

## NOTES

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# “IF AN (ENDANGERED) TREE FALLS IN THE FOREST, AND NO ONE IS AROUND . . . .”: RESOLVING THE DIVERGENCE BETWEEN STANDING REQUIREMENTS AND CONGRESSIONAL INTENT IN ENVIRONMENTAL LEGISLATION

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### INTRODUCTION

During the mid-twentieth century, Congress passed a series of statutes that changed the face of American law.<sup>1</sup> Legislative protection was extended to the air, water, endangered species, and tracts of land where “the earth and its community of life [remain] untrammelled by man.”<sup>2</sup> Many of these statutes include “citizen suit” provisions, an innovation designed to foster public participation in environmental protection.<sup>3</sup> The participation encouraged by citizen suits, however, did not follow the traditional model of civic involvement. Indeed, citizen suits were designed to “replace deficient pro-

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1 See, e.g., Robert V. Percival, “Greening” the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 809 (2002).

2 16 U.S.C. § 1131(c) (2006). These resources are protected, respectfully, by the Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006); Clean Water Act, 33 U.S.C. §§ 1294–1297 (2006); Endangered Species Act, 16 U.S.C.A. §§ 1531–1544 (2006); and the Wilderness Act, 16 U.S.C. §§ 1131–1136 (2006).

3 See Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 64 (1989).

grams of administrative enforcement”<sup>4</sup> with a body of “private attorneys general,”<sup>5</sup> encouraging citizens to air their grievances in Article III courts rather than through the political process.<sup>6</sup> Understandably, this new<sup>7</sup> model of enforcement has evoked a wave of commentary and criticism.<sup>8</sup> In the court system, the influx of citizen suits has been accompanied by an evolution (or, many would say, devolution) of the doctrine of standing. Although the exact contours of the standing doctrine still remain unclear,<sup>9</sup> its most recent “phase” has proved challenging to plaintiffs attempting to enforce environmental statutes through citizen suits.<sup>10</sup> In several notable cases, plaintiffs have been barred from court despite Congress’ apparent intent to enable “any person” to proceed with a citizen suit.<sup>11</sup> These plaintiffs were barred because they failed to assert a cognizable injury to *themselves*,

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4 *Id.* at 56.

5 *Bennett v. Spear*, 520 U.S. 154, 165 (1997) (internal quotation marks omitted).

6 *See Cross, supra* note 3, at 56. Citizen suits can be initiated against the Government (or government officials) in an attempt to compel them to carry out their statutory duties, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992), or against private parties for alleged violations of a statute, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 180–88 (2000).

7 Commentators have noted, however, that citizen suits resemble the *qui tam* actions available shortly after the founding, and thus are not new. *See* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 174–77 (1992).

8 *See generally id.*; Robin Kundis Craig, *Will Separation of Powers Challenge “Take Care” of Environmental Citizen Suits? Article II, Injury-in-Fact, Private “Enforcers,” and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93 (2001) (examining separation of powers issues raised by citizen-suits brought under environmental statutes); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185 (discussing the various ways in which citizens involved themselves in environmental enforcement).

9 Some commentators consider standing “‘among the most amorphous [concepts] in the entire domain of public law.’” Katherine A. Burke, Comment, *Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633, 642 (2004) (quoting JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 83 (6th ed. 2000)).

10 Commentators have divided the Court’s standing jurisprudence into several “eras” or “phases.” *See* Sunstein, *supra* note 7, at 168.

11 *See, e.g., Lujan*, 504 U.S. at 562; *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972); *Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 336 (D.C. Cir. 2003).

although the statutes were seeking to protect the *environment*,<sup>12</sup> and citizen suit provisions do not require personal harm.<sup>13</sup>

An old riddle comes to mind: “If a tree falls in the forest, and no one is around to hear, does it make any sound?” Adapted to the context of environmental law, the question can be posed: “If a tree falls in the forest, and no one is around, can statutory protections be enforced via citizen suit?” By barring plaintiffs who do not sustain a “particularized” injury,<sup>14</sup> courts answer in the negative. Congress, however, in deciding to protect the tree itself, seems to desire an affirmative answer to the question.

This divergence between the apparent will of Congress and the doctrine of standing stems from the courts’ view of their proper role within the constitutional scheme of government. The Article III judiciary is established to adjudicate disputes between individuals, or “private rights,” while the political branches are charged with creating law and taking care that it be faithfully executed.<sup>15</sup> Although a bright-line “public-versus-private rights” rule has not been adopted as the touchstone for what can (or must) be adjudicated in Article III courts,<sup>16</sup> this view of separation of powers has heavily influenced modern standing

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12 Notably, some environmental statutes do seek to prevent harm to persons. See Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 899. The definition, however, between what constitutes “harm,” be it to persons or to the environment, is “ambiguous and contested” in the context of environmental law. *Id.* at 900. This Note does not attempt to identify the precise harms which environmental laws seek to prevent, or claim that Congress’ *sole* motive behind environmental statutes is to protect the environment. Rather, this Note proceeds on the assumption that at least *one* purpose of environmental laws is to prevent harm to the environment (whatever the definition of “harm” may be), even if the statutes protect both persons and the environment.

13 For a discussion of these inquiries, see *infra* Part II.B. Although other statutes, such as the Americans with Disabilities Act, contain “citizen suit” provisions, the provisions differ in that they permit any person *aggrieved* by a violation of this statute to sue in court. See 42 U.S.C. § 12117(a) (2006) (giving “any person alleging discrimination on the basis of disability” standing to sue). In contrast, environmental statutes permit “any person” to enforce the provisions in court. See, e.g., 16 U.S.C. § 1540(g) (2006).

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

15 *Id.* at 577 (citing and quoting *Stark v. Wickard*, 321 U.S. 288, 309–10 (1944) (footnote omitted)); see also Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 694–712 (2004) (noting that the Article III judiciary, historically, has limited itself to adjudicating private rights disputes).

16 See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986); see also Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 572 (2007) (noting that “the Constitution does not itself fix the precise contours of [public and private] rights”).

requirements.<sup>17</sup> Via the doctrine of standing, courts have resisted congressional attempts to use them as a means through which ordinary citizens can influence execution of the law. Rather, an individual may approach a court only when his or her suit seeks to vindicate a “private right”; in other words, when the plaintiff suffers some injury to him or herself and approaches the court seeking relief.<sup>18</sup>

Many disagree with this conception of the judiciary’s role, and the doctrine of standing has been thoroughly criticized.<sup>19</sup> However, perhaps these criticisms are misplaced. After all, it was Congress that decided to protect the environment, while granting persons the right to sue. Additionally, it was Congress that determined to enforce these statutory protections (at least partially) in the courts, whose jurisdiction is cabined by Article III. Thus, it makes sense that Congress should attempt to resolve the resulting conflict between the branches.

This Note assumes that the doctrine of standing properly articulates the role of Article III courts in our tripartite system, and looks to how Congress can repair the disconnect between the purpose of environmental statutes and the injuries required to convey standing. As expressed in its standing decisions,<sup>20</sup> the judiciary’s primary role is to adjudicate private-rights disputes, while leaving creation and enforcement of the law to the political branches. Accordingly, there are two ways in which Congress can remove the tension inherent in the current enforcement scheme: (1) provide a public-rights forum for adjudication of citizen suits brought under environmental laws by creating an Article I tribunal; or (2) make environmental citizen suits mirror private-rights disputes, by granting environmental resources the right to bring citizen suits. Although both of these proposals would remedy

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17 See, e.g., *Lujan*, 504 U.S. at 559–60; see also Nelson, *supra* note 16, at 571–72 (2007) (claiming that the development of “American-style” separation of powers was, in part, driven by the distinction between public and private rights).

18 “Private rights” are generally defined as those “held by discrete individuals,” as opposed to “public rights,” which “belong to the body politic.” Woolhandler & Nelson, *supra* note 15, at 693. Figuring out precisely what constitutes a “private” versus a “public” right is admittedly not easy; this lends to the considerable confusion surrounding standing. See *id.* at 694.

19 Criticism of the doctrine runs the gamut from arguing that modern standing doctrine itself constitutes a violation of separation of powers, see Sunstein, *supra* note 7, at 214, 235–36, to insisting that the doctrine “impose[s] a theory of value in which human beings are the source and center of value” upon the populous, Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 DUKE ENVTL. L. & POL’Y F. 347, 348 (2008). However, some commentators defend the standing doctrine, claiming that “recent [Supreme Court] decisions are continuous with historical tradition.” Woolhandler & Nelson, *supra* note 15, at 713.

20 See *supra* note 15 and accompanying text.

the divergence highlighted in this Note, creating an Article I tribunal would inject political considerations back into the enforcement of environmental statutes.<sup>21</sup> This would effectively undermine the purpose of citizen suits, and perhaps the effectiveness of environmental law as a whole.<sup>22</sup> Therefore, this Note proposes that Congress grant environmental resources the power to bring citizen suits, drawing upon the paradigm of federally chartered corporations.

Part I of this Note gives a brief overview of the modern standing doctrine. Part II analyzes the Endangered Species Act,<sup>23</sup> using standing disputes arising under its citizen suit provision to highlight the divergence between its purpose and the injuries-in-fact required to establish Article III standing. Part III advances two possible methods through which Congress could heal the divergence. Part III.A discusses, and eventually dismisses, the idea of an Article I tribunal for adjudication of environmental citizen suits, and Part III.B proposes vesting environmental resources with the right to bring citizen suits to enforce environmental statutes, drawing on the paradigm of federally chartered corporations.

## I. THE MODERN DOCTRINE OF STANDING

Standing is “‘among the most amorphous [concepts] in the entire domain of public law.’”<sup>24</sup> However, it has become a topic of debate only recently, with the phrase first appearing in 1944 and the vast majority of discussion occurring after 1970.<sup>25</sup> The doctrine stems from the “case or controversy” language of Article III, as well as upon a “common understanding of what activities are appropriate . . . to

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21 See *infra* Part III.B.3.

22 Cf. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 4–5 (2003) (noting that the number of citizen suits brought under environmental statutes “easily outpaces EPA referrals for enforcement to the U.S. Department of Justice”).

23 16 U.S.C. §§ 1531–1544 (2006).

24 JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 86 (7th ed. 2006) (quoting *Judicial Review: Hearings of S. 2097 Before the Subcomm. on Constitutional Rights of the S. Comm. On the Judiciary*, 9th Cong., pt. 2, 498 (1966) (statement of Paul A. Freund, Professor of Law, Harvard Law School)).

25 Sunstein, *supra* note 7, at 169. Some commentators suggest that the doctrine of standing began taking shape in the 1920s and 1930s as a response to the fledgling administrative state, although the first use of the word “standing,” and the doctrine’s constitutional roots, occurred in 1944. See Benzoni, *supra* note 19, at 351–54. But see Woolhandler & Nelson, *supra* note 15, at 713 (contending that the constitutional roots of the standing doctrine, although not expressed as such, stretch back to the early nineteenth century).

courts.”<sup>26</sup> In its most recent “phase,”<sup>27</sup> the Supreme Court has emphasized that the doctrine of standing is vital to maintaining the separation of powers envisioned by the Constitution.<sup>28</sup> Although this assertion has been thoroughly criticized by academics,<sup>29</sup> it seems that the Court’s conception of standing, and the requirements stemming therefrom, will govern standing decisions for the foreseeable future.<sup>30</sup>

To ensure that a dispute is a “case” or “controversy” under Article III, a plaintiff must satisfy several constitutional and prudential standing requirements. Section A of this Part discusses the constitutional requirements of standing: injury-in-fact, causation, and redressability. Section B notes some important prudential standing requirements, highlights the important distinction between regulated parties and parties seeking regulation of someone else, and discusses standing requirements for associations and corporations.

#### A. “Irreducible Constitutional Minimum” Requirements

In *Lujan v. Defenders of Wildlife*,<sup>31</sup> the Supreme Court enumerated the “irreducible constitutional minimum” requirements of standing: injury-in-fact, causation between the injury and alleged illegal conduct, and likelihood that the injury will be “redressed by a favorable decision” in court.<sup>32</sup> These elements ensure that the dispute before the court is a “Case” or “Controversy”<sup>33</sup> over which Article III grants jurisdiction, restricting the judiciary to its constitutionally assigned

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26 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also* *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (“[A]t an irreducible minimum, Art. III requires the party who invokes the court’s authority to ‘show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.’” (quoting *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979))); *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970) (“[T]he question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to ‘cases’ and ‘controversies.’”).

