id.*

courthouse to environmental plaintiffs everywhere.[8] Yet, *Sierra Club* is probably more famous for the dissent written by Justice William O. Douglas. Justice Douglas argued that "environmental objects" should be able "to sue for their own preservation."[9] 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.[10]

Justice Douglas' powerful rhetoric immediately captured the popular imagination,[11] but his colleague Justice Harry Blackmun recognized at the time that it was not actually that radical a proposal. Practically speaking, according to Justice 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."[12] This was not too far from Justice 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 Justice Blackmun and his clerks to conclude, "Douglas' analysis is just an imaginative and novel method of arriving at Stewart's result."[13]

Rather, the more radical dissent belonged to Justice Blackmun. "If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content," he wrote.[14]

> 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?[15]

Justice Blackmun proposed two alternatives to Justice 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."[16] Second, Justice 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, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues."[17] 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*, the Supreme Court sharply restricted standing for environmental plaintiffs. In 1992, Justice Antonin Scalia wrote for the Court in *Lujan v. Defenders of Wildlife*,[18] articulating a new test that, while still allowing for aesthetic or recreational injuries, made attaining standing considerably harder: a plaintiff must demonstrate that he or 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.[19] In *Lujan*, the Court also ruled, for the first time ever,[20] that an explicit congressional grant of standing to "citizens" to sue for a violation of an environmental statute was unconstitutional.[21] It is apparent that Justice Scalia's opinion was motivated, in part, by his "undisguised hostility toward the purposes of the environmental laws."[22] Justice Blackmun, in the twilight of his career, accused Justice Scalia of going on a "slash-and-burn expedition through the law of environmental standing."[23]

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.[24] Considering the coming environmental catastrophe that climate change will almost certainly usher in, this is a shame indeed. Yet, how to fix environmental standing? How to free ourselves from such a complicated, convoluted, conservative doctrine?

In this Article, I advocate for the elimination of the injury-in-fact requirement, at least in environmental cases. To do so, I thoroughly retrace the history of standing in general, and of environmental standing in

8. *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. L. 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).
9. *Sierra Club*, 405 U.S. at 741-42 (Douglas, J., dissenting).
10. *Id.* at 742-43.
11. *See* correspondence in Club Memberships, Sierra Club, 1972-1977 Folder, Box 1765, William O. Douglas Papers, Library of Congress [hereinafter Douglas Papers]; Miscellaneous Memos, Cert Memos, Vote of Court Folder, Box 1545, Douglas Papers.
12. *Sierra Club*, 405 U.S. at 743 (Douglas, J., dissenting).
13. 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]).
14. *Sierra Club*, 405 U.S. at 755 (Blackmun, J., dissenting).
15. *Id.* at 755-56.
16. *Id.* at 756-57.
17. *Id.* at 757.
18. 504 U.S. 555, 22 ELR 20913 (1992).
19. *Id.* at 560.
20. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 165 (1992).
21. *Lujan*, 504 U.S. at 573-77.
22. Percival & Goger, *supra* note 8, at 120; *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 896-97 (1983).
23. *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting).
24. *See* Holly Doremus, *The Persistent Problem of Standing in Environmental Law*, 40 ELR 10956 (Oct. 2010).

particular. In Part I, I show that Justice 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 20th 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, and the Framers certainly never intended Article III to limit standing.

Further, 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.[25] Only in the early 20th century did the Court begin demanding that plaintiffs show that they had suffered an injury, and even into the mid-20th century, the Court still accepted plaintiffs' ability to stand for the public.

Many scholars have studied this earlier period.[26] But in the longer article from which this one is adapted, I pay especial attention to the period from the mid-1960s to the mid-1970s.[27] By closely scrutinizing the Justices' personal papers, I show that the nebulous injury requirement of the early 20th 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 clear, which enabled Justice Scalia to rewrite the history of standing in the 1990s, claiming he was simply clarifying a "traditional requirement."[28] In subsequent decisions, the Court claimed it had "always" treated standing in this way,[29] which one scholar has commented "is bad history or a blatant lie."[30]

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. Only by examining the Justices' papers can we fully grasp how muddled and unintentional the transition toward "injury-in-fact" and away from "standing for the public" truly was.

Using this history, I 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 Justice 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 Justice Blackmun himself was possibly ignorant of the old doctrine of standing for the public, and though he inaccurately characterized the 20th-century standing doctrine as "traditional,"[31] 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 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 argue, this is justified by the profound ahistoricity 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 demonstrate, over the past several decades (at the same time the Court was destroying the concept of standing for the public), a number of states liberalized environmental standing, often with encouraging results. Yet, a close look at these state environmental standing statutes reveals that drafters of 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.

In the Appendix, I propose a model statute. This is, however, just a draft, and I sincerely hope that other advocates revise it to make it as Justice 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 1970s*

Historically speaking, there was *no* requirement that litigants demonstrate standing. As many scholars have noted, the Framers of the Constitution said nothing to indicate

25. Union Pac. R.R. Co. v. Hall, 91 U.S. 343, 354-55 (1875).
26. *See* Sunstein, *supra* note 20; 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).
27. Scott W. Stern, *Standing for Everyone:* Sierra Club v. Morton*, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 Fordham Envtl. L. Rev. ___ (forthcoming 2019).
28. Scalia, *supra* note 22, at 881-82.
29. Raines v. Byrd, 521 U.S. 811, 819 (1997).
30. Jeremy Patrick, *A Polemic Against the Standing Requirement in Constitutional Cases*, 41 Cap. U. L. Rev. 603, 622 (2013).
31. Sierra Club v. Morton, 405 U.S. 727, 755-56, 2 ELR 20192 (1972) (Blackmun, J., dissenting).

that they wished to limit standing.[32] 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."[33] 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.[34]

Of course, this did not 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).[35] 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.[36]

What about an individual suing the state to remedy a harm greater than the one he or she suffered, or to force the state to perform (or stop performing) a particular act, even if that act did not affect the individual, per se? The English had a well-established common-law practice of allowing "strangers" to bring suit to challenge virtually any public action.[37] 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."[38]

As the 19th 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.[39] 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.[40] 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.[41]

In 1875, this became Supreme Court precedent, when Justice William Strong wrote (relying on English common law) that merchants with "no interest other than such as belonged to others in employment like theirs, and [though] the duty they seek to enforce by the writ is a duty to the public generally" could bring a suit forcing a railroad to comply with its statutory responsibility.[42] It was not until the 1920s that the Court began demanding that citizens show they have been personally deprived of some right in order to have standing to sue.[43] None of these early cases, however, involved a statutory, common-law, or constitutional right-of-action, and none stated that standing was required by Article III.[44]

The early 20th-century standing cases, which began to demand injuries, were decided as they were in part because Justices Louis Brandeis and Felix Frankfurter were worried that citizens would use the courts to invalidate progressive (and later New Deal) programs.[45] Further, it is no coincidence that this restrictive doctrine emerged in the years after the statutory reestablishment of federal question jurisdiction, which inundated federal courts with cases; the workload of the Supreme Court increased fully threefold between 1870 and 1890. "It should come as little surprise that the courts were not passive during this onslaught. Several of the classic exclusionary doctrines of federal jurisdiction developed in this period"—including standing.[46]

Yet, the Supreme Court made clear in 1940 that it still accepted standing for public actions relying on statutorily created rights-of-action,[47] and it was on this basis that the U.S. Congress enacted §10 of the Administrative Procedure Act (APA).[48] Section 10 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.[49] As Cass Sunstein noted, the "adversely affected or aggrieved" language was in fact "congressional authorization of actions by people lacking legal injuries."[50]