27 Professor Sunstein has separated the Court’s standing doctrine into five distinct phases. *See* Sunstein, *supra* note 7, at 168. For purposes of this Note, I only discuss the most recent phase.

28 *Lujan*, 504 U.S. at 559–60.

29 *See, e.g.*, Jonathon R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 73–76 (2007); Sunstein, *supra* note 7, at 235–36.

30 For example, every case cited in this Note applied the standing framework set forth in *Lujan*. Although the stringency with which those requirements were applied varied, all the decisions at least purported to follow those requirements.

31 504 U.S. 555.

32 *Id.* at 560–61.

33 *Id.*

role and preventing judicial intrusion on the purview of the political branches.

### 1. Injury-in-Fact

In order to establish standing, a plaintiff must allege an “invasion of a legally protected interest” which is both “concrete and particularized” and “actual or imminent,” as opposed to “‘conjectural’ or ‘hypothetical.’”<sup>34</sup> Thus, generalized grievances that affect every citizen’s interest in proper application of the law, where the relief requested does not tangibly benefit the plaintiff more than it does the public at large, are not sufficient to convey standing.<sup>35</sup> This requirement is based, in part, on a “common understanding of what activities are appropriate . . . to courts.”<sup>36</sup> Further, a plaintiff may not merely assert that *someone* has suffered a cognizable injury; rather, the party seeking review must “be *himself* among the injured.”<sup>37</sup>

The injury suffered by a plaintiff does not have to be particularly egregious, and injuries to aesthetic, scientific, educational, or recreational interests are sufficient to grant standing.<sup>38</sup> Thus, a plaintiff suffers an injury-in-fact when he is prevented from watching elephants at a circus,<sup>39</sup> when he is a member of a bird-watching group with reduced opportunities to view endangered raptors,<sup>40</sup> or when he is prevented from recreating by a river because of a fear of pollution.<sup>41</sup> However, a plaintiff may not sue in court when he suffers no injury, even when a defendant has clearly violated an environmental statute by discharging toxic chemicals into a river.<sup>42</sup>

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34 *Id.* at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

35 *Id.* at 573–74.

36 *Id.* at 560.

37 *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (emphasis added).

38 *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 844–45 (9th Cir. 2002); *see also Lujan*, 504 U.S. at 562–63 (“[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”).

39 *See Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 338 (D.C. Cir. 2003).

40 *See Nat’l Audubon Soc’y*, 307 F.3d at 849.

41 *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–82 (2000).

42 *See Van Scoy v. Shell Oil Co.*, C94-3327 FMS, 1995 WL 232419, at \*1 (N.D. Cal., 1995), *aff’d*, 1996 WL 563449 (9th Cir., Oct. 2, 1996).

## 2. Causation

To establish standing, the injury-in-fact suffered by the plaintiff must 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.’”<sup>43</sup> Although the specific implications of this requirement are not entirely clear, federal courts may not “raise the standing hurdle higher than the necessary showing for success on the merits in an action.”<sup>44</sup> In the environmental context, plaintiffs may satisfy the “causation” element of Article III standing by showing an increased *risk* of environmental degradation which would result in an injury-in-fact; the environmental damage need not have already occurred.<sup>45</sup>

## 3. Redressability

To maintain an action in federal court, a plaintiff must show that a favorable decision by the court is “‘likely’” to redress the alleged injury.<sup>46</sup> In other words, a court’s decision must be binding on the perpetrator of the injury, or otherwise compel the defendant to stop the injurious activity. This element is particularly difficult to establish when a plaintiff’s relief depends upon the actions of an entity which is not a party to the case.<sup>47</sup> Because a court decision would not legally bind such an entity, the plaintiff can only speculate that a favorable decision will remedy his injury.<sup>48</sup> For example, when a plaintiff claims injury from violation of a treaty between the United States and Canada, and the court cannot force Canada to comply with the treaty,

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43 *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

44 *Laidlaw*, 528 U.S. at 181.

45 See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159–61 (4th Cir. 2000). The causation prong of the standing inquiry does not appear to be particularly difficult to establish. In some environmental contexts, particularly in determining whether a particular pollutant was the cause of environmental destruction, the causation requirement may prove a substantial bar. The example of global warming is illustrative. Because “any single polluter is likely to produce only a tiny proportion of the [greenhouse gasses],” proving causation may cause serious problems for plaintiffs bringing citizen suits. Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 6 (2005). These sorts of problems, however, are outside the scope of this Note.

46 *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38).

47 See *id.* at 568. This problem often arises, as in *Lujan*, when a government official is sued for failing to carry out some statutory duty, the completion of which does not assure any particular outcome.

48 See *id.* at 568–69.



the plaintiff lacks standing.<sup>49</sup> The redressability requirement can be satisfied, however, where punitive fines would deter the defendant from causing further injury in the future.<sup>50</sup> For example, a plaintiff has standing when he seeks only punitive fines payable to the government.<sup>51</sup> Such fines are “likely” to deter the defendant from polluting, thus remedying the plaintiff’s injury and satisfying the redressability requirement.<sup>52</sup>

These constitutional requirements, although necessary, are not always sufficient to convey standing. To protect the purpose of Article III “to the extent necessary under the circumstances,” courts have established various prudential standing requirements.<sup>53</sup> These prudential requirements are discussed below, along with a discussion of the heightened standing inquiry for parties seeking regulation of someone else and standing requirements for associations.

### B. Prudential and Other Concerns

In addition to the standing requirements which stem from Article III, plaintiffs often must overcome various prudential barriers created by the courts.<sup>54</sup> Depending on the particular injury the plaintiff is asserting, and whether the plaintiff is a regulated party or one seeking to compel regulation, standing may be more or less difficult to establish. Additionally, the standing requirements for associations or corporations differ slightly from those applicable to individuals.

#### 1. Prudential Requirements

In addition to the “irreducible constitutional minimum”<sup>55</sup> elements of standing, a plaintiff often must overcome various prudential standing requirements.<sup>56</sup> Courts will decline jurisdiction if the plain-

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49 See *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008).

50 See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000).

51 See *id.* at 185–87.

52 See *id.* at 187.

53 *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1106 (2d Cir. 1992).

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

55 *Id.*

56 See *id.*; *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982); *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Notably, “Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.” *Warth*, 422 U.S. at 501. In environmental statutes with citizen suits, Congress has overridden prudential concerns. See *Bennett v. Spear*, 520 U.S. 154, 164–65 (1997). Therefore, in this subsec-

tiff does not assert his own legal rights and interests, but instead “rest[s] his claim to relief on the legal rights or interests of third parties.”<sup>57</sup> Therefore, even when a plaintiff suffers a cognizable injury from injury to a third party, a court may decline jurisdiction and dismiss the case.<sup>58</sup> Further, a plaintiff may be denied standing if he or she asserts an interest which is “pervasively shared and most appropriately addressed in the representative branches.”<sup>59</sup> Thus, when an otherwise valid injury-in-fact is not unique or otherwise differentiated from injury to the populace at large, a court may decline to hear the suit.<sup>60</sup> Lastly, if the harm asserted by the plaintiff does not fall within “the zone of interests to be protected or regulated by the statute . . . in question,”<sup>61</sup> a court may not exercise jurisdiction. Although prudential standing requirements may be significant in some areas of law, citizen suit provisions effectively negate their application.<sup>62</sup> Therefore, prudential barriers to standing do not play a significant role in the context of environmental citizen suits.<sup>63</sup>

## 2. Regulated Parties Versus Parties Seeking Regulation

In *Lujan*, Justice Scalia, speaking for the Court, noted that the “nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue.”<sup>64</sup> If the plaintiff is an object of regulation, standing is normally not difficult to establish.<sup>65</sup> In contrast, if the plaintiff asserts injury arising “from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*,” standing “is ordinarily ‘substantially more difficult’ to establish.”<sup>66</sup>

This distinction is particularly relevant for citizen suits. Citizen suits are, by design, enforcement actions. Their purpose is to decrease reliance on agency enforcement, thus avoiding problems of

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tion, examples from nonenvironmental statutes are used to explain the prudential requirements.

57 *Warth*, 422 U.S. at 499.

58 *See id.*

59 *Valley Forge Christian Coll.*, 454 U.S. at 475.

60 *Id.*

61 *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

62 *See Bennett v. Spear*, 520 U.S. 154, 164–65 (1997) (discussing the inapplicability of these requirements to citizen suits initiated under the ESA).

63 *Id.*

64 *Lujan v. Defenders of Wildlife*, 540 U.S. 555, 561 (1992).

65 *Id.* at 561–62.

66 *Id.* at 562 (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

underenforcement.<sup>67</sup> Plaintiffs bringing enforcement actions, however, normally assert injury due to the government's failure to regulate a third party's activity. Therefore, in these cases standing is "substantially more difficult" to establish.<sup>68</sup> However, citizen suits may also be brought to challenge existing regulations.<sup>69</sup> This type of citizen suit is brought by "regulated parties" and thus standing is normally not difficult to establish.<sup>70</sup> This distinction adds somewhat to the disconnect highlighted in this Note: those utilizing citizen suits in the manner which they were intended, as enforcement actions, find it more difficult to establish standing in Article III courts.

### 3. Associational Standing

An association may bring suit if: (1) one of its members would have standing in his or her own right; (2) if the interest the association seeks to protect is "germane to [its] purpose;" and (3) if "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>71</sup> The first two prongs of the test are grounded in the Article III case or controversy requirement, but the third is merely a prudential limit imposed by courts.<sup>72</sup> Thus, an association may have standing to assert the rights of its members regardless of whether the association itself has any independent rights or is empowered to sue in court. The ability to approach a court, however, hinges on the ability of a group member to satisfy the normal standing requirements.<sup>73</sup>

If statutorily empowered to do so, an association may be "entitled to sue on [its] own behalf for injuries [it] ha[s] sustained."<sup>74</sup> Corporations are a typical example of such associations. Both federal and state corporations are generally granted the power to "sue and be sued," and thus may approach a court to vindicate contractual, statutory, or even constitutional rights.<sup>75</sup> Corporations and associations

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67 See Cross, *supra* note 3, at 55.

68 *Lujan*, 540 U.S. at 562 (quoting *Warth*, 422 U.S. at 505).

69 See *Bennett v. Spear*, 520 U.S. 154, 171–72 (1997).

70 *Lujan*, 540 U.S. at 561–62.

71 See, e.g., *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996) (quoting *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

72 *Id.* at 555–56.

73 See, e.g., *Lujan*, 540 U.S. at 562–67; *Disability Rights Wis., Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 801–04 (7th Cir. 2008); *Haw. County Green Party v. Clinton*, 124 F. Supp. 2d 1173, 1201–03 (D. Haw. 2000).

74 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982).

75 See *infra* Part III.B.2 (discussing federal corporations).

are considered “persons” for purposes of environmental citizen suits, and may initiate citizen suits in court.<sup>76</sup> Corporations must, however, establish the Article III standing requirements vis-à-vis themselves as entities.<sup>77</sup>

Although the doctrine of standing remains controversial,<sup>78</sup> it is fundamental to the judiciary’s view of its proper role in the constitutional system of governance. In the context of environmental statutes, where statutes protect environmental resources, standing requirements force plaintiffs to allege injury to themselves in addition to violations of the underlying statutes.<sup>79</sup> The resulting divergence of the injuries required to establish standing and the harms which environmental statutes seek to prevent is discussed in the following section, using standing decisions arising under the Endangered Species Act to highlight the disconnect.

## II. ENDANGERED SPECIES ACT: PURPOSE, STRUCTURE, AND STANDING

The Endangered Species Act (ESA) is representative of the statutes which constitute American environmental law. Passed to protect “charismatic megafauna representative of our national heritage,”<sup>80</sup> the ESA embodies a strong policy of federal protection for all species threatened with extinction. The ESA contains a citizen suit provision, under which “any person” can bring suit in court to enforce its substantive protections.<sup>81</sup> Given the ESA’s broad protection of endangered species, coupled with the citizen suit as an enforcement mechanism, it is not surprising that standing under the ESA has been thoroughly litigated. An analysis of the ESA and citizen suits brought to enforce its provisions illustrates the disconnect between the purpose of the statute and the injuries-in-fact required to establish Article III standing.

Subpart A of this Part analyzes the purpose of the ESA. Subpart B discusses standing disputes under the ESA, giving concrete examples of the disconnect between cognizable injury-in-fact and the substantive protections of the statute. Subpart C discusses the harmful effects of the disconnect on plaintiffs, Congress, and the environment.