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

32. George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ELR 10028, 10034-35 (Jan. 1999); Sunstein, *supra* note 20, at 173; Berger, *supra* note 26, at 818; Patrick, *supra* note 30, at 621; *see also* Percival & Goger, *supra* note 8, at 121.
33. Susan Bandes, *The Idea of a Case*, 42 Stan. L. Rev. 227, 231 (1990) (quoting 2 Records of the Federal Convention of 1787, at 430 (Max Farrand ed., 1911)).
34. Van Cleve, *supra* note 32, at 10029-34; Berger, *supra* note 26, at 819-20; Jaffe, *supra* note 26, at 1270.
35. U.S. Const. art. III, §2. On the original meaning of "cases" and "controversies," see Sunstein, *supra* note 20, at 168.
36. Sunstein, *supra* note 20, at 170-71.
37. Berger, *supra* note 26, at 818-19, 824-25, 827; Jaffe, *supra* note 26, at 1274-75; Richard 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).
38. State v. Justices of Middlesex, 1 Coxe 244, 247 (N.J. 1794) (*cited in* Jaffe, *supra* note 26, at 1275-76).
39. Jaffe, *supra* note 26, at 1275-78.
40. *Id.* at 1276-79.
41. *See* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 Va. L. Rev. 1131, 1134 (2009); Sunstein, *supra* note 20, at 175-78, 182.
42. Union Pac. R.R. Co. v. Hall, 91 U.S. 343, 354-55 (1875).
43. Frothingham v. Mellon, 262 U.S. 447, 488 (1923); Edward Hines Yellow Pine Trs. v. United States, 263 U.S. 143, 148 (1923); Fairchild v. Hughes, 258 U.S. 126, 129 (1922).
44. Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 Duke Envtl. L. & Pol'y F. 347, 351, 353-54 (2008); Magill, *supra* note 41, at 1135-38; Sunstein, *supra* note 20, at 180.
45. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1452-57 (1987).
46. *Id.* at 1452.
47. Federal Commc'ns Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940).
48. 5 U.S.C. §702; Sunstein, *supra* note 20, at 182.
49. 5 U.S.C. §702.
50. Sunstein, *supra* note 20, at 182.

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.[51]

It is clear from my analysis of the Justices' papers—described at length in my longer article—that the Justices of the 1960s only created the injury-in-fact and other rigid modern standing requirements out of an ignorance of history and because of unimaginative arguments made by plaintiffs' lawyers.[52] Further, it is apparent that few of the Justices of this era intended to abandon the notion of uninjured parties standing for the public, enabled by statutory causes of action. In several instances, they only failed to affirm this because they felt it was not necessary to do in the cases at hand.

First, in *Flast v. Cohen*, Chief Justice Earl Warren wrote for the Court that a taxpayer did have standing to sue because she had suffered an economic injury, albeit a minute one.[53] In so doing, the Court ignored (though did not repudiate) Supreme Court precedent and centuries of common law related to standing for the public. In dissent in *Flast*, Justice Harlan sought to remind his colleagues that "[t]his 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."[54] But this reminder would prove to have been made in vain. In his *Flast* concurrence, Justice Douglas misconstrued the role of "a private attorney general," seeming to suggest that such a citizen standing for the public had to have some "stake in the outcome of the litigation," even though this stake could be marginal.[55] This was an inaccurate summation of precedent.

Next, in *Association of Data Processing Service Organizations, Inc. v. Camp*[56] and in *Barlow v. Collins*,[57] decided on the same day, it is clear that Justice Douglas—the author of both opinions—wanted to leave the door open for "plaintiffs with revolutionary ideas (previously unaccepted by courts)."[58] Further, Justice Douglas very nearly included a reference to cases that "involve the public interest," in which a "private attorney general [can] tender the questions on the merits," but his clerk cut this at the last moment, "[s]ince there is no express standing provision in the statute in this case."[59] Thus, Justice Douglas apparently intended to recognize what he had gotten wrong in his *Flast* opinion: that statutorily created causes of action to stand for the public were clearly acceptable.

Instead, though, Justice Douglas borrowed a phrase that Justice William Brennan had used in an earlier draft of the *Barlow* opinion—"injury in fact"—and used it as the basis of his opinion.[60] "The first question," he wrote in the final opinion, "is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. . . ."[61] Many scholars would later take the injury-in-fact requirement, and Justice Douglas' use of it, to task for being "remarkably sloppy,"[62] for being an "unredeemed disaster,"[63] and for doing "[m]ore damage to the intellectual structure of the law of standing . . . than . . . any other decision."[64] The term "injury in fact" had apparently been coined by the scholar Kenneth Culp Davis a decade earlier,[65] in what Sunstein has called a "misreading" of the APA.[66]

Two decades later, the Court would seize on this phrase and this opinion to strike down a statutorily created cause of action to stand for the public, but, as he would make clear in a 1970 memo to his colleagues, Justice Douglas avowedly considered statutory grants of standing "not [to] be unconstitutional."[67] Justice Brennan too apparently accepted the doctrine of standing for the public, but since the plaintiffs had not attempted to invoke it, he "d[id] not consider" it.[68] Both Justices Brennan and Douglas had inadvertently laid the groundwork for Justice Scalia to one day neuter standing.

Justice Douglas' *Data Processing* opinion (heavily influenced by Justice 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.[69] Yet, the opinion also "butchered the prior law"; plus, "[i]t was in the aftermath of *Data Processing* that the standing for the public principle died in the Supreme Court."[70] 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-20th 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

51. William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 255-56 (1988).
52. Stern, *supra* note 27.
53. 392 U.S. 83, 91-94 (1968). Justice Warren added that the "very existence" of the "current debate" over standing "suggests that we should undertake a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits." *Id*. at 94.
54. *Id*. at 131 (Harlan, J., dissenting).
55. *Id*. at 108-14 (Douglas, J., dissenting).
56. 397 U.S. 150 (1969).
57. 397 U.S. 159 (1970).
58. Letter From Thomas C. Armitage to William O. Douglas (Jan. 9, 1970) (on file in Law Clerk Folder, Box 1475, Douglas Papers).
59. William O. Douglas, Draft Opinion at 4, Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1969) (No. 69-85) (on file in Law Clerk Folder, Box 1475, Douglas Papers).
60. *See* William Brennan, Draft Opinion at 6, Barlow v. Collins, 397 U.S. 159 (1970) (No. 69-249) (on file in Folder 4, Box I:215, William Brennan Papers, Library of Congress).
61. *Data Processing*, 397 U.S. at 152.
62. Sunstein, *supra* note 20, at 185.
63. Richard Stewart, *Standing for Solidarity*, 88 Yale L.J. 1559, 1569 (1979) (reviewing Joseph Vining, Legal Identity: The Coming Age of Public Law (1978)).
64. Fletcher, *supra* note 51, at 229.
65. 3 Kenneth C. Davis, Administrative Law Treatise §22.02, at 211-13 (1958) (interpreting the APA's statement that a person who is "adversely affected or aggrieved" by agency action has standing to sue).
66. Sunstein, *supra* note 20, at 185-86.
67. William O. Douglas, Memorandum to the Conference (Jan. 21, 1970) (on file in Miscellaneous Memos, Cert Memos, Vote of Court Folder, Box 1475, Douglas Papers).
68. Barlow v. Collins, 397 U.S. 159, 172 n.5 (1970) (Brennan, J., dissenting).
69. Magill, *supra* note 41, at 1162.
70. *Id*. at 1163.

both almost affirmed the concept, but then both (somewhat inexplicably) backed away.

The final nail in the coffin for the traditional understanding of standing would be *Sierra Club v. Morton*.

## B. *Justice Blackmun's Forgotten Fight:* Sierra Club

Barely six months after the Court announced its decisions in *Data Processing* and *Barlow*, the Sierra Club filed a petition for certiorari.[71] The Club had challenged the U.S. Forest Service's (the 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 U.S. Court of Appeals for the Ninth Circuit ruling that had denied the Club standing to sue.[72] 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.[73]

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 public. Nonetheless, the deeper story of this case and the Justices' deliberations remain instructive in the present. This story reveals that the Justices still did not intend to eliminate the concept of standing for the public, and that Justice 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 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.[74] 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.[75] Walt Disney himself had been quietly buying property around Mineral King for years and had donated generously to Gov. Ronald Reagan's campaign in an effort to ensure California's support for the project.[76] 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.[77] Yet, arise it did, with a vengeance, when in the mid-1960s, the Sierra Club began militating against the project.

On June 5, 1969, after years of unsuccessfully pleading with Disney and the Forest Service to scuttle the development,[78] the Club sued several federal officials to stop the project from going forward, including Secretary of the Interior Walter Hickel, the named defendant. (He would later be replaced as named defendant following the confirmation of a new Secretary of the Interior, 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."[79] The project, the Club continued, would cause irreparable harm to Mineral King.[80] The Club anticipated that standing would be an issue in this case, so its lawyers wrote in their complaint, "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."[81]

At the hearing, federal attorneys argued (among other things) that the Sierra Club did not have standing to sue.[82] In its brief to the trial court, recounted Club member Tom Turner:

> [T]he 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?"[83]

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.[84]

71. Administrative Docket Book, Sierra Club v. Morton, 405 U.S. 727 (1972) (No. 70-34) (on file in Case File O.T. 1971 Folder, Box 1522, Douglas Papers).
72. Sierra Club v. Hickel, 433 F.2d 24, 1 ELR 20015 (9th Cir. 1970).
73. Petition for Certiorari at 18, *Morton* (No. 70-34) (on file in Legal Papers 1969 Folder, Box 3, Mineral King Collection, Fresno State Univ. [hereinafter Mineral King Collection]).
74. *Quoted in* Alexandra K. Vicknair, Mindsets, Motivations, Mickey Mouse, and the Mountains: The Social, Political, and Intellectual Foundations of the Mineral King Controversy, 1965-1978, at 15 (2013) (M.A. thesis, California State Univ., Stanislaus).
75. *Id.*
76. *Id.* at 69-70.
77. *Id.* at 73-74.
78. John L. Harper, Mineral King: Public Concern With Government Policy 76-115 (1982); Vicknair, *supra* note 74, at 98-106.
79. Complaint, Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970) (No. 24966) (on file in Legal Papers 1969 Folder, Box 3, Mineral King Collection).
80. *Id.*
81. *Id.* For more on the Club's filings, see Cutler, *supra* note 2, at 70.
82. Harper, *supra* note 78, at 169. *See also* Sierra Club v. Hickel, 1 Envtl. L. Dig. 54, 54 (1969); Cutler, *supra* note 2, at 73-74.
83. Tom Turner, *Who Speaks for the Future?*, Sierra, July/Aug. 1990, at 38.
84. *Quoted in* Cutler, *supra* note 2, at 79.

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).[85] "Judge Sweigert was not at all bothered by the Club's broad claim of standing," recalled Turner.[86] 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 "fail[ed] to establish infringement of any legally protected interest belonging to it."[87]

On September 16, 1970, six months after the Supreme Court's rulings in *Data Processing* and *Barlow*, a Ninth Circuit panel voted 2-1 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."[88] "More recently," however, a "profusion of cases . . . have developed new precedents on the law of standing."[89] These included *Flast*, *Data Processing*, and *Barlow*.[90] The Ninth Circuit then ran through the injury-in-fact analysis, 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."[91] This was not enough for standing.

As to the concept of standing for the public, the Ninth Circuit accepted it, but wrote:

> [T]hat 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, authority to bring suits to challenge official action.[92]

Somewhat confusingly, the Ninth Circuit dismissed the notion that §10 of the APA could confer such authority on the Club, citing *Data Processing*'s demand of an injury-in-fact.[93]

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.[94] 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."[95] "A viable rule cannot rest upon such a fragile distinction," wrote the Club.[96] "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."[97]

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."[98] However, other than name-checking "the public interest" several times,[99] 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."[100] Yet, the Club went perhaps too far in its embrace of *Data Processing*'s "injury in fact" and "zone of interests" analysis. It 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.[101]

In arguing to expand the definition of injury-in-fact to include aesthetic and other noneconomic 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.[102] But this tactic may have been a mistake, given the language in both Justice Douglas' and Justice 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

85. Preliminary Injunction, *Hickel* (No. 24966) (on file in Legal Papers 1969 Folder, Box 3, Mineral King Collection); Harper, *supra* note 78, at 169-70.
86. Turner, *supra* note 83, at 38.
87. Brief for Appellants, *Hickel* (No. 24966), *cited in* Harper, *supra* note 78, at 171-72.
88. Sierra Club v. Hickel, 433 F.2d 24, 28-29, 1 ELR 20015 (9th Cir. 1970) (quoting Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943)).
89. *Id.* at 29.
90. *Id.*
91. *Id.* at 32-33.
92. *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.
93. *Id.* at 32-33.
94. Harper, *supra* note 78, at 173.
95. Petition for Certiorari, *supra* note 73, at 14.
96. *Id.*
97. *Id.*
98. *Id.* at 18.
99. *See also id.* at 12.
100. Reply Brief for Petitioner at 1, Sierra Club v. Morton, 405 U.S. 727 (1972) (No. 70-34).
101. *Id.* at 4 (internal quotations and punctuation omitted) (citing Baker v. Carr, 369 U.S. 186, 208 (1962)).
102. 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 conservational interests." Brief for Petitioner at 13, *Morton* (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.

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 action. . . .[103]

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. . . ."[104]

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.[105] 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 build this resort, he will destroy the area," one young man wrote to Justice Douglas in the fall of 1971.[106]

> 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 beauty. . . .[107]

Months earlier, Justice 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."[108]

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," Justice Blackmun clerk Michael A. LaFond wrote in a memo arguing that the Sierra Club had standing.[109] "This case is of great importance in light of the growing concern about the quality of our natural environment," added Justice Thurgood Marshall clerk Paul Gewirtz.[110] "The effect of the [Ninth Circuit's] decision below is to make it impossible for environmental interests to be represented in court. (Who will represent them?) There is no reason for the Court to want this result."[111]

The Justice that environmental activists believed would be their most natural ally was Justice Douglas. There had never been as ardent a conservationist as Justice 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, Justice 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, Justice Douglas advocated for stronger public control over public lands; sought to have

103. *Quoted in* Susan R. Schrepfer, *Perspectives on Conservation: Sierra Club Strategies in Mineral King*, 20 J. Forest Hist. 176, 188 (1976).
104. *Id.*
105. Turner, *supra* note 83, at 67.
106. Letter From Jim Hanson to William O. Douglas (Oct. 17, 1971) (on file in Folder 1, Box 552, Douglas Papers).
107. *Id.*
108. Letter From Peter Heiser Jr. to William O. Douglas (Jan. 13, 1971) (on file in Miscellaneous Memos, Cert Memos, Vote of Court Folder, Box 1545, Douglas Papers).
109. Michael A. LaFond, Bench Memo (Nov. 13, 1971) (on file in Folder 7, Box 137, Blackmun Papers).
110. Paul Gewirtz, Untitled Memorandum (on file in 70-34 Sierra Club v. Morton Folder, Box 81, Thurgood Marshall Papers, Library of Congress [hereinafter Marshall Papers]).
111. *Id.*

the Court condemn DDT; and generally pushed to have the Court address matters through the lens of environmentalism.[112] Yet, in late 1962, Justice 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.[113]

As *Sierra Club* neared oral arguments, Justice Douglas dispatched his clerks to research both the case and his history with the Club.[114] 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, Justice Douglas' 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.[115] 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.[116]