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76 See, e.g., *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177 (9th Cir. 2004).

77 See *Havens Realty Corp.*, 455 U.S. at 377.

78 See *supra* note 8 and accompanying text.

79 See *infra* Part II.B.

80 Shannon Petersen, Note, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 467 (1999).

81 16 U.S.C. § 1540(g)(1) (2006).

### A. *Purpose of the Endangered Species Act*

The stated purpose of the ESA is to provide a means “whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such . . . species.”<sup>82</sup> All federal departments and agencies are required to “utilize their authorities in furtherance of” protecting endangered and threatened species.<sup>83</sup> To this end, federal agencies are subject to numerous procedural requirements, including mandatory consultation with the Secretary of the Interior to ensure agency actions do not jeopardize a species,<sup>84</sup> completion of biological assessments to determine whether an endangered or threatened species is present in an area where construction is contemplated,<sup>85</sup> and a prohibition on any “irreversible or irretrievable commitment of resources” to projects which may jeopardize a threatened or endangered species.<sup>86</sup> The ESA also operates on private individuals and entities, prohibiting “any person” from importing, exporting, transporting, or “taking” an endangered or threatened species.<sup>87</sup> Violations of the ESA may result in civil or criminal penalties.<sup>88</sup>

Courts have determined that the ESA embodies the “plain intent of Congress . . . to halt and reverse the trend toward species extinction, whatever the cost.”<sup>89</sup> Indeed, in *Tennessee Valley Authority v. Hill*,<sup>90</sup> the Supreme Court found that Congress spoke “in the plainest of words, making it abundantly clear that the balance [of equities] has been struck in favor of affording endangered species the highest of priorities.”<sup>91</sup> Accordingly, any agency action that jeopardizes an endangered or threatened species may be enjoined, even at the cost of tens of millions of taxpayer dollars.<sup>92</sup> Additionally, courts have found it “obvious . . . from the scheme of the statute” that the statutory protections of the ESA extend to endangered species themselves,

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82 *Id.* § 1531(b).

83 *Id.* § 1531(c)(1).

84 *Id.* § 1536(a)(2).

85 *Id.* § 1536(c).

86 *Id.* § 1536(d).

87 *Id.* § 1538.

88 *Id.* § 1540.

89 *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

90 437 U.S. 153.

91 *Id.* at 194.

92 *See, e.g., id.* at 172–73 (enjoining the completion of a dam over part of the Little Tennessee River at an expense of over \$100 million, even though the dam was nearly completed).

and not to human persons.<sup>93</sup> Accordingly, commentators have classified the ESA as a codification of “environmental ethics,”<sup>94</sup> and courts have judged it to be the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>95</sup> Although the ESA extends protection to endangered species, only human persons who suffer personal injury have standing to enforce its protections via citizen suit.<sup>96</sup> Therefore, some harm outside the purpose of the statute must occur to permit enforcement in Article III courts.

### B. *Standing under the ESA*

Standing under the ESA has been heavily litigated, and the ESA has given rise to several of the seminal modern standing cases.<sup>97</sup> This is hardly surprising given the ESA’s protection of species and the judiciary’s focus on injury to persons. Standing disputes under the ESA are perfect examples of the disconnect between Congressional intent and the Article III injury-in-fact requirement. The following sections analyze standing under the ESA, beginning with the statute’s citizen suit provision. Section I.B.2 provides several examples of injuries which failed to convey standing, and section I.B.3 analyzes several cases in which the plaintiffs did manage to establish the requisite injury-in-fact.

#### 1. Citizen Suit Provision

“Any person” may bring suit to enforce the provisions of the ESA.<sup>98</sup> A “person” is defined as, *inter alia*, “an individual, corporation, partnership, trust, association, or any other private entity.”<sup>99</sup> This provision “eliminates any prudential standing requirements.”<sup>100</sup> However, to bring a citizen suit, plaintiffs must satisfy Article III’s

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93 *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177 (9th Cir. 2004).

94 RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE* 175 (1989).

95 *Tenn. Valley Auth.*, 437 U.S. at 180.

96 *See Cetacean Cmty.*, 386 F.3d at 1177–78; *see also infra* Part II.B.2 (discussing injuries insufficient to grant standing).

97 *See Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

98 16 U.S.C. § 1540(g) (2006).

99 *Id.* § 1532(13).

100 *Am. Soc’y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 336 (D.C. Cir. 2003).

“irreducible constitutional minimum” requirements.<sup>101</sup> It is here that the disconnect between the injury-in-fact requirement and congressional purpose appears: in order to enforce the ESA’s protections, a potential plaintiff must be able to show *both* that there has been a violation of the statute *and* that the violation caused him a judicially cognizable injury. Although the ESA protects endangered species, only injury to human persons is sufficient to establish standing. Thus, the harm which the ESA seeks to prevent is not itself sufficient to convey standing. Rather, some incidental injury to a human person must occur to enable enforcement via citizen suit.<sup>102</sup> When such incidental injury does occur, plaintiffs must posture their citizen suit in terms of personal injury even when the lawsuit is motivated by a moral or ethical concern for endangered species or the environment itself.<sup>103</sup> Several examples of asserted injuries-in-fact highlight this incongruity.<sup>104</sup>

## 2. Injuries Insufficient to Grant Standing

In *Hawaii County Green Party v. Clinton*,<sup>105</sup> the plaintiffs asserted, inter alia, that the Navy violated the ESA by using sonar that injured endangered aquatic species.<sup>106</sup> The sonar was used in international waters.<sup>107</sup> The Green Party’s members used the waters surrounding Hawaii, and the marine animals inhabiting those waters, for “scientific study, whale watching, recreation, sport, food, and personal restora-

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101 See, e.g., *Lujan*, 504 U.S. at 560, 578 (1992) (holding that, because none of its members satisfied Article III standing requirements, Defenders of Wildlife could not bring suit under the citizen-suit provision of the ESA).

102 See *infra* Parts II.B.2–B.3.

103 See *Lujan*, 540 U.S. at 563 (“[The injury-in-fact test] ‘requires that the party seeking review be himself among the injured.’” (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972))); *Sierra Club*, 405 U.S. at 739 (“Mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved.” (internal quotation marks omitted)); Benzoni, *supra* note 19, at 348 n.2 (noting that a plaintiff suing under the Animal Welfare Act could not “argue that he suffered a moral or ethical injury by the [mistreatment of animals], since the courts have not recognized such an injury” as sufficient to grant standing).

104 These cases deal with only the injury-in-fact prong of the Article III standing requirements. Additionally, they are all examples of those seeking to compel regulation, as opposed to parties being regulated. As mentioned *supra* Part I.B.2, parties seeking to compel regulation have a more difficult time establishing standing. These cases, however, best illustrate the divergence of harms sought to be prevented by Congress with the injuries sufficient to convey standing.

105 124 F. Supp. 2d 1173 (D. Haw. 2000).

106 *Id.* at 1180.

107 *Id.* at 1202 & n.24.

tion and healing.”<sup>108</sup> The Green Party, however, failed to allege that those endangered species harmed by the Navy’s sonar would have entered the waters surrounding Hawaii.<sup>109</sup> Thus, the Green Party did not assert a judicially cognizable injury-in-fact, and the group lacked standing to sue.<sup>110</sup> The disconnect is obvious: harm to endangered species, which is the harm Congress sought to prevent in passing the ESA, did not create an incidental injury to a human person, so the Green Party could not enforce the substantive provisions of the ESA via citizen suit.

*Van Scoy v. Shell Oil Company*,<sup>111</sup> an unreported case from the Ninth Circuit, tells a similar tale. In that case, Van Scoy alleged that Shell discharged toxic chemicals into a river, harming several endangered bird and fish species in violation of the ESA.<sup>112</sup> He brought an action under the ESA’s citizen-suit provision, claiming that the discharge would result in decreased revenue for his fishing and wildlife viewing business.<sup>113</sup> Van Scoy, however, did not own a boat from which to operate such a business, nor did he have plans to obtain one.<sup>114</sup> Further, the evidence showed that he simply “was not really at all interested in [observing the endangered birds and fishes].”<sup>115</sup> Therefore, Van Scoy suffered no personal injury from the alleged violation, and his case was dismissed for lack of standing.<sup>116</sup> Again, the disconnect is evident: the harm which the plaintiff sought to enjoin—harm to endangered species resulting from discharge of toxic chemicals—is a harm Congress sought to prevent in passing the ESA. However, the injury to the plaintiff—lost revenue for a nonexistent fishing and wildlife viewing business—did not grant him standing to proceed in an Article III court, and thus he could not bring a citizen suit to enforce the ESA’s statutory protections.

### 3. Injuries Sufficient to Grant Standing

Cases in which plaintiffs did establish standing also illuminate the disconnect between the courts’ injury-in-fact analysis and the underlying substance of a claim. These cases demonstrate the manner in which plaintiffs must couch their claims to exhibit proper injuries-in-

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108 *Id.*

109 *Id.*

110 *Id.* at 1203.

111 No. 95-15961, 1996 WL 563449 (9th Cir. Oct. 2, 1996).

112 *See id.* at \*1.

113 *Id.*

114 *Id.*

115 *Id.* at \*2.

116 *Id.*



fact, and how far a court's standing analysis may range from the purpose of the statute.

In *National Audubon Society, Inc. v. Davis*,<sup>117</sup> a case that “pit[ted] bird-lovers, seeking to protect endangered and threatened species, against fox-lovers, seeking to protect predators from inhumane traps,” the plaintiffs challenged a California law which banned the use of leg traps in California.<sup>118</sup> They alleged that banning leg traps, which were used to control foxes that preyed on endangered raptors, would result in an increased number of predators and a corresponding increase in deaths of raptors, all in violation of the ESA.<sup>119</sup> The Audubon Society asserted that the increase in mortality would injure them by decreasing the opportunity to engage in “bird and wildlife observation, nature photography, aesthetic enjoyment, and other scientific, educational, and recreational activities.”<sup>120</sup> The Ninth Circuit held that this injury was sufficient to grant Article III standing.<sup>121</sup> Thus, the disconnect appears again: a ban on leg traps that would lead to an increase in predation of endangered species would harm an endangered species and thus was prohibited by the ESA. However, the incidental injury which permitted the Audubon Society to enforce the ESA in court, and enjoin the harm prohibited by the statute, was a decreased chance to observe the endangered birds and other wildlife.<sup>122</sup>

In *American Society for the Prevention of Cruelty to Animals v. Ringling Brothers & Barnum & Bailey Circus*,<sup>123</sup> the plaintiff claimed that Ringling Brothers, who use endangered Asian elephants in their circus performances, abused the elephants in violation of the ESA.<sup>124</sup> Thomas Rider, a member of the Society, had been an elephant handler for Ringling Brothers and claimed that he could tell when an elephant had been abused by observing its behavior.<sup>125</sup> Rider asserted that he would like to view the elephants, but was prevented from doing so by the pain of observing the elephants' tell-tale behavior.<sup>126</sup> This, combined with a demonstrated desire and ability to view the elephants once the abuse had ceased, prompted the D.C. Circuit to find

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117 307 F.3d 835 (9th Cir. 2002).

118 *Id.* at 842–43 (citing CAL. FISH & GAME CODE § 3003.1–.2 (West 1998 & Supp. 2001)).

119 *Id.* at 845. The Audubon Society claimed that because of this conflict the ESA preempted California law. *Id.*

120 *Id.* at 844–45.

121 *Id.* at 849.

122 *Id.*

123 317 F.3d 334 (D.C. Cir. 2003).

124 *Id.* at 335.

125 *Id.*

126 *Id.*

Rider's injury "within decisions of . . . the Supreme Court recognizing that harm to one's aesthetic interests in viewing animals may be a sufficient injury in fact."<sup>127</sup> Thus, the alleged violation of the ESA, mistreatment of an endangered species, could be enjoined by Article III courts. Rider was granted standing by way of the incidental "aesthetic and emotional injury"<sup>128</sup> stemming from his familiarity with elephant behavior.