The Justice that few expected to be a secret crusader for the environment was Justice Blackmun. Appointed to the Court only one year earlier, Justice Blackmun had been personally very close to conservative Chief Justice Warren Burger since kindergarten, and in his first years on the Court his voting record mirrored Justice Burger's: Justice Blackmun voted like the lifelong Republican that he was. Yet, unbeknown to most, Justice Blackmun was struggling with his ideology, as well as his perception that several of his colleagues—Justice Douglas above all—did not respect him.[117]

When it came to *Sierra Club*, Justice 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," Justice Blackmun wrote in a memo to himself a few days before oral arguments.[118]

> 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.[119]

Yet, it also appears that Justice Blackmun may have been unaware that, quite apart from *Data Processing*'s injury-in-fact requirement, there was another way litigants had historically gotten standing: by suing on behalf of the public, enabled by a statutory right-of-action (in this case, §10 of the APA).[120] In a bench memo one of Justice 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."[121] 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, Justice 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.[122]

Oral arguments took place on November 17, 1971. According to Justice 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 Justice Blackmun's eyes—began at 11:07 a.m.[123] 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.[124] 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."[125]

Yet, Selna also suggested that the Club's 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 Sierra Club's attorney clearly

112. Peter Manus, *Wild Bill Douglas's Last Stand: A Retrospective on the First Supreme Court Environmentalist*, 72 Temp. L. Rev. 111, 155-68 (1999).
113. Memo on WOD and the Sierra Club (on file in Law Clerk Folder, Box 1545, Douglas Papers).
114. *See id*. and Kenneth R. Reed, Internal Memorandum (Nov. 5, 1971) (on file in Miscellaneous Memos, Cert Memos, Vote of Court Folder, Box 1545, Douglas Papers).
115. Reed, *supra* note 114.
116. *Id*.
117. *See* Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 119, 163-64 (1979).
118. Harry Blackmun, *No. 7034—Sierra Club v. Morton, Secretary* (Nov. 15, 1971) (on file in Folder 7, Box 137, Blackmun Papers).
119. *Id*.
120. *See* APA, 5 U.S.C. §702.
121. LaFond, *supra* note 109.
122. *Id*.
123. Harry Blackmun, Notes on Oral Argument, Sierra Club v. Morton, 405 U.S. 727 (1972) (No. 70-34) (on file in Folder 7, Box 137, Blackmun Papers).
124. Transcript of Oral Argument, Sierra Club v. Morton, 405 U.S. 727 (1972) (No. 70-34), https://www.oyez.org/cases/1971/70-34.
125. *Id*.

> assert why the Court should logically limit its expansion of standing to such advocates.[126]

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. For instance, when discussing *Data Processing* and other standing cases that demanded injuries, 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."[127] 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, Justice Douglas asked Solicitor General Erwin Griswold (arguing for Secretary of the Interior Morton) about Michigan's recently passed law that 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,"[128] and asked if Congress could do the same.[129]

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.[130] (This last assumption reflected a misunderstanding of the APA, the framers of which had intended it to do just that: assure a private right-of-action when agencies shirk their duties.)[131]

Yet, if Justice Douglas and Griswold were aware of this possibility, Justice 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. Justice Blackmun asked Selna whether "a broad general interest [in] the problems of ecology" was enough for standing in this case.[132] 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."[133]

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.[134]

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 Justice Douglas' and Justice 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 injury to Club members who could no longer hike on trails in Mineral King.[135]

Next, it was Justice Douglas' turn to speak. He passed.[136] Justice Brennan dwelt on the injury-in-fact requirement from *Data Processing*—he had not been convinced that the Club had suffered an injury based on the evidence presented, but he agreed with Justice 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. Justice Brennan finished by expressing his hope that the Court would clarify that injuries could be aesthetic as well as economic.

Justice Byron White went next, and said he hoped the Court would not do that in this case. Perhaps more than his colleagues, Justice 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. Justice Stewart largely agreed. He began by saying he simply could not agree with the district court; he thought the Ninth Circuit had gotten it right. Unlike Justice Burger, he saw no need to issue a narrow ruling.[137]

According to Justice Douglas' notes, Justice Marshall spoke next and did not say much. He would vote to affirm the Ninth Circuit. Justice Blackmun—the most junior Jus-

126. Peter Manus, *The Blackbird Whistling—The Silence Just After Evaluating the Environmental Legacy of Justice Blackmun*, 85 Iowa L. Rev. 429, 506 (2000).
127. Transcript of Oral Argument, *supra* note 124.
128. Michigan Environmental Protection Act, Mich. Comp. Laws Ann. §691-1201(2)(1) (West 1970). This will be discussed in greater depth *infra* Section II.B.
129. Transcript of Oral Argument, *supra* note 124.
130. Brief for Respondent at 26, Sierra Club v. Morton, 405 U.S. 727 (1972) (No. 70-34). The government positively cited Brennan's reference to this in his *Barlow* dissent. Barlow v. Collins, 397 U.S. 159, 172 n.5 (1970).
131. Sunstein, *supra* note 20, at 185-86.
132. Transcript of Oral Argument, *supra* note 124.
133. *Id.*
134. *Id.*
135. Harry Blackmun, Conference Notes, *Sierra Club* (No. 70-34) (on file in Folder 7, Box 137, Blackmun Papers); William O. Douglas, Conference Notes, *Sierra Club* (No. 70-34) (on file in Miscellaneous Memos, Cert Memos, Vote of Court Folder, Box 1545, Douglas Papers).
136. Blackmun, *supra* note 135.
137. *Id.* and Douglas, *supra* note 135.

tice, and thus the last to vote—professed himself to be at roughly the same place as Justice Brennan—there might be standing based on the interests of environmentally minded Club members.[138] Finally, attention turned back to Justice Douglas, who was the last to speak. Again, Justice Douglas would not vote one way or the other; he told the other Justices that he may end up not participating, as he had been a member of the Sierra Club for years, and spent time on its board of directors, even though he had resigned his membership the year before.[139]

After the conference ended, Justice 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 standing is apparent, injunctive relief is less important. But I would grant injunctive relief."[140]

With Chief Justice Burger, and Justices 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 Justice Stewart to write the majority opinion. Justice Stewart's first draft was nearly identical to his final one.[141] In both, he began by recognizing Mineral King's "great natural beauty."[142] He then reviewed the standing doctrine—the "injury in fact" and "zone of interests" test.[143] Crucially, Justice 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."[144]

The only factoid revealed in Justice Stewart's papers is that he added in a later draft one of the most critical lines of his opinion—the footnoted sentence clarifying, "Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint . . ."[145] 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.[146]

This was the section that none-too-subtly told the Club how it could acceptably gain standing.

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

> 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.[147]

The Club, according to Justice 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."[148]

Justice Stewart's account of doctrine was blatantly ahistorical. "Actually, no," wrote Elizabeth Magill of Justice Stewart's "revisionist version of the history of standing doctrine."[149] "Prior to 1970," a statutory provision alone, without an individualized injury (economic or otherwise), could permit "aggrieved parties to challenge administrative action."[150] In *Sierra Club*, Justice Stewart used his framing of history to justify expanding injury-in-fact to include noneconomic injuries while demanding an injury in all cases.[151]

Justice 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 §10 of the APA). Justice Stewart and the majority readily accepted this *Data Processing* injury requirement, even as it rejected the Club's more prosaic arguments.

Justice Stewart's opinion would be embraced by a majority of Justices, but Justice Douglas' 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 California (USC), 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

138. Douglas, *supra* note 135.
139. Blackmun, *supra* note 135.
140. *Id.*
141. Potter Stewart, Draft Majority Opinion, *Sierra Club* (No. 70-34) (on file in Folder 693, Box 79, Potter Stewart Papers, Yale Univ. [hereinafter Stewart Papers]).
142. *Id.* and Sierra Club v. Morton, 405 U.S. 727, 728, 2 ELR 20192 (1972).
143. *Sierra Club*, 405 U.S. at 733.
144. *Id.* at 734-35.
145. See handwritten comment at the bottom of Potter Stewart, Draft Majority Opinion at 8, *Sierra Club* (No. 70-34) (on file in Folder 694, Box 79, Stewart Papers).
146. *Sierra Club*, 405 U.S. at 735.
147. *Id.* at 736.
148. *Id.* at 737.
149. Magill, *supra* note 41, at 1165.
150. *Id.*
151. *Id.* at 1166-67.

to bring to the Court's attention the theory that was taking shape in my mind."[152]

Stone knew he had to act quickly. He wanted to write an article in the *Southern California Law Review*, but it would not 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 Justice 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,"[153] in a matter of weeks.[154]

The article traced the evolution of legal rights for those who formerly lacked them—women, children, the elderly, imprisoned people, the mentally ill, "Blacks, foetuses, 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."[155] 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.[156] This would be similar to legal guardianship for children or the mentally "incompetent." The Sierra Club could be such a guardian for Mineral King.[157] This article was mailed off to Justice Douglas in December.[158]

"Should Trees Have Standing?" impressed the environmentally minded Justice very deeply. It is possibly what convinced him not to recuse himself. In the first draft of his dissent, handwritten on a yellow legal pad, Justice 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.[159]

Inanimate objects like ships and corporations, he noted, are sometimes parties in litigation, and they have legal personhood for "purposes of the adjudicatory processes"—"[s]o 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."[160]

Practically speaking, nature could be represented by "those people who have so frequented the place as to know its values and wonders."[161] Justice 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?"[162]

In the months that followed, Justice Douglas' 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."[163] Note, however, that this addition also introduced the word "injury" into Justice Douglas' opinion. This was not accidental. Justice Douglas and his clerks considered Mineral King's standing to hinge on "a showing of 'injury in fact' (to the Valley)."[164] And Justice 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.[165]

Justice Douglas circulated a draft of his dissent to the other Justices on February 14, 1972—Valentine's Day.[166] The next day, one of Justice Blackmun's clerks wrote to his boss that Justice Stewart had "resolved the standing issue correctly," but "Justice Douglas' 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."[167]

Justice Blackmun had been wrestling with the case for months, and he waited to read Justice Douglas' and Justice 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.[168]

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152. Christopher D. Stone, Should Trees Have Standing?: Law, Morality, and the Environment xi-xiii (2010).
153. Christopher D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972).
154. Stone, *supra* note 152, at xiv.
155. Stone, *supra* note 153, at 450-56.
156. *Id.* at 464-65.
157. *Id.* at 464, 468.
158. Stone, *supra* note 152, at xiv.
159. William O. Douglas, First Draft at 1, Sierra Club v. Morton, 405 U.S. 727 (1972) (No. 70-34) (on file in Typed Draft, Penciled Draft, Riders Folder, Box 1545, Douglas Papers).
160. *Id.* at 1-2.
161. *Id.* at 7.
162. *Id.* at 6.
163. Sierra Club v. Morton, 405 U.S. 727, 741, 2 ELR 20192 (1972) (Douglas, J., dissenting).
164. Letter From William H. Alsup to William O. Douglas (Feb. 21, 1972) (on file in Law Clerk Folder, Box 1545, Douglas Papers).
165. *Sierra Club*, 405 U.S. at 745 (Douglas, J., dissenting). *See also* Manus, *supra* note 112, 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.").
166. William O. Douglas, Draft Dissent, Sierra Club v. Morton, 405 U.S. 727 (1972) (No. 70-34) (on file in Law Clerk Folder, Box 1545, Douglas Papers).
167. Letter From Michael A. LaFond to Harry Blackmun (Feb. 15, 1972) (on file in Folder 7, Box 137, Blackmun Papers).
168. Harry Blackmun, First Draft Dissent at 1, *Sierra Club* (No. 70-34) (on file in Folder 7, Box 137, Blackmun Papers).

> 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 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.[169]

Justice 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."[170] 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.[171]

In subsequent drafts, Justice 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?
>
> . . . .
>
> 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.[172]

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.[173]

Justice Blackmun and his clerks privately felt this disposition was superior, practically speaking, to Justice Stewart's and to the dissents. While Justice 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."[174] They also recognized that Justice Douglas' 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 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.[175]

Only Justice 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. Justice White's and Justice Burger's votes were never in question; they went with Justice Stewart. Justice Marshall's vote seems less logical to a modern observer. As Robert V. Percival has noted, in spite of his clerk's pleading, Justice Marshall joined Justice Stewart's opinion just three days after it was circulated.[176] (Justice Douglas' dissent was

169. *Id.*
170. *Id.* at 4.
171. *Id.* at 5.
172. Sierra Club v. Morton, 405 U.S. 727, 756-57, 2 ELR 20192 (1972) (Blackmun, J., dissenting).
173. *Id.* at 757-58.
174. Frampton, *supra* note 13, at 1.
175. *Id.* at 6.
176. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights From the Marshall Papers*, 23 ELR 10606, 10619-20 (Oct. 1993).

circulated the same day.) Justice Marshall's sparse papers do not reveal his rationale, but subsequent opinions make clear that Justice Marshall was surprisingly conservative when it came to standing.[177]

Justice Brennan was apparently quite incensed by Justice 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."[178] 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 Justice Blackmun suggested), rather than reaching a broader conclusion.[179] Just days before the Court's decision was announced, however, Justice Brennan scrapped this dissent and replaced it with a much shorter one.[180] In an opinion just three sentences long, he wrote that he believed the Club had standing based on the second reason articulated by Justice Blackmun.[181]

Even after putting the finishing touches on his passionate dissent, Justice 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 Justice Douglas' 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."[182] Justice Douglas agreed, and they both read their dissents in open court.[183]

All flowery rhetoric aside, Justice Douglas' dissent suggested that environmental organizations should have standing to sue when a "natural object" suffers an injury-in-fact; Justice 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."[184] Neither opinion was truly radical. Justice Douglas' opinion embraced the injury-in-fact requirement that he had first written into law in *Data Processing*.[185] Even Justice Blackmun's opinion did not elaborate at length on just what he meant by "litigate environmental issues," and it is worth noting that Justice Blackmun framed his opinion as "no more progressive than was the decision in *Data Processing* itself."[186]

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.[187] Justice Blackmun 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, Justice 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.[188]

To Justice 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"[189] were so great that it justified casting aside the "procedural limitations rooted in traditional concepts of standing."

Justice 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.[190]

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

177. *See* Linda R.S. v. Richard D., 410 U.S. 614, 617-18 (1973).
178. William Brennan, First Draft Dissent at 1, Sierra Club v. Morton, 405 U.S. 727 (1972) (No. 70-34) (on file in Sierra Club v. Morton Folder, Box 81, Marshall Papers).
179. *Id.* at 2-3.
180. William Brennan, Memorandum to the Conference (Apr. 11, 1972) (on file in Miscellaneous Memos, Cert Memos, Vote of Court Folder, Box 1545, Douglas Papers).
181. Sierra Club v. Morton, 405 U.S. 727, 755, 2 ELR 20192 (1972) (Brennan, J., dissenting).
182. 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 117, at 164-65.
183. Woodward & Armstrong, *supra* note 117, at 165.
184. *Sierra Club*, 405 U.S. at 757 (Blackmun, J., dissenting).
185. For a powerful defense of Douglas' dissent, see Manus, *supra* note 112, pt. III.
186. *Id.*
187. 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 administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption. . . ."

National Ass'n of Sec. Dealers, Inc. v. Securities & Exch. Comm'n, 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)).
188. *Sierra Club*, 405 U.S. at 759 (Blackmun, J., dissenting).
189. *Id.* at 755 (Blackmun, J., dissenting).
190. *Id.* at 760 n.2.