### C. *Anomaly and Effects*

This collection of cases exposes the disconnect between the purpose of the ESA and the doctrine of standing. In each of the cases, the injury-in-fact required to convey standing was separate and distinct from the harm which threatened the species. Instead, the injury-in-fact was two steps removed from the protections afforded by the statute: the defendant violated the statute, which harmed or threatened to harm an endangered species, which resulted in an incidental injury to the plaintiff.<sup>129</sup> This disconnect has two major effects: (1) it prevents enforcement of violations whose effects are felt solely by the environment, without incidental injury to third parties; and (2) it forces plaintiffs to present their claims in a self-centered manner, disguising the ethical motives behind their claims and losing the rhetorical power of advocating for the environment itself. These outcomes negatively affect all those involved in environmental legislation. They are harmful to Congress, whose attempt to protect the environment may be thwarted; harmful to the plaintiffs, who are prevented from airing their ethical concerns about the environment; and harmful to the environment, which may be destroyed due the inability of concerned citizens to assert a cognizable injury-in-fact.

In the first instance, violations of a statute which are sufficiently isolated so as to destroy an environmental resource without causing injury to persons cannot be enjoined by citizen suit. For example, one can imagine Ringling Brothers abusing endangered elephants without

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127 *Id.* at 336.

128 *Id.* at 335 (internal quotations omitted).

129 Notably, there does *not* necessarily have to be harm to the environment. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the majority found that the plaintiff had standing absent harm to the environment. 528 U.S. 167, 181 (2000) ("The relevant showing for Article III standing . . . is not injury to the environment but injury to the plaintiff."). In dissent, Justice Scalia, joined by Justice Thomas, stated that "[t]ypically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him." *Id.* at 199 (Scalia, J., dissenting).

any person being injured. Likewise, statutory violations which occur on large tracts of private land, access to which is limited to persons complicit with the damage, could lead to environmental destruction without fear of citizen suits. Although enforcement actions could still be brought by the EPA, this defeats the purpose of the citizen-suit provision, which was designed precisely to prevent reliance on agency enforcement.<sup>130</sup> In these instances, if agency enforcement were foreclosed through “agency capture,” lack of funding, or simply a dearth of political will, a protected environmental resource may be destroyed with impunity, no matter how stringent the statutory protection.<sup>131</sup>

The second instance illustrates perhaps the greatest effect standing requirements have on environmental plaintiffs: they are forced to couch their claims in terms of self-interest, as opposed to an ethical, moral, or public interest in the environment itself. Thus, plaintiffs appear to value the environment only insofar as its destruction affects them.<sup>132</sup> For example, in the *Ringling Brothers* case, the American Society for the Prevention of Animals was forced to base its claim on the desire of Thomas Rider to view elephants in the circus, rather than an ethical problem with the abuse itself.<sup>133</sup> As pointed out by Professor Benzoni, this shift in terms

can erode the very values that bring us to feel an obligation to ecosystems and other life. Even when one’s concern with injury to other life is ethical, to be legally cognizable it must be put in terms of human injury, such as a recreational injury or an aesthetic injury,

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130 See Cross, *supra* note 3, at 55.

131 The problems of agency capture, underfunding, and lack of political will are cited by commentators as the cause of agency underenforcement. See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1624 (1995) (discussing agency capture); Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 126–27 (2007) (pointing to the ineffective enforcement policies, agency capture, accountability failures, and inadequate funding); Sarah Wood Borak, Comment, *The Legacy of “Deep Throat”: The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No FEAR Act of 2002*, 59 U. MIAMI L. REV. 617, 625–26 (2005) (discussing agency capture).

132 See Benzoni, *supra* note 19, at 350–51. This perception may spill over to affect a court’s balancing of equities in the context of preliminary injunctions. For example, in *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008), the Supreme Court weighed the interests of the Navy against the *recreational* interests of the plaintiffs, instead of the interests of the public in the whales or other endangered animals being injured. See *id.* at 377.

133 See *Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 336 (D.C. Cir. 2003).

which fundamentally distorts the ethical dimension of the experienced reality.<sup>134</sup>

This harmful situation stems from Congress' choice of enforcement mechanisms. In choosing to protect the environment itself, while placing enforcement power in the hand of individual citizens, Congress has decided to protect a generalized interest in nonhuman resources through an action which requires a particular, concrete harm to a person or group of persons.<sup>135</sup> In order to remedy this disconnect, while respecting Article III courts and their asserted role in the constitutional system, Congress could either (1) remove the standing inquiry completely, by providing an Article I tribunal,<sup>136</sup> or (2) make citizen suits more like traditional "private rights" disputes by granting environmental resources the power to sue on their own behalf.<sup>137</sup>

### III. RESOLVING THE DISCONNECT: TWO POSSIBILITIES

Although Congress intended to enable "any person" to bring citizen suits to enforce environmental statutes, only those plaintiffs who suffer cognizable injuries-in-fact satisfy Article III standing requirements. Thus, some plaintiffs are barred from court, despite the fact that a violation of an environmental statute resulted in harm to the

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134 Benzoni, *supra* note 19, at 351.

135 A plaintiff does not necessarily have to be a human person; a corporation may bring suit under the ESA. See *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177 (9th Cir. 2004). However, an association of nonhumans cannot bring a citizen suit under the ESA. *Id.* at 1179.

136 Adjudication of citizen suits in Article I tribunals has been discussed by various authors. For terrific overviews of the topic of Article I tribunals as a whole, see Nelson, *supra* note 17; James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004). For an approach tailored to solving standing problems in the context of citizen suits, see David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301 (2007), and for a discussion of their possible use in environmental litigation, see Timothy C. Hodits, Note, *The Fatal Flaw of Standing: A Proposal for an Article I Tribunal for Environmental Claims*, 84 WASH. U. L. REV. 1907 (2006).

137 Granting standing to animals has been advocated in several articles. See, e.g., Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1359 (2000). In the context of the ESA, see Burke, *supra* note 9, at 655–65. None of these articles, however, discuss the disconnect exhibited in this Note, and do not contain a discussion of the "private" versus "public" rights adjudication. Katherine Burke's comment does contain a robust discussion of the procedures by which attorneys could represent nonhumans via Federal Rule of Civil Procedure 17(c), *id.* at 652–55, and Cass Sunstein's article covers a broad range of animal-welfare statutes, including the ESA. See Sunstein, *supra*, at 1342–58.

environment.<sup>138</sup> Even when a plaintiff can satisfy the Article III injury-in-fact requirement, he is still forced to couch his claim in terms of personal interest, which lacks the rhetorical power of advocating for the environment itself.<sup>139</sup> Thus, the divergence of the Article III injury-in-fact requirement and congressional purpose in environmental legislation causes substantial harm. In order to remedy this problem, without requiring the courts to re-think the doctrine of standing, Congress should take action and heal this divergence.

As expressed in the doctrine of standing, courts view their primary role as adjudicating disputes between individuals, or “private rights disputes.”<sup>140</sup> In contrast, Congress attempted to vest ordinary citizens with the power to enforce general “compliance with the law[,]” a role which is traditionally vested in the political branches.<sup>141</sup> Further, Congress extended protection to environmental resources, while only granting standing to humans and groups of humans.<sup>142</sup> Accordingly, Congress could repair the divergence in one of two ways: (1) provide a public rights forum by creating an Article I tribunal to adjudicate environmental citizen suits, thus relieving plaintiffs of the requirement to assert personal harm; or (2) convey standing to environmental resources, so that they may bring citizen suits alleging damage to themselves, thus making the proceeding mirror traditional “private rights” disputes. Although Congress could permissibly create an Article I tribunal to adjudicate environmental citizen suits, there are poignant policy objections to its creation.<sup>143</sup> Notably, these objections center around the independence of Article I tribunals, and are substantially similar to the concerns Congress sought to solve by creating citizen suits. Therefore, an Article I tribunal is not the best manner in which to heal the disconnect highlighted in this Note. Rather, Congress should grant environmental resources the limited right to bring citizen suits, repairing the disconnect while maintaining enforcement power outside the political branches.

Subpart A discusses the possibility of creating an Article I tribunal for environmental citizen suits. Section A.1 lays out permissible uses of Article I tribunals, and suggests that an environmental tribunal would be constitutional. Section A.2 discusses the strong objections to the creation of an environmental tribunal, and section A.3 concludes that

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138 See *supra* Part II.B.2.

139 See *supra* notes 132–34 and accompanying text.

140 See *supra* note 15 and accompanying text.

141 See Nelson, *supra* note 16, at 566.

142 See *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1178–79 (9th Cir. 2004).

143 See *infra* Part III.A.3.

these objections undermine the entire purpose of creating citizen suits, and accordingly rejects the creation of an Article I tribunal.

Subpart B of this Part advances the possibility of Congress granting environmental resources standing to sue. Section B.1 notes the considerable support in case law for the proposition, while section B.2 provides a brief overview of federal corporations, a helpful paradigm for granting non-humans the right to sue. Section B.3 details the specific proposal, including some suggested statutory language; section B.4 notes some possible variations on the proposal; and section B.5 addresses potential objections to the proposal.

#### A. *Article I Tribunal for Environmental Citizen Suits*

In order to foster public involvement in enforcing environmental legislation, while respecting the role of Article III courts as articulated in the doctrine of standing, Congress could create an Article I tribunal for adjudication of environmental citizen suits.<sup>144</sup> In an Article I tribunal, plaintiffs simply would not need to establish standing, and therefore would have no need to assert injury to themselves. Thus, plaintiffs could seek to prevent or remedy harms to the environment itself, which comports with the congressional purpose of environmental legislation. Notably, the Article I tribunal would be particularly appropriate for those plaintiffs disputing “the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*”<sup>145</sup> for whom standing in Article III courts is substantially more difficult to establish.<sup>146</sup> Shifting these types of disputes to an Article I tribunal would be constitutional, as they fit tidily within a well established use of Article I tribunals.<sup>147</sup> Disputes between private parties, where the plaintiff is either a regulated party or is able to assert a cognizable injury-in-fact, do not fit so cleanly within the historical uses of Article I tribunals. Jurisdiction over these disputes, however, would likely be constitutional, given the Supreme Court’s functional approach in determining the permissible jurisdiction of Article I tribunals.

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144 I am certainly not the first to come up with this idea. See, e.g., James Dumont, *Beyond Standing: Proposals for Congressional Response to Supreme Court “Standing” Decisions*, 13 VT. L. REV. 675, 684–89 (1989); Krinsky, *supra* note 136; Hodits, *supra* note 136, at 1936–40.

145 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

146 *Id.*

147 See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (establishing “public-rights” adjudications as a historical example of permissible Article I tribunals); Krinsky, *supra* note 136, at 323–24 (asserting that “citizen suits . . . fall within the rubric of ‘public rights’”); Hodits, *supra* note 136, at 1937 (arguing that environmental claims fit the definition of public rights adjudications).

## 1. Permissible Uses of Article I Tribunals

The extent to which Congress may vest jurisdiction in Article I tribunals is not entirely clear. Indeed, case law involving Article I tribunals is “as troubled, arcane, confused and confusing as could be imagined.”<sup>148</sup> However, the Supreme Court has had occasion to discuss the outer bounds of permissible jurisdiction, which roughly correspond with the historical (although vague) distinction between public and private rights.<sup>149</sup> Generally, Article III courts are required to adjudicate disputes involving “core ‘private rights,’” such as the protection of person and property while Article I tribunals may exercise jurisdiction over rights “belonging to the body politic.”<sup>150</sup> Although the public-versus-private rights distinction proves useful in understanding generally what types of disputes may be adjudicated in the political branches, recent decisions of the Supreme Court establish the tests to determine the permissible jurisdiction of Article I tribunals.

The Court has rejected “bright-line tests” in determining whether a particular dispute must be adjudicated in Article III courts. However, Supreme Court precedent provides two manners in which an Article I tribunal could pass constitutional muster: (1) if the tribunal adjudicates “public rights” cases, which are deemed a “historical use” of Article I tribunals in the *Northern Pipeline* case,<sup>151</sup> or (2) if the tribunal’s jurisdiction passes the functional test handed down in *Commodity Futures Trading Commission v. Schor*.<sup>152</sup> Interestingly, these two tests correspond to the general configurations of environmental citizen suits: private plaintiffs suing government officials, and private plain-

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148 Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 239 (1990).

149 See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986) (arguing that a non-Article III tribunal’s jurisdiction must “be assessed by reference to the purposes underlying the requirements of Article III”); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) (describing the recognition of non-Article III tribunals’ decisionmaking authority); *N. Pipeline*, 458 U.S. at 67–70 (plurality opinion) (discussing the historical development of the public-rights doctrine); see also Nelson, *supra* note 16, at 594–624 (discussing these bounds).