### 3. The Aftermath

*Sierra Club*'s effect on the doctrine of standing was immediate and significant. Within weeks, lower courts across the country began citing it.[191] Legal philosophers ran with Justice Douglas' dissent and began debating legal rights for nature.[192] And the Court continued to hear standing cases, giving the Justices the opportunity to refine the doctrine even further—especially Justice Lewis Powell, who joined the Court just after *Sierra Club* was decided and who worried about the dangers of liberalizing standing.[193]

In 1973, Justice 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 the individual's injury and that the court had the ability to *redress* that injury (later, two central components of the *Lujan* test).[194] In 1975, Justice Powell wrote for the Court that standing must be based on one's own "distinct and palpable" injury, not that of any third party; Justice Powell's opinion also affirmed Justice Marshall's demands of causation and redressability, introduced two years earlier.[195]

In 1976, Justice 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.[196] Elizabeth Magill has argued that when the Court handed down this decision, it "erased the standing for the public principle."[197] Justice Brennan wrote separately, calling the apparent elimination of standing for the public "most disturbing."[198] 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.[199]

In 1983, a rising star judge named 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."[200] Judge Scalia boldly suggested "that courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large."[201]

Judge Scalia's "traditional requirement" was a blatant misrepresentation of history, but it was nonetheless a harbinger of what was to come. Judge Scalia feared that broad standing gave the judiciary too much power and thus threatened the separation of powers. Judge 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."[202]

In 1992, now ensconced on the Supreme Court, Justice Scalia got the chance to realize his dream. That year, the Court decided *Lujan*, a case in which an environmental nonprofit sued the government to challenge the validity of federal action. The Endangered Species Act (ESA) 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."[203] Originally, the U.S. 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 to require 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.[204] Justice 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.[205]

Justice Scalia articulated a three-part test for standing, which he claimed "[o]ver the years, our cases have established."[206] First, "the plaintiff must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical."[207] This injury "must affect the plaintiff in a personal and individual way."[208] 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."[209] Finally, "it

191. *See* Edelstein v. Ferrell, 295 A.2d 390, 395 (N.J. Super. Ct. Law Div. 1972); State ex rel. Pruitt-Igoe Dist. Cmty. Corp. v. Burks, 382 S.W.2d 75, 78 (Mo. Ct. App. 1972); Friends of Mammoth v. Board of Supervisors, 502 P.2d 1049, 1053, 2 ELR 20673 (Cal. 1972); Soap & Detergent Ass'n v. Chicago, 56 F.R.D. 423, 425 (N.D. Ill. 1972); Akron Bd. of Educ. v. State Bd. of Educ., 56 F.R.D. 385, 389 (N.D. Ohio 1972).
192. *See* Roderick Frazier Nash, The Rights of Nature: A History of Environmental Ethics 130-40 (1989).
193. United States v. Richardson, 418 U.S. 166, 188-93 (1974) (Powell, J., concurring) (*cited in* Magill, *supra* note 41, at 1174-75). I am indebted to Magill's analysis on the subject of Justice Powell.
194. Linda R.S. v. Richard D., 410 U.S. 614, 617-18 (1973).
195. 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).
196. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 60 (1976).
197. Magill, *supra* note 41, at 1180.
198. *Simon*, 426 U.S. at 64 (Brennan, J., concurring).
199. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 74-75, 8 ELR 20545 (1978); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-89 (1973).
200. Scalia, *supra* note 22, at 881-82.
201. *Id.*
202. *Id.* at 897.
203. 16 U.S.C. §1536(a)(2); ELR Stat. ESA §7(a)(2).
204. Lujan v. Defenders of Wildlife, 504 U.S. 555, 558-59, 22 ELR 20913 (1992).
205. *Id.* at 560-72.
206. *Id.* at 560.
207. *Id.* (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (internal quotations omitted).
208. *Id.* at 560 n.1.
209. *Id.* at 560 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1975)) (internal quotations and punctuation omitted).

must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[210]

Yet, Justice Scalia's opinion went even further than establishing this test. For the first time,[211] the Court held that Article III required invalidation of an explicit congressional grant of standing. The Court struck down the ESA's grant of a right-of-action to any person suing to stop a violation of the Act.[212] Justice Scalia wrote:

> We have consistently held 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.[213]

This was based on Justice 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."[214]

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 Sunstein, "surprisingly novel."[215] 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.[216]

Justice Blackmun, well over 80 and just two years from retirement, despaired at this desecration of his hopes from *Sierra Club*. He accused Justice Scalia and the majority of going on a "slash-and-burn expedition through the law of environmental standing."[217] As Percival has shown, Justice Scalia's draft opinion in *Lujan* had been slow to win acceptance. Justices David Souter and Anthony Kennedy convinced Justice Scalia to make small changes in order to get their votes, much to Justice Scalia's annoyance. Justice Blackmun's clerks also believed Justice Scalia had revised his majority opinion in response to pointed criticisms in Justice Blackmun's draft dissent.[218] Justice Blackmun's final dissent angrily denounced Justice Scalia's opinion as departing from and mischaracterizing precedent.[219] He rejected the majority's invalidation of the ESA's conferral of standing, but he did not invoke the long history of standing for the public.[220]

Justice 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.[221] 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."[222]

Yet, it is a shame that Justice 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 did indeed go against precedent.[223] And it went against the wisdom and intentions of past Justices. As recently as 1970, for instance, Justice 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."[224] The Court has strayed far from that view, and the public and the environment are the worse because of that.

### *C. Standing in Environmental Cases Today*

For the most part, Justice 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 he or 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.[225] 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 Environmental Services, 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

210. *Id.* at 561(quoting *Simon*, 426 U.S. at 41) (internal quotations and punctuation omitted).
211. Sunstein, *supra* note 20, at 165.
212. 16 U.S.C. §1540(a).
213. *Lujan*, 504 U.S. at 573-74.
214. *Id.* at 577 (quoting U.S. Const. art. II, §2).
215. Sunstein, *supra* note 20, at 166.
216. *Id.*
217. *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting).
218. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights From the Blackmun Papers*, 35 ELR 10637, 10658-60 (Aug. 2005).
219. *Lujan*, 504 U.S. at 592-94 (Blackmun, J., dissenting).
220. *Id.* at 601-05.
221. *Id.* at 606.
222. *Quoted in* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Envtl. L. & Pol'y F. 39, 40 (2001).
223. Federal Commc'ns Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940); Scripps-Howard Radio, Inc. v. Federal Commc'ns Comm'n, 316 U.S. 4, 11-15 (1942).
224. Douglas, *supra* note 67.
225. *Lujan*, 504 U.S. at 560.

"'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.[226]

Plaintiffs can still assert that the injury-in-fact that they have suffered is nonphysical and noneconomic,[227] but the hurdle is somewhat higher for asserting an injury-in-fact to one's health.[228] Courts have issued mixed messages on whether rising sea levels and other climate harms constitute actual, imminent, and traceable injuries-in-fact.[229] And the Supreme Court recently affirmed Justice 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 Samuel Alito.[230] "Article III standing requires a concrete injury even in the context of a statutory violation."[231]

## II. Standing in Environmental Cases Tomorrow: A Separate Rule for Environmental Cases

### A. *The Lessons of History*

So, why does 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 20th century, congressional grants of standing were unquestionably constitutional and standing for the public 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 20th-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 Justices 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 Justices Douglas, Brennan, Harlan, and Blackmun never intended to abandon standing for the public.[232] 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, Justice 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. Justice Blackmun called this (ahistorically, but sincerely) "an imaginative expansion of our traditional concepts of standing."[233] 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,"[234] in Justice Blackmun's words, represent *the* most pressing danger ever faced by humanity and human civilization.

In recent years, leaders from United Nations (U.N.) Secretary General António Guterres[235] to President Barack Obama[236] 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.[237] 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."[238] It emphasized the threat of "irreversible impacts," including mass extinction events, increased risk of fires, pest, and disease

226. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181-84, 30 ELR 20246 (2000).
227. Summers v. Earth Island Inst., 555 U.S. 488, 494, 39 ELR 20047 (2009); *Laidlaw*, 528 U.S. at 180-84; American Bottom Conservancy v. U.S. Army Corps of Eng'rs, 650 F.3d 652, 656-58, 41 ELR 20206 (7th Cir. 2011); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152-60, 30 ELR 20369 (4th Cir. 2000); Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784, 787, 13 ELR 20580 (9th Cir. 1983); Neighborhood Dev. Corp. v. Advisory Council on Historic Pres., 632 F.2d 21, 11 ELR 20083 (6th Cir. 1980).
228. Natural Res. Def. Council v. Environmental Prot. Agency, 464 F.3d 1, 6, 36 ELR 20051 (D.C. Cir. 2006).
229. *Compare* Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 521-23, 37 ELR 20075 (2007), *and* Juliana v. United States, 217 F. Supp. 3d 1224, 1242-46, 46 ELR 20072 (D. Or. 2016), *with* Washington Envtl. Council v. Bellon, 741 F.3d 1075, 1077, 44 ELR 20023 (9th Cir. 2014), *and* Washington Envtl. Council v. Bellon, 732 F.3d 1131, 1142, 43 ELR 20231 (9th Cir. 2013), *and* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 868, 42 ELR 20195 (9th Cir. 2012) (Pro, J., concurring).
230. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).
231. *Id.*
232. *See*, *e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 64 (1976) (Brennan, J., concurring).
233. Sierra Club v. Morton, 405 U.S. 727, 757, 2 ELR 20192 (1972) (Blackmun, J., dissenting).
234. *Id.* at 755-56.
235. 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. 29, 2018, https://www.nytimes.com/2018/03/29/climate/united-nations-climate-change.html.
236. President Barack Obama, Remarks in the 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.
237. IPCC, *Fifth Assessment Report (AR5)*, https://www.ipcc.ch/report/ar5/ (last visited Nov. 8, 2018).
238. IPCC, Climate Change 2014: Synthesis Report 4, http://www.climatechange2013.org/images/uploads/SYR_AR5_LONGERREPORT_Corr2.pdf.

outbreaks,[239] immense deforestation, and huge numbers of climate refugees.[240] "Science has spoken. There is no ambiguity," declared then-U.N. Secretary General Ban Ki-moon, announcing the *Fifth Assessment*. "Leaders must act; time is not on our side."[241]

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 hundreds of millions of people to poverty, displacement, and death.[242] 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."[243] Climate policy scholar Nathan Hultman wryly commented, "An equally accurate but more evocative title could have been, 'We're almost out of time.'"[244]

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.[245] "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.[246] Further, 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 fact."[247] It is particularly difficult given the 1983 case *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."[248]

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).[249] 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."[250] Notably, the law did not define "pollution," "environmental quality," or "the public trust"—it was meant to be "flexible, innovative, and responsive."[251]

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 quality[252] and was influenced by the environmental movement that was

239. *See also* Jonathan A. Patz et al., *Climate Change: Challenges and Opportunities for Global Health*, 312 JAMA 1565, 1566 (2014).
240. IPCC, *supra* note 238, at 13, 74, 76.
241. 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/.
242. IPCC, Global Warming of 1.5°C: Summary for Policymakers B1.1-B5.7 (2018), http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.
243. *Id.* at C2.1.
244. 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/.
245. Niran Somasundaram, *State Court Solutions: Finding Standing for Private Climate Change Plaintiffs in the Wake of* Washington Environmental Council v. Bellon, 42 Ecology L.Q. 491, 506 (2015).
246. 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 (T.F. Stocker et al. eds., 2013), http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf.
247. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 22 ELR 20913 (1992).
248. 461 U.S. 95, 101-02 (1983) (internal quotations omitted).
249. Mich. Comp. Laws Ann. §§324.1701-.1706 (West 2005).
250. *Id.* §324.1701(1).
251. Joseph L. Sax, Defending the Environment: A Strategy for Citizen Action 248 (1971).
252. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

exploding during that turbulent decade.[253] 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."[254]

Sax decided to draft a bill that would recognize a public right to a decent environment and make that right enforceable by the public.[255] He felt about environmental standing the same way Justice 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*, adding[256]:

> 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 reveals how little it appreciated the real meaning of the test case it had before it.[257]

Over three-and-a-half days in 1969, Sax drafted the bill and sent it to the West Michigan Environmental Action Council. "It discourages me to think that we can only be protected by having the right to sue," a 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!"[258] State Rep. 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.[259] 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.[260]

In the first 13 years after MEPA's passage, 185 actions were filed under the law (coming from more than one-half of Michigan's 83 counties).[261] Contrary to the predictions of many critics of looser standing, these actions resulted in considerable success.[262] 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 comply with environmental standards in building condominiums along Lake Michigan in Manistee in the late 1990s.[263]

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."[264] And as one scholar of the law wrote in 1985, "statistics indicate that frivolous neighborhood disputes have not flooded the Michigan court system."[265] Suits filed under MEPA in its first five years constituted less than 0.02% of all civil suits filed.[266]

Sax was deeply distressed by the Court's ruling in *Sierra Club*.[267] He wanted other states to copy MEPA, and in 1971, he published an influential book that included a "model law" as an appendix.[268] Over the next decade, eight states adopted statutes closely modeled on MEPA: Connecticut,[269] Florida,[270] Maryland,[271] Minnesota,[272] Nevada,[273] New Jersey,[274] North Dakota,[275] and South Dakota[276] (while two states—Hawaii[277] and Illinois[278]—amended their constitutions to the same effect).[279] In 1970, bills modeled after MEPA were also introduced in the U.S. Senate and U.S. House of Representatives,

253. Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 Ecology L.Q. 351, 353 (1998).
254. Bentley Historical Library, University of Michigan, *Joseph L. Sax Papers, 1943-2013: Biography*, https://quod.lib.umich.edu/b/bhlead/umich-bhl-85292?byte=140234841;focusrgn=bioghist;subview=standard;view=reslist (last visited Nov. 8, 2018).
255. Sax, *supra* note 251, at 248.
256. Sax, *supra* note 252, at 88.
257. *Id.*
258. Bentley Historical Library, *supra* note 254.
259. *Id.*
260. *Id.*
261. Daniel K. Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits in the 1980s*, 12 Ecology L.Q. 271, 273-76 (1985).
262. *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. Urb. L. 589 (1976).
263. Laura Bishop, *High Court Diminishes Reach of Michigan Environmental Statute*, Mich. Land Use Inst., Sept. 11, 2006, http://www.mlui.org/mlui/news-views/articles-from-1995-to-2012.html?archive_id=731#.WtUHp5PwZE5.
264. 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 ELR 10144 (Sept. 1979).
265. Slone, *supra* note 261, at 272; *see also* Sax & DiMento, *supra* note 262, at 5-8.
266. 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).
267. *See* Sax, *supra* note 252.
268. Sax, *supra* note 251, at 249-52.
269. Environmental Protection Act of 1971, Conn. Gen. Stat. §§22a-14 to -20 (2017).
270. Environmental Protection Act of 1971, Fla. Stat. §403.412 (2018).
271. Maryland Environmental Standing Act of 1978, Md. Code Ann., Nat. Res. §1-503 (2018).
272. Minnesota Environmental Rights Act of 1971, Minn. Stat. §116B.01 (2018).
273. Nev. Rev. Stat. Ann. 41.540 (2017) (enacted 1971 (Acts of 1971, at 861)).
274. Environmental Rights Act of 1974, N.J. Stat. §§2A:35A-1 to -14 (2018).
275. North Dakota Environmental Law Enforcement Act of 1975, N.D. Cent. Code §§32-40-01 to -11 (2017).
276. South Dakota Environmental Protection Act of 1973, S.D. Codified Laws Ann. §§34A-10-1 to -17 (2018).
277. Haw. Const. art. XI, §9 (amended 1978, current through 2018).
278. Ill. Const. art. XI, §2 (amended 1977, current through 2018).
279. *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).