150 Nelson, *supra* note 16, at 562.

151 See *N. Pipeline*, 458 U.S. at 63–64, 69 (plurality opinion).

152 See 478 U.S. 833, 851 (1986). The *Schor* test could be seen as completely replacing the *Northern Pipeline* “historical exceptions” analysis, and probably does. However, the narrowness of *Northern Pipeline*’s exceptions, and the fact that the Court in *Thomas* and *Schor* permitted use of Article I tribunals that were broader than those historical exceptions, suggests that if a tribunal fits into the *Northern Pipeline* definition, it will invariably pass the *Schor* factor test.

tiffs suing another private party.<sup>153</sup> When a private plaintiff sues a government official for allegedly failing to carry out his or her statutory duty, the plaintiff is asserting a right to “general compliance with regulatory law,”<sup>154</sup> which fits cleanly with *Northern Pipeline’s* definition of a public rights dispute.<sup>155</sup> When a plaintiff sues a private defendant for violation of an environmental statute, the suit does not necessarily fit within this formalistic definition. However, this type of dispute would likely pass the functional test handed down in *Schor*. These two tests, and their application to an Article I tribunal for environmental citizen suits, are discussed in turn below.

a. “Public-Rights” Cases

In *Northern Pipeline*, the Supreme Court laid out several “narrow situations” in which jurisdiction may be vested in Article I tribunals.<sup>156</sup> One such situation is for the adjudication of “public-rights” disputes.<sup>157</sup> The doctrine of public rights, according to the plurality, extends “only to matters arising ‘between the Government and persons subject to its authority in connection with the performance of [their legislative or executive duties],’” and only where the matter could have been determined “exclusively by those departments.”<sup>158</sup> These matters are distinguished from disputes concerning “‘the liability of one individual to another,’” which “lie at the core of the historically recognized judicial power” and may not be delegated to non-Article III tribunals.<sup>159</sup> Obviously, a plurality opinion does not form binding precedent. However, the other opinions in *Northern Pipeline* deemed the plurality’s view too restrictive.<sup>160</sup> Therefore, although the “narrow exceptions” do not encompass the universe of permissible jurisdiction for an Article I tribunal, it is safe to say there would be no constitutional difficulty in vesting jurisdiction over “public rights” cases in an Article I tribunal.

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153 See Cross, *supra* note 3, at 55.

154 Woolhandler & Nelson, *supra* note 15, at 693.

155 See *N. Pipeline*, 458 U.S. at 69 (plurality opinion) (“[A] matter of public rights must at a minimum arise ‘between the government and others.’” (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929))).

156 See *id.*, 458 U.S. at 64–67.

157 For a more detailed account of the doctrine, see Nelson, *supra* note 16, at 563–64.

158 *N. Pipeline*, 458 U.S. at 67–68 (plurality opinion) (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

159 See *id.* at 69–70 (quoting *Crowell*, 285 U.S. at 51).

160 See *id.* at 89–92 (Rehnquist, J., concurring); *id.* at 92 (Burger, C.J., dissenting); *id.* at 92–118 (White, J., dissenting).



When a private plaintiff sues an executive official alleging breach of an environmental statute, as seen in *Lujan* or *Tennessee Valley Authority*, the suit clearly falls within the public rights doctrine. In *Lujan*, for example, the plaintiff asserted that the Secretary of the Interior did not comply with his statutory duty to consult with the Fish and Wildlife Service regarding a government-funded project that may harm an endangered species.<sup>161</sup> Thus, the suit was against Lujan, a person “‘subject to [the Government’s] authority’” in performance of his official duties.<sup>162</sup> Because Lujan was statutorily obligated to carry out the consultation, the suit was over a matter which “could have been determined exclusively by [his] department[ ].”<sup>163</sup> Therefore, the suit in *Lujan* fits within the definition of a public rights dispute, which Article I tribunals are permitted to adjudicate. Notably, this pattern of citizen suit, where a plaintiff alleges unlawful failure to regulate someone else, are those in which standing is “‘substantially more difficult’ to establish.”<sup>164</sup> Ultimately, an Article I tribunal would be particularly helpful in this context.

b. *Schor* Factors

The Supreme Court has rejected “absolute construction[s] of Article III,” and has not viewed the “historical exceptions” enumerated in *Northern Pipeline* as capturing the universe of permissible jurisdiction for Article I tribunals.<sup>165</sup> Rather, whether an Article I tribunal may adjudicate a particular dispute is determined by examining “the purposes underlying the requirements of Article III,”<sup>166</sup> which demands protection of “the role of the independent judiciary within the constitutional scheme of tripartite government.”<sup>167</sup> Thus, Congress may not remove jurisdiction from Article III when doing so threatens the “institutional integrity of the Judicial Branch.”<sup>168</sup> A four

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

162 *N. Pipeline*, 458 U.S. at 68 (plurality opinion) (quoting *Crowell*, 285 U.S. at 50).

163 *Id.*

164 *Lujan*, 504 U.S. at 562 (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

165 *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985).

166 *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986).

167 *Thomas*, 473 U.S. at 583. The Court is also concerned with “safeguard[ing] litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’” *Schor*, 478 U.S. at 848 (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)). This concern lies primarily with adjudication of personal interests, *see id.*, and is therefore relevant to this discussion only to the extent that the proposed tribunal would exercise jurisdiction over claims affecting such rights.

168 *Schor*, 478 U.S. at 851.

factor test, laid out in *Commodity Futures Trading Commission v. Schor*, determines when the integrity of the judicial branch is threatened. The factors are: (1) “the extent to which ‘the essential attributes of judicial power are reserved to Article III courts;”<sup>169</sup> (2) “the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts;” (3) “the origins and importance of the rights to be adjudicated;” and (4) “the concerns that drove Congress to depart from the requirements of Article III.”<sup>170</sup>

Disputes between private individuals, brought under citizen-suit provisions of environmental statutes, would likely pass *Schor*’s second factor. As exhibited in this Note,<sup>171</sup> disagreements about standing are, in essence, disputes about whether Article III courts can, or should, exercise jurisdiction over citizen suits between private parties.<sup>172</sup> Some Justices see no problem in exercising jurisdiction over citizen suits, while others would presumably be more than willing to see jurisdiction over citizen suits vested outside of Article III.<sup>173</sup> However, even those Justices willing to exercise jurisdiction over citizen suits would not consider them to lie within the “range of jurisdiction and powers normally vested only in Article III courts.”<sup>174</sup> The fact that citizen suits were not prevalent until the 1970s,<sup>175</sup> combined with the apparent willingness to respect congressional intent, demonstrates that there would probably be no constitutional objection to an environmental tribunal on the basis of *Schor*’s second factor.

Additionally, it could be (and is) argued that the only reason environmental plaintiffs phrase their lawsuits in terms of private rights is precisely *because* of standing requirements, with which the environ-

169 *Id.* (internal quotation marks omitted) This factor examines the “oversight” of an Article III court. Obviously, this factor depends on the precise details of the proposed tribunal. Because the proposal for an Article I tribunal is rejected, *see supra* Part II.A.3, *Schor*’s first factor is not analyzed in this Note.

170 *Schor*, 478 U.S. at 851.

171 *See supra* Part II.B.

172 This debate is seen in the majority opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–62 (1992), as well as in Justice Scalia’s dissent in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 198–215 (2000) (Scalia, J., dissenting). To be sure, some Justices do not seem to have any hesitation in exercising jurisdiction over citizen suits. However, this is *not* to say that these suits are deemed to be at the core of the judicial function.

173 *Compare Laidlaw*, 528 U.S. at 180–88 (asserting a broader view of standing in citizen suits), *with id.* at 198–215 (Scalia, J., dissenting) (applying a strict view of standing to citizen suits).

174 *Schor*, 478 U.S. at 851.

175 Citizen suits in environmental and other statutes were not prevalent until the 1970’s, although enforcement actions by citizens—actions *qui tam*—date to much earlier. *See* Sunstein, *supra* note 7, at 175–76.

mental tribunal would dispense.<sup>176</sup> In other words, once plaintiffs are not required to demonstrate a “particularized” injury to their personal interests, they would posture their complaint as genuine public rights disputes, thus shedding any resemblance to private rights. For example, in the *Ringling Brothers* case,<sup>177</sup> Thomas Rider would not have to seek redress of his inability to view the circus. Rather, the Society could simply assert their general interest in having Ringling Brothers follow the ESA, perhaps seeking an injunction to the abusive practice and punitive fines to be paid to the government.<sup>178</sup> Thus, it is likely that the suits over which the proposed tribunal would exercise jurisdiction would cease to mirror private rights disputes, again weighing in favor of its constitutionality according to *Schor*’s second factor.

The third factor of the *Schor* test considers the “origins and importance of the right.”<sup>179</sup> To the extent “rights” are created in environmental law, their origins are clearly in federal statutes, as opposed to being rooted in the common law or State legislation.<sup>180</sup> When plaintiffs sue for enforcement of environmental statutes, they do not claim that the alleged perpetrator is liable to *them*, or has violated *their* rights, so much as they claim that the alleged perpetrator should be enjoined from harming the *environment*.<sup>181</sup> Additionally, note that the plaintiffs in many environmental cases do *not* ask the court to redress

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176 See Benzoni, *supra* note 19, at 350–51 (noting that “[t]he current standing doctrine . . . forces environmentalists to couch their claims in terms of human self-interest,” although suits may be initiated because environmentalists “feel an obligation to ecosystems and other life”).

177 See *supra* notes 123–28 and accompanying text.

178 In *Laidlaw*, the Supreme Court held that punitive fines were a sufficient deterrent to redress the plaintiff’s injury. See *Laidlaw*, 528 U.S. at 192–93. This was the source of controversy. See *id.* at 202–10 (Scalia, J., dissenting). However, if this case were adjudicated in an Article I tribunal as a public rights case, then the “redressability” inquiry would be dispensed with, and there would be no controversy.

179 See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

180 For example, think about the Endangered Species Act. It does not so much create a right in a *particular party* to be free from another party’s “taking” of an endangered animal. Rather, it can either be seen as creating a right for *everyone* to be free from such taking, or as creating a right for *everyone* to accrue the benefits of bio diversity.

181 See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558–59 (1992) (seeking an injunction requiring the Secretary of the Interior to issue regulations requiring compliance with the ESA’s consultation provisions for U.S. agencies funding projects overseas); *Am Soc’y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 335–36 (D.C. Cir. 2003) (seeking an injunction against future violations of the ESA and for forfeiture of the endangered species); *Sw. Ctr. for Biological Diversity v. United States*, 82 F. Supp. 2d 1070, 1071 (D. Ariz. 2000) (seeking an order to enjoin the Forest Service from issuing a grazing permit until consultation requirements of the ESA are complied with).

the injury which grants them standing; rather, they pray that the activity which harms the *environment* be enjoined.<sup>182</sup> Therefore, the origins of rights created by environmental statutes, and their importance, weighs in favor of the constitutionality of an environmental tribunal.

*Schor's* final factor weighs "the concerns that drove Congress to depart from the requirements of Article III."<sup>183</sup> This factor is aimed at determining whether "Congress has . . . attempted to 'withdraw from judicial cognizance'" part of Article III courts' jurisdiction.<sup>184</sup> In this instance, the motivating factor behind creation of the environmental tribunal is to move an enforcement mechanism (the citizen suit), which the courts have found difficult to handle, into the legislative branch. In essence, Congress would be recognizing that Article III courts are not constitutionally permitted to adjudicate citizen suits to the fullest extent. In other words, Congress' motive would not be to strip Article III courts of jurisdiction, but rather to respect the judiciary's traditional role by providing a public rights forum for public rights disputes. Thus, it appears as though an Article I tribunal could exercise jurisdiction over citizen suits brought to enforce environmental statutes.<sup>185</sup> There are, however, serious and damaging policy arguments against creating such a tribunal. These arguments are addressed below.

## 2. Objections

The scope of permissible jurisdiction which may be vested in Article I tribunals is determined by a functional test, and is actually quite expansive. Thus, an Article I tribunal for adjudication of citizen suits would probably be constitutional. However, there are many strong policy arguments against the idea. Article I judges lack life tenure and salary protection, and are generally seen as less independent than their counterparts in Article III courts.<sup>186</sup> Additionally, there are serious critiques of the independence of Article I tribunals and other specialized courts.<sup>187</sup> The environmental tribunal, as a specialized Article I court, would be vulnerable to all of these criticisms.