but neither passed.[280] Two additional states, Indiana[281] and Iowa,[282] passed similar laws in subsequent decades, while two other states, Louisiana[283] and Wyoming,[284] 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."[285]

As Susan George summarized in 1997, these 14 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.[286] Only one-half of these provisions enabled a citizen suit in the absence of a violation of the law, which is a "powerful tool."[287] 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), Michigan courts begin ruling that the "any person" provision of MEPA violated the separation of powers enshrined in Michigan's Constitution.[288] "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 Michigan Supreme Court in a 4-3 decision in 2004.[289] Further, the "judicial power," as the state 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."[290]

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."[291] 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."[292] 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* test.[293]

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 Minnesota Environmental Rights Act (MERA) for decades with considerable success.[294] 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."[295] 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.[296] The legislature drafted MESA specifically to give standing to people who had not suffered an injury.[297] "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."[298] 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."[299]

Sadly, MERA too has been undermined. Because Minnesota courts have not interpreted MERA to grant attorney fees to successful plaintiffs,[300] "the statute effectively provides standing only to those with considerable financial resources, or for those who use it as a shield of last-

280. Sax, *supra* note 251, at 247 n.1.
281. Ind. Code Ann. §§13-30-1-1 to -12 (2018) (enacted 1996 (Pub. L. No. 1-1996, §20)).
282. Iowa Code §455B.111 (2017) (enacted 1986 (86 Acts, ch. 1245, §1888)).
283. La. Rev. Stat. §30:2026 (2017) (enacted 1979 (Acts 1979, No. 449, §1)).
284. Wyo. Stat. §35-11-904 (2018) (enacted 1973 (Laws 1973, ch. 250, §1)).
285. Quoting *supra* 283 & 284. *See also* Ariz. Rev. Stat. §49-264 (2018).
286. George et al., *supra* note 279, at 14, 17-20.
287. *Id.* at 15, 17.
288. Mich. Const. art. III, §2.
289. National Wildlife Fed'n v. Cleveland Cliffs Iron Co., 684 N.W.2d 800, 808 (Mich. 2004).
290. *Id.* at 806.
291. Michigan Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 709 N.W.2d 174, 210-11 (Mich. Ct. App. 2005).
292. Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010).
293. *See*, *e.g.*, MCNA Ins. Co. v. Department of Tech., Mgmt. & Budget, 913 N.W.2d 653, 653-54 (Mich. 2018) (Markman, C.J., dissenting).
294. *See* Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, 624 N.W.2d 796, 806 (Minn. Ct. App. 2001); White v. Minnesota Dep't of Natural Res., 567 N.W.2d 724 (Minn. Ct. App. 1997); State ex rel. Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, No. C-01-05286 (Scott County Dist. Ct. Nov. 22, 2002); Klass, *supra* note 264, at 723.
295. 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*, 21 B.C. Envtl. Aff. L. Rev. 401, 417 (1994).
296. 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).
297. *Id.* at 502.
298. *Id.* at 499.
299. *Id.* at 502.
300. *See* State ex rel. Friends of the Riverfront v. City of Minneapolis, 751 N.W.2d 586 (Minn. Ct. App. 2008).

resort."[301] The same is true of MEPA.[302] Indeed, according to George et al., only one-half of the state statutes provide for the award of fees and costs.[303] An ideal statute, then, would define as many terms as possible, as comprehensively as possible, and would allow for the granting of attorney and litigation fees.

Administrative procedures can also present roadblocks. Indiana's Environmental Policy Act, for instance, forces plaintiffs to exhaust all administrative remedies, and allows the state agency to hold a hearing and make a determination (which it has 180 days to do) before they can sue.[304] "These barriers to suit have prevented the Indiana act from being used frequently," writes Peter H. Lehner.[305] Similarly onerous administrative requirements also hinder citizen actions enabled by Florida's Environmental Protection Act.[306] 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, §2 of the Illinois Constitution allowed any person to sue "any party, governmental or private" to enforce his or her "right to a healthful environment."[307] 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 must nevertheless still exist a cognizable cause of action."[308] 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.[309] Further, 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 Illinois' Endangered Species Protection Act,[310] because the section's right to a "healthful environment" was not intended to include the protection of endangered species.[311]

Hawaii's Constitution's Article XI, §9, approved by voters in 1978,[312] was somewhat more specific than Illinois', 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.[313]

Hawaiian courts have ruled that, because §9 is part of the constitution, it allows for a "less rigorous standing requirement,"[314] 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."[315]

However, Hawaiian courts have also stated that this less rigorous, less restrictive analysis still demands that 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."[316] The court defined this injury as a harm to "some legally protected interest,"[317] and under §9, individuals do have an interest in "a clean and healthful environment,"[318] 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."[319]

In sum, a brief overview of the state 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 Justice 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.

301. Michael Wietecki, *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).
302. *See* Nemeth v. Abonmarche Dev., Inc., 576 N.W.2d 641, 651-54 (Mich. 1998).
303. George et al., *supra* note 279, at 18.
304. 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, *The Indiana Environmental Policy Act. Casting a New Role for a Forgotten Statute*, 70 Ind. L.J. 613, 642-44 (1995).
305. Peter H. Lehner, *The Efficiency of Citizen Suits*, 2 Alb. L. Envtl. Outlook 4, 10 (1995).
306. Florida Wildlife Fed'n v. State Dep't of Envtl. Regulation, 390 So. 2d 64, 66, 11 ELR 20169 (Fla. 1980).
307. Ill. Const. art. XI, §2.
308. Citizens Opposing Pollution v. ExxonMobil Coal U.S.A., 962 N.E.2d 956, 967 (Ill. 2012).
309. *Id.*
310. 520 Ill. Comp. Stat. 10/1 et seq. (2018).
311. Glisson v. City of Marion, 720 N.E.2d 1034, 1041-42 (Ill. 1999).
312. David Kimo Frankel, *Enforcement of Environmental Laws in Hawai'i*, 16 Haw. L. Rev. 85, 134 (1994).
313. Haw. Const. art. XI, §9.
314. Sierra Club v. Department of Transp., 167 P.3d 292, 313 (Haw. 2007).
315. In re Maui Elec. Co., 408 P.3d 1, 22 (Haw. 2017) (citations and punctuation omitted).
316. *Sierra Club*, 167 P.3d at 313, *aff'd*, *Maui Elec. Co.*, 408 P.3d at 22.
317. *Id.* at 314.
318. Haw. Const. art. XI, §9.
319. *Maui Elec. Co.*, 408 P.3d at 22, *aff'g Sierra Club*, 167 P.3d at 312.

## III. Conclusion

My hope is that this Article has demonstrated the urgent necessity of fundamentally reforming the American environmental standing doctrine. In the following Appendix, 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.[320]

Taking a cue from past successes and failures, I have included a statement of purpose, a lengthy list of definitions, an explicit grant of standing, and clear delineations of relief, jurisdiction, etc. Ideally, this law would be enacted 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.

## Appendix: 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, nonhuman animals, and nature can exist in harmony, in order that present and future generations of humans and nonhuman 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, and 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 that 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—that 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

320. *See*, *especially*, Md. Code Ann., Nat. Res. §1-503; Minn. Stat. §§116B.01-.02; N.D. Cent. Code §§32-40-03 to -11; S.D. Codified Laws Ann. §34A-10-1; Sax, *supra* note 251, at 249-52; George et al., *supra* note 279, at 28.

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 caused, 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 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 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 that 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 that 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 that 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.