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182 See sources cited *supra* note 129.

183 *Schor*, 478 U.S. at 851.

184 *Id.* at 854–55 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

185 See sources cited *supra* note 136.

186 See, e.g., Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can It Be Without Article III?*, 46 *MERCER L. REV.* 863, 865–68 (1995).

187 See RICHARD A. POSNER, *THE FEDERAL COURTS* 244–70 (1999).

Article I judges of the proposed environmental tribunal would lack the “bedrock” characteristics of Article III independence: life tenure and salary protection.<sup>188</sup> Thus, there would be strong disincentives for them to make politically unpopular decisions. Although there is evidence to suggest that life tenure does not result in considerable differences in decisionmaking,<sup>189</sup> and that some Article I judges are effectively insulated from direct coercion,<sup>190</sup> it is certainly true that Article I judges *appear* or *are regarded as* less than independent—and the “appearance of justice remains a critical factor” in the adjudicative process.<sup>191</sup> Because the arena of environmental law is such a politically charged field,<sup>192</sup> the perception of bias in an environmental tribunal would likely be much stronger than in, say, the United States Tax Court.<sup>193</sup> This perceived lack of independence would be a large hurdle to overcome, and the decisions of the tribunal would probably be heavily criticized on this basis, no matter whether the decision is perceived as unduly favoring environmental or business interests.

Apart from critiques surrounding the independence of the individual judges, Article I tribunals are perceived to be subject to systematic or institutional bias, be it through “agency capture” or political influence.<sup>194</sup> Although Article I courts are not standard agencies, they are still vulnerable to “agency capture,” which occurs when a regulating or enforcement agency develops “a policy bias in support of [the] . . . regulated [interest].”<sup>195</sup> An environmental tribunal would see many repeat players, most likely consisting of members of a partic-

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188 Bruce A. Carroll, *The Possible Impact of Article I Judges: Collective Analysis of Judicial Decision Making Between Article I and Article III Judges*, 15 TRINITY L. REV. 50, 50 (2008).

189 See generally *id.* (concluding that the decisions of magistrate judges, who do not have life tenure, do not differ significantly from their Article III colleagues).

190 See Hoffman & Cihlar, *supra* note 186, at 864 (noting that some administrative law judges and Article I judges are regarded as being “imbued with the essential elements of judicial independence”).

191 *Id.* at 867.

192 See POSNER, *supra* note 187, at 254 (describing the “fierce divisions in environmental law”).

193 See Hoffman & Cihlar, *supra* note 186, at 869–73 (putting forward the Tax Court as a model of a successful Article I court).

194 See, e.g., POSNER, *supra* note 187, at 254 (noting that “the officials who appoint judges [to specialized courts] will be better able to use the appointments process to shape the court”); Hodas, *supra* note 131, at 1624 (noting that Congress sought to avoid agency capture by preventing the regulated community from “us[ing] enforcement fora to debate, litigate or even raise economic efficiency issues that EPA resolved in its regulations”); Borak, *supra* note 131, at 625–26 (describing the problem of “agency capture”).

195 See Borak, *supra* note 131, at 625–26.

ular regulated industry. This regulated industry could organize itself in a cohesive manner, arguing before the tribunal in a coherent, coordinated, and organized fashion.<sup>196</sup> Over time, it is possible that this sustained, well-organized, and well-funded voice would sway the tribunal, leading to systematic bias in favor of the industry.<sup>197</sup> In other words, the tribunal could become a political forum in which the regulated community could “debate, litigate [and] . . . raise economic efficiency issues,” and possibly accept these arguments, even if Congress had previously made a determination of the proper balance between efficiency and environmental protection.<sup>198</sup> Notably, this capture could swing either way: if the business sector was more organized and consistent, it could persuade the tribunal to be biased in its favor; if, however, environmental groups were able to organize and strategically bring citizen suits, making the same arguments, the tribunal could be captured in their favor.

As a specialized court, the proposed environmental tribunal could be manipulated by political processes more easily than the generalist Article III judiciary.<sup>199</sup> As noted by Judge Posner, experts in a particular field such as environmental law are often divided into discrete “camps,” each of which represents the “divisions in ethical, political, and economic thought” of the field.<sup>200</sup> By ascertaining to which “camp” a potential nominee adheres, the body appointing judges to a tribunal can easily predict the outcomes of a nominee’s future decisions, thus increasing the ability to appoint judges to achieve particular policy outcomes.<sup>201</sup> Additionally, because the subject matter is limited, the decisions of a specialized court are easy to monitor, enabling Congress to “control or at least influence” the tribunal “through the appropriations process.”<sup>202</sup>

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196 See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 141–48 (1971) (describing how business interests can organize themselves to influence politics).

197 See Hodas, *supra* note 131, at 1624 n.37 (citing KEITH HAWKINS, *ENVIRONMENT AND ENFORCEMENT* 3 (1984)).

198 *Id.*; see also POSNER, *supra* note 187, at 255 (noting that the Commerce Court was abolished after three years of existence because “the court was thought to have been ‘captured’ by the railroads”). One could imagine, for example, the adjudication of *Tennessee Valley Authority v. Hill* had it been in an agency. See *supra* note 92. If an agency was repeatedly forced to enjoin multi-million dollar projects, and was constantly assailed by inefficiency arguments, perhaps the agency would eventually give in and thus underenforce the ESA.

199 See POSNER, *supra* note 187, at 251.

200 *Id.*

201 *Id.* at 254.

202 *Id.*

In addition to concerns about the independence of an environmental tribunal, there are doubts as to its ability to issue binding judgments,<sup>203</sup> the required scope of Article III review,<sup>204</sup> and other separation of powers concerns.<sup>205</sup> Further, the creation of a tribunal, most likely based in Washington, D.C., would lead to a geographical concentration of power and a corresponding decrease in its availability as a national forum.<sup>206</sup>

These objections to an Article I tribunal for adjudication of environmental citizen suits are strong, and probably valid. In fact, these concerns are similar to those which drove Congress to permit citizen suits in the first place.<sup>207</sup> Citizen suits were designed to take enforcement power out of the political branches, remedying the problem of underenforcement caused by agency capture, under funding, and general political pressure.<sup>208</sup> To insert these problems back into the mix, through the forum in which enforcement takes place, makes little sense.

### 3. Conclusion

An Article I tribunal to adjudicate citizen suits brought under environmental statutes would probably be constitutional, and would heal the disconnect between the Article III injury-in-fact requirement and congressional purpose in environmental legislation.<sup>209</sup> In such a tribunal, plaintiffs bringing citizen suits would not be required to assert a cognizable injury to themselves, and thus could couch their claims in terms of the harm to the environment. However, there would be serious concerns with the tribunal's independence, both as to individual judges and to the institution itself.<sup>210</sup> Additionally, the permissible scope of the tribunal's power is unclear. Most importantly, creation of an Article I tribunal seriously undermines the very purpose

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203 See Krinsky, *supra* note 136, at 306, 310.

204 *Id.* at 213–16.

205 See *id.* at 317–23.

206 See POSNER, *supra* note 187, at 258.

207 See CROSS, *supra* note 3, at 55–56; Klass, *supra* note 131, at 126–28.

208 See Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 872–73 (1989) (noting Congress' intent to use citizen suits as "an *alternative* to government enforcement when it is lax or stretched too thin"); Cross, *supra* note 3, at 56 (arguing that citizen suits "may replace deficient programs of administrative enforcement"); Klass, *supra* note 131, at 126–28 (explaining how patterns of administrative behavior led to the establishment of citizen suits).

209 See *supra* Part II.C for a discussion of this disconnect.

210 See *supra* Part III.A.2.

of citizen suits as an enforcement mechanism, which were designed to “replace deficient programs of administrative enforcement.”<sup>211</sup> Through an Article I tribunal, concerns about agency capture, bias, and general political pressures are reintroduced into the enforcement equation, undermining the ingenuity and effectiveness of citizen suits. Therefore, ultimately an Article I tribunal would not be the best manner in which to remedy the disconnect highlighted in this Note.

Fortunately, an Article I tribunal is not the only solution to the disconnect between the Article III injury-in-fact requirement and the purpose of environmental legislation. Granting standing to environmental resources would both heal the disconnect and maintain enforcement power outside of the political branches. This would maintain the logic behind citizen suits, while overcoming the standing hurdle thrown up by Article III courts. In subpart B I propose the idea of granting standing to environmental resources.

### B. *Standing for Environmental Resources*

The most effective way for Congress to enforce environmental protections, while preserving enforcement in Article III courts, is to grant protected resources the right to sue on their own behalf.<sup>212</sup> Thus, the standing inquiry would mirror that under normal, human-centric statutes: the plaintiff would have to show a violation of the statute which resulted in harm to *him* (or, in this case, *it*), causation between the defendant’s conduct and resultant injury, and that a favorable court decision would redress the injury.<sup>213</sup> Therefore, the

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211 See Cross, *supra* note 3, at 56.

212 See sources cited *supra* note 137 for other discussions of this same topic.

213 Some “traditional,” human-centric statutes, such as the Americans with Disabilities Act, may be enforced by citizen suits. See 42 U.S.C. §§ 12188(a)(1) (2006) (permitting “any person who is being subjected to discrimination on the basis of disability” to bring suit under the statute). There are certainly standing disputes under the ADA. See, e.g., *Disability Rights Wis., Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 801 (7th Cir. 2008) (denying standing to an organization where none of its members had been adversely affected by the allegedly illegal building of a school for disabled children); *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 548 F. Supp. 2d 723, 726 n.5 (D. Ariz. 2008) (discussing the plaintiff-intervenor’s lack of standing to challenge the conditions of a movie theatre they had not entered). These disputes center around whether the plaintiff received a cognizable injury-in-fact. *Disability Rights Wis.*, 522 F.3d at 801; *Harkins Amusement*, 548 F. Supp. 2d at 726 n.5. The relevant injury in these cases, however, is the injury which is prevented by the statute: discrimination. In other words, the standing inquiry merely determines whether the harm sought to be prevented by the statute occurred; the relevant question is whether a disabled person was actually discriminated against. In contrast, the standing inquiry in environmental legislation hinges upon whether the plaintiff has suffered an injury



type of harm which the statute seeks to prevent, injury to the environment, would be sufficient to grant standing to an entity with the power to sue. In this manner, the protections afforded by environmental statutes would no longer be in tension with the traditional role of the judiciary: the plaintiff would seek redress of an injury *to itself*, which occurred due to violation of a statute.

Empowering environmental resources to appear in court seems absurd at first blush; could a court announce the case of “Denizens of the Okefenokee Swamp v. John Doe”<sup>214</sup> with a straight face? Plus, how exactly would an environmental resource show up to argue its case? Our legal system, however, already has cognizance over claims made by nonhuman entities.<sup>215</sup> Most notable are claims involving corporations, associations, or even ships in the context of admiralty law.<sup>216</sup> In addition, persons who are unable to express themselves or otherwise appear in court, such as juveniles or incompetent adults, are not completely barred from the judicial system.<sup>217</sup> Rather, Federal Rule of Civil Procedure 17(c) creates a means by which disabled parties’ rights may be represented in court.<sup>218</sup> Therefore, the fact that environmental resources are not human and cannot actually appear in court does not form a *per se* bar from the legal system.

This subpart discusses the possibility of Congress granting standing to environmental resources, thus empowering them to bring citizen suits to enforce environmental laws. Section B.1 explores the courts’ apparent willingness to adjudicate disputes between environmental resources and persons. Section B.2 discusses the paradigm of federally chartered corporations, and notes how this familiar model provides valuable precedent for Congress creating legal entities to achieve particular policy goals. Section B.3 details the precise proposal, and section B.4 raises, and attempts to resolve, possible objections.

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separate and apart from those harms which the statutes seek to prevent. *See supra* Part II.B.

214 This is an entirely contrived name, although the Okefenokee Swamp is a National Wildlife Refuge in Southeast Georgia. *See* U.S. Fish & Wildlife Serv., Okefenokee National Wildlife Refuge, <http://www.fws.gov/okefenokee/> (last visited March 16, 2009).

215 *See* *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting) (“Inanimate objects are sometimes parties in litigation”).

216 *See id.* at 741–43; Sunstein, *supra* note 137, at 1360–61; Burke, *supra* note 9, at 649.

217 *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004).

218 *See* Burke, *supra* note 9, at 652 (citing and quoting FED. R. CIV. P. 17(c)).

## 1. Support in Case Law

The possibility of environmental resources having standing to sue has surprising support in case law.<sup>219</sup> Perhaps the strongest language in support of granting standing to environmental resources comes from Justice Douglas' dissent in *Sierra Club v. Morton*.<sup>220</sup> In that case, a majority of the Supreme Court affirmed a Ninth Circuit decision holding that the Sierra Club lacked standing to enjoin development of a ski resort in the Mineral King Valley of central California. The Sierra Club "failed to allege that it or its members would be affected . . . by the . . . development," and thus failed to establish an Article III injury-in-fact.<sup>221</sup> In dissent, Justice Douglas passionately argued that, just as other nonpersons such as corporations or ships can be parties to litigation,<sup>222</sup>

[s]o it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it.<sup>223</sup>

Due to the values an environmental resource could assert, if permitted to do so, Justice Douglas advocated a "simplified" rule of standing that "allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage."<sup>224</sup> This rule would result in "the conferral of standing upon environmental objects to sue for their own preservation."<sup>225</sup> In fact, Justice Douglas makes essentially the same observation as many con-

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219 Although there appears to be only one case *holding* that the objects of environmental regulation have standing to sue, see *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995) *abrogated in part by Cetacean Cmty. v. Bush*, 386 F.3d 1169, other courts have indicated, in dicta, either that such objects have standing under current environmental legislation, see *Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988), or that Congress could convey standing on such objects if they so desired, see *Cetacean Cmty.* 386 F.3d at 1176.

220 405 U.S. at 741 (1972).

221 *Id.* at 735.

222 *Id.* at 742 (Douglas, J., dissenting).

223 *Id.* at 743.

224 *Id.* at 741.

225 *Id.* at 742.

temporary environmental advocates: environmental resources, as such, have an ability to “speak for the ecological unit of life” in a manner beyond the ability of a human plaintiff.<sup>226</sup> Although Justice Douglas advocated a judicially created grant of standing, his reasoning certainly recognizes the power of Congress to convey standing to environmental resources.

Even without a statutory grant of standing or a Justice Douglas-like judicial rule, a substantial number of cases have proceeded with an environmental resource as the named plaintiff.<sup>227</sup> Although the resources are not the actual party at interest, but are rather designated the head plaintiff for ethical or strategic purposes,<sup>228</sup> these cases show that it would not be completely foreign for an environmental resource to bring suit on its own behalf. More on point, the Northern District of California held in *Marbled Murrelet v. Pacific Lumber Co.*<sup>229</sup> that the marbled murrelet, an endangered bird, had “standing to sue ‘in its own right’” under the ESA.<sup>230</sup> Along these lines, the Ninth Circuit has stated that the palila, a member of the endangered honeycreeper family, has the legal capacity to “wing[ ] its way into federal court as a plaintiff in its own right.”<sup>231</sup> This language has since been superseded by later cases, and dismissed as mere rhetorical flourish.<sup>232</sup> These cases do exhibit, however, that courts do not view nonhumans as absolutely barred from the courtroom. Rather, they

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226 *Id.* at 743. See *supra* notes 132–34 and accompanying text for a discussion of how environmental resources best represent the ethical values of environmental protection.

227 See, e.g., *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004); *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461 (3d Cir. 1997); *Palila v. Haw. Dep’t of Land & Natural Res.*, 852 F.2d 1106 (9th Cir. 1988); *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995) *abrogated in part by* *Cetacean Cmty. v. Bush*, 386 F.3d 1169; *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170 (M.D. Fla. 1995); *Hawaiian Crow (‘Alala) v. Lujan*, 906 F. Supp. 549 (D. Haw. 1991). However, when the standing of the species was challenged in *Hawaiian Crow*, the animal was removed as a plaintiff. See *Hawaiian Crow*, 906 F. Supp. at 551–52.

228 J.B. RUHL ET AL., *THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW* 896 (2008).

229 880 F. Supp. 1343.

230 *Id.* at 1346 (quoting *Marbled Murrelet v. Babbitt*, No. C-93-1400-FMS, slip op. at 9 n.4 (N.D. Cal. Sept. 1, 1993)) *abrogated in part by* *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004).

231 *Palila v. Haw. Dep’t of Land & Natural Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988), *abrogated in part by* *Cetacean Cmty.*, 386 F.3d 1169.

232 See *Cetacean Cmty.*, 386 F.3d at 1178 (holding that the Endangered Species Act does not grant endangered animals the right to sue on their own behalf); *Hawaiian Crow*, 906 F. Supp. at 552 n.2 (categorizing the quoted language in *Palila* as mere rhetorical flourish).

express a distinctive willingness to embrace environmental resources as plaintiffs.

Bolstering this point, recent cases have denied standing to environmental resources based solely on statutory interpretation. In *Cetacean Community v. Bush*, the Ninth Circuit held that although “it is obvious” that “animals are the protected [objects of the ESA],” Congress did not intend to grant endangered species standing to sue.<sup>233</sup> However, the court saw

no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.<sup>234</sup>

This apparent willingness to support a Congressional grant of standing is mirrored by a case arising under the Marine Mammal Protection Act, *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*.<sup>235</sup> In that case, the District of Massachusetts denied standing to Kama, a dolphin, stating that “[i]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.”<sup>236</sup>

From these cases, it is obvious that Congress has not granted environmental resources the capacity to sue. It is equally obvious that environmental resources are not barred from court solely because of their status as nonhumans; rather, they cannot sue because they lack the requisite statutory grant of standing.<sup>237</sup> Repeatedly, courts refer to other nonhuman persons which are granted legal rights.<sup>238</sup> Among these nonhuman entities are corporations. Below is a brief overview of federal corporations, followed by a discussion of how Congress can draw upon this paradigm to empower environmental resources to bring citizen suits under environmental statutes.

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233 *Cetacean Cmty.*, 386 F.3d at 1177–78.

234 *Id.* at 1176.

235 836 F. Supp. 45 (D. Mass. 1993).

236 *Id.* at 49.

237 *See Cetacean Cmty.*, 386 F.3d at 1177–78.

238 *See, e.g., id.* at 1178.

## 2. An Existing Paradigm: Federally Chartered Corporations

Since the early days of the Republic, Congress has created corporations as a means of obtaining various policy goals.<sup>239</sup> These corporations, created by federal charter, are vested with whatever powers Congress deems necessary to achieve their ends.<sup>240</sup> Generally, these powers include the power to sue and be sued in federal court.<sup>241</sup> The paradigm of federal corporations is instructive, as it reveals a well established history of creating nonhuman, legal “persons,” complete with the power to sue, to further particular policy goals. Additionally, federal corporations establish that certain entities may have statutory rights which are separate and distinct from the rights of its members.<sup>242</sup>

Congress has created federal corporations to pursue a wide range of policy goals, from building and managing dams on the Mississippi River to providing mentors to socially and economically challenged individuals.<sup>243</sup> To fulfill their designated purpose, each corporation is granted a detailed and unique set of purposes, powers, and restrictions.<sup>244</sup> Because there is no federal incorporation statute, each corporation is formed by a separate piece of legislation, in which Congress details the precise legal capacities of each.<sup>245</sup> Thus, Congress controls every legal capacity of a corporation and often explicitly prohibits corporations from engaging in certain activities.<sup>246</sup>

Two examples highlight the variety of purposes for which federal corporations are created, and the extent of congressional control over their precise legal capacities. The Tennessee Valley Authority (TVA) was created in 1933 for the purpose of improving navigation, fostering industrial development, and controlling the destructive flood waters

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239 See, e.g., *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 767 (1824) (“[Corporations] possess[] only those properties . . . as are supposed best calculated to effect the object for which it was created.” (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819))); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317–18 (1819) (describing the Bank of the United States and its powers).

240 See KEVIN R. KOSAR, CONG. RESEARCH SERV., CONGRESSIONAL OR FEDERAL CHARTERS 2 (2005), available at <http://www.fas.org/sgp/crs/misc/RS22230.pdf>.

241 See, e.g., *Osborn*, 22 U.S. (9 Wheat.) at 805.

242 See *infra* notes 255–59 and accompanying text.

243 See 16 U.S.C. § 831 (2006) (creating the Tennessee Valley Authority); 36 U.S.C. § 30101 (2006) (creating Big Brothers—Big Sisters of America).

244 See KOSAR, *supra* note 240, at 2.

245 See *id.* at 3.

246 See, e.g., 36 U.S.C. § 30107 (2006) (listing restrictions on the power of Big Brothers—Big Sisters).

of the Tennessee and Mississippi Rivers.<sup>247</sup> To achieve this end, the TVA is granted strikingly broad powers, including the power to exercise eminent domain, construct dams, assist in the relocation of populations disturbed by construction activities, and even conduct law enforcement duties.<sup>248</sup> The TVA is a “wholly owned government corporation,” and thus is legally considered an agent of the United States.<sup>249</sup>

Federal corporations may also be created in the private sector.<sup>250</sup> In contrast to the TVA’s broad, quasi-governmental purpose and powers, so-called Title 36 Corporations are created for “the promotion of patriotic, charitable, educational, and other eleemosynary activities.”<sup>251</sup> Big Brothers—Big Sisters of America, chartered in 1998 as a Title 36 Corporation, is created to “assist individuals throughout the United States in solving their social and economic problems and in their health and educational and character development.”<sup>252</sup> To this end, the corporation may sue and be sued, borrow money, make contracts, and acquire property.<sup>253</sup> Notably, the enabling legislation for Big Brothers—Big Sisters contains explicit restrictions on the organization’s power. The entity is *not* permitted to issue stock, contribute to candidates for public office, make loans, or distribute its income.<sup>254</sup> Thus, Big Brothers—Big Sisters is chartered for a relatively narrow purpose, and is vested with correspondingly narrow powers.

Like corporations created under state law, federally chartered corporations have a legal existence separate both from the body which created it and from its individual members.<sup>255</sup> Indeed, “incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.”<sup>256</sup> Accordingly, if permitted by the enabling statute, corporations may

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247 16 U.S.C. § 831 (2006).

248 *See id.*

249 31 U.S.C. § 9101(3)(N) (2006); KEVIN R. KOSAR, CONG. RESEARCH SERV., FEDERAL GOVERNMENT CORPORATIONS 5–6 (2009), *available at* [http://assets.opencrs.com/rpts/RL30365\\_20090107.pdf](http://assets.opencrs.com/rpts/RL30365_20090107.pdf).

250 *Id.* at 2–3 (discussing privately-owned, government-sponsored enterprises like Fannie Mae).

251 *See* RONALD C. MOE, CONG. RESEARCH SERV., CONGRESSIONALLY CHARTERED NONPROFIT ORGANIZATIONS (“TITLE 36 CORPORATIONS”) 1 (2004), *available at* <http://www.llsdc.org/attachments/wysiwyg/544/CRS-RL30340.pdf>

252 *See* 36 U.S.C. § 30102(1) (2006).

253 *See id.* § 30105.

254 *See id.* § 30107.

255 *See* KOSAR, *supra* note 249, at 6.

256 *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).

vindicate their rights in court.<sup>257</sup> The corporation need not allege injury to its individual members; rather, corporations are “entitled to sue on *their own* behalf for injuries *they* have sustained.”<sup>258</sup> Thus, despite the fact that corporations are non-human, “artificial being[s] . . . existing only in contemplation of law,” courts have cognizance over suits by, against, and between corporations, and the rights vindicated by a corporation may be separate and distinct from those adhering to its members.<sup>259</sup>

This brief overview of federally chartered corporations underscores Congress’ ability to create legal entities narrowly tailored to a particular policy goal. Historically, Congress has harnessed this power to pursue a variety of ends. Article III courts have cognizance over suits brought by these entities, regardless of the fact that they are “artificial,” as opposed to “natural,” persons.<sup>260</sup> Further, these entities have an existence separate and apart from that of their members, and a distinct set of obligations, powers, and privileges.<sup>261</sup> From the paradigm of federal corporations, it is neither a particularly large nor daring step for Congress to vest environmental resources with the right to sue, on their own behalf, for violations of environmental statutes.

### 3. Proposal

Drawing from the paradigm of federal corporations, Congress could empower groups of environmental resources to sue in federal court “on their own behalf.”<sup>262</sup> Granting full corporate charters to environmental resources, however, would be undesirable and unworkable; environmental resources obviously cannot engage in any sort of management activities, and the broad implied powers of normal cor-

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257 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Rights adhering in a corporation may be constitutional, as in *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); statutory, as in *Havens Realty Corp.*, 455 U.S. at 378–79; or contractual, as in *Railway Co. v. McCarthy*, 96 U.S. 258, 266–67 (1878). The preceding cases involve corporations created under state law. However, both state and federal corporations are legal entities apart from their members. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) (acknowledging the ability of the Bank of the United States to make contracts and sue on its own behalf).

258 *Havens Realty Corp.*, 455 U.S. at 379 n.19 (1982) (emphasis added).

259 *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

260 See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990) (“[T]he rule regarding the treatment of corporations as ‘citizens’ has become firmly established . . .”).

261 *Cedric Kushner Promotions*, 533 U.S. at 163.

262 *Havens Realty Corp.*, 455 U.S. at 379 n.19 (1982).

porations could raise myriad problems.<sup>263</sup> Therefore, Congress should not endow environmental resources with the separate legal existence of a corporation, but grant them only one power: the power to bring citizen suits under environmental statutes.

To solve the disconnect between the injury-in-fact required to convey constitutional standing and congressional intent in environmental statutes,<sup>264</sup> Congress should create groups of environmental resources, and endow these groups with the power to sue in federal court. This could be done in a fairly simple manner. First, Congress should amend the definition of “persons,” found in the citizen suit provisions of environmental statutes, to include “any group designated as such by the Secretary of the Interior under \_\_ U.S.C. \_\_.” This would constitute the requisite statutory grant of standing, and answer the judicial call for Congress to specifically state and give environmental resources the power to sue.<sup>265</sup>

Congress should then expand Title 16<sup>266</sup> of the U.S. Code and create a scheme by which to grant “citizen-suit charters” to groups of environmental resources. A “citizen-suit charter” would grant a separate legal identity to an environmental resource, and empower that resource to bring citizen suits under environmental statutes. The precise text could be as follows:

(a) The Secretary of the Interior shall grant a “citizen-suit charter” to environmental resources, upon petition by any party. A “citizen-suit charter” shall be granted upon a finding that an environmental resource is, or is reasonably anticipated to be at some future time, harmed by the violation of an environmental statute enumerated in this section. “Citizen-suit charters” shall be granted, at a minimum, to those species or sub-species designated as “endangered” or “threatened” under the Endangered Species Act.

The Secretary of the Interior is the logical choice for granting “citizen-suit charters” because of his role in the ESA. Under the ESA, the Secretary of the Interior accepts petitions for an animal to be

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263 Courts generally construe corporate powers broadly. See ROBERT H. HAMILTON & JONATHAN R. MACEY, *CASES AND MATERIALS ON CORPORATIONS* 227–28 (10th ed. 2007) (describing the decline of the *ultra vires* doctrine and movement toward broad construction of corporate powers).

264 See *supra* Part II.C.

265 See *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1178 (9th Cir. 2004) (“Absent a clear direction from Congress . . . we hold that animals do not have standing . . .”).

266 I suggest adding the section to Title 16 in order to make a clear distinction between these groups and “Title 36” charters, which are granted to nonprofit organizations. See MOE, *supra* note 251, at 1.



listed as endangered.<sup>267</sup> Once petitions are received, the Secretary goes through a consultation process and eventually determines whether the species should be listed.<sup>268</sup> Presumably, through this process, the Secretary garners some knowledge in environmental resources, as well as expertise in the petitioning process itself. The power to grant “citizen-suit charters” could conceivably be vested in the EPA. However, given the fact that the EPA is empowered to undertake enforcement actions pursuant to most environmental statutes, it makes sense to vest the power to grant “citizen-suit charters,” which are designed to be another, more broad power of enforcement, in a separate agency.

The statutory criteria are needed to establish an “intelligible principle” on which to base granting a “citizen-suit charter,” thus avoiding a non-delegation challenge.<sup>269</sup> The proposed criteria are purposefully expansive, such that the Secretary could conceivably grant a charter to nearly all environmental resources. This would be appropriate, as currently, citizen suits may be initiated to protect any and all environmental resources which suffer harm from violations of environmental laws. The scope of protected resources under the amended section should not be significantly restricted.

(b) The sole purpose of granting a “citizen-suit” charter is to empower environmental resources to bring suit on their own behalf under the “citizen suit” provisions enumerated in this section. Accordingly, the sole power granted to a group holding a “citizen-suit” charter is to bring suit under the Clean Water Act, the Clean Air Act, the Endangered Species Act, and the Marine Mammal Protection Act, to enforce the protections afforded by those statutes. Groups holding a “citizen-suit charter” shall not be empowered to bring suit under any other statute or bring any common law causes of action. The groups holding a “citizen-suit charter” exist as an entity separate and apart from the United States government and any resources making up the group. No claims, including counterclaims, may be brought against the group holding a “citizen-suit charter,” except that claims may be brought against an attorney representing such group under Federal Rule of Civil Procedure 11.

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267 See 16 U.S.C. § 1533 (2006) (providing for determination and listing of endangered species); RUHL ET AL., *supra* note 228, at 37–38 (describing application of these provisions).

268 16 U.S.C. § 1533(a).

269 See, e.g., *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (requiring that an agency be given an “intelligible principle” on which to exercise legislative or quasi-legislative power (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))).

This section makes it clear that these groups are not intended to be “normal” corporations, but rather a specialized group designed specifically to promote effective enforcement of existing statutes via citizen suit. Limiting the grant of standing to these particular statutes would placate fears that environmental resources would become entitled to common law rights and remedies. Permitting Federal Rule of Civil Procedure 11 claims to be brought against the attorney would provide a disincentive to bringing abusive suits.

(c) The group holding the “citizen-suit charter” shall recover reasonable attorneys’ fees incurred in a successful action, out of any fine money awarded to the United States Government as a result of a successful suit. The remainder of the fine money shall be paid to the Government as if the action had been won by the United States in an enforcement action brought under that same statute.

Section (c) would probably be the most controversial. Attorneys’ fees would be a valuable incentive to initiate citizen suits; however, it could also be seen as an incentive for filing frivolous claims, or as creating a profitable market for nonexecutive enforcement of the law. Permitting sanctions under Federal Rule of Civil Procedure 11 would put a damper on frivolous claims, but this provision could admittedly encourage abusive litigation.

Section (c) would also solve the problem exhibited in the *Laidlaw* case, where several Justices casted doubt on the proposition that a private party in a citizen suit could seek punitive fines to be paid to the government.<sup>270</sup> Under this arrangement, a private party would have a personal stake in the fine being awarded. Additionally, this would echo *qui tam* actions of the past, making the whole concept perhaps more palatable to the historically minded.<sup>271</sup>

(d) Any attorney meeting the Federal Rule of Civil Procedure 17(c) factors shall be empowered to represent the chartered group in federal or state court.

This section probably poses the most practical problems. Once the groups are created and given a citizen-suit charter, the obvious question remains: who will bring the suit on behalf of the group, and represent their interests in court? Incorporating the Rule 17(c) procedures provides a relatively well established test to determine who is

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270 See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 204 (2000) (Scalia, J., dissenting).

271 See Sunstein, *supra* note 7, at 174–77, for a discussion of *qui tam* actions and possible implications for Article III standing.

best suited to represent an incapacitated entity.<sup>272</sup> However, permitting only one lead representative for the group in each citizen suit would lead to fierce competition between environmental groups.<sup>273</sup> Additionally, litigation of standing issues would simply be replaced by Rule 17(c) litigation; parties which meet the Rule 17(c) factors would likely satisfy the traditional standing requirements. However, Rule 17(c) litigation would be centered around a different issue: who was entitled to *represent the environment*, rather than who is entitled to represent *their own* interests. The Rule 17(c) factors would ensure that the groups will be represented by attorneys who are in the best position to do so. Thus, a desirable function of the doctrine of standing will be retained,<sup>274</sup> while permitting litigants to couch their claims in terms of the harm to the environment, thus removing the harmful effects of the current situation.<sup>275</sup>

(e) Groups holding a “citizen-suit charter” shall *not* have any of the powers adhering to charters granted in any other section of the United States Code, and Chartered Groups exist *only* for the purposes of bringing citizen-suit actions under the statutes enumerated in part (a) of this section.

This section would prevent courts from confusing “citizen-suit charters” with other charters, thus keeping the powers of the groups in this section from being overly broad.

#### 4. Alternatives

The proposed text is just one of several approaches Congress could take. Below, I discuss two alternatives that would meet different concerns.

Section (d) of the proposal could permit the Secretary of the Interior to appoint attorneys or groups of attorneys to represent each chartered group. This, however, would add a political bent to the enforcement of citizen suits, and perhaps lead to appointment of attorneys based upon factors other than who would best represent the interests of the group. Because citizen-suit provisions are designed to

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272 For a discussion of the Rule 17(c) factors, and their applicability for citizen suits under the ESA, see Burke, *supra* note 9, at 652–55.

273 See RUHL, *supra* note 228, at 896 (noting that there are sometimes “turf wars” when multiple NGOs are involved in a single citizen suit).

274 See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (noting that standing “ensur[es] that the people most directly concerned are able to litigate the questions at issue”).

275 See *supra* Part II.C for a discussion of the harmful effects of the current situation.

spread the enforcement power around the population, as opposed to keeping it concentrated in the political branches,<sup>276</sup> permitting any party who satisfies the Rule 17(c) factors to represent the group seems to be more in line with congressional intent.

Congress could also determine whether or not to make this the sole means through which citizen suits may be brought. Although this option would eliminate the disconnect highlighted in this Note, it would restrict the amount of potential “private attorneys general” available to enforce the statute. Thus, I would encourage Congress to permit plaintiffs to invoke the citizen-suit provision on behalf of themselves, as is currently done, until the effectiveness of the chartering program is ascertained. If the program is successful, then perhaps eventually it could become the sole means through which citizen suits could be initiated.

## 5. Objections

Some would likely object to the proposed amendments on the grounds that granting standing to environmental resources would entail “[r]adical changes in our legal institutions” that would have “serious, detrimental impacts on human rights and freedoms.”<sup>277</sup> These objections, however, seem misplaced. After all, Congress has *already* passed significant statutes designed to protect the air, water, and endangered species.<sup>278</sup> At issue is the effective enforcement of those statutes, not the substance of their provisions. Objections revolving around whether environmental resources should be protected, at the expense of persons’ rights, are entirely separate from objections to Congress’ protection of those resources in a manner which tailors the harm prevented by the statute with the injury-in-fact sufficient to convey standing.

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276 See Cross, *supra* note 3, at 55.

277 David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 748–49 (1995). Notably, these objections are aimed at those seeking to extend legal rights to animals, generally. *Id.* at 749. It is likely, however, that granting animals the ability (or “right”) to sue would evoke these same objections. Although Schmahmann and Polacheck mention the ESA, they contend that the Act does not convey rights to animals, but rather “seek[s] to conserve nature’s diversity with an eye towards man’s long-term interests.” *Id.* at 768. This may be true, but the fact remains that the ESA protects *animals*, not *persons*. In noting that “courts have focused on the impacts on the *human* environment and have refused to let the well-being of animals outweigh those impacts,” *id.* at 771, Schmahmann and Polacheck are correct; however, the reason courts do so is because *standing* requires harm to persons, not because the statute itself protects persons.

278 See Endangered Species Act, 16 U.S.C.A. §§ 1531–1544 (2006); Clean Water Act, 33 U.S.C. §§ 1294–1297 (2006); Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006).

Notably, these types of objections do not invoke the concerns expressed by courts when denying standing in citizen suits. The requirements of standing are voiced in terms of injury to the plaintiff, without regards to the identity of the plaintiff.<sup>279</sup> The concerns underlying standing decisions deal with separation of powers, and courts' proper role in constitutional governance.<sup>280</sup> In fact, many plaintiffs in environmental suits are corporations or other associations, as opposed to "real" human persons.<sup>281</sup> For purposes of standing, one of the association's members must be injured (thus the focus on whether a human has been injured),<sup>282</sup> but the association itself has the right to sue.

These amendments would arguably introduce political factors into the enforcement process. One could imagine powerful interests lobbying the Secretary of the Interior to deny charters to certain resources, or the Secretary simply being unwilling to grant them in the first place. However, Congress could minimize this concern by mandating the grant of citizen suit charters upon a finding of statutory factors. Political pressure would be more of a concern if the Secretary were empowered to appoint attorneys to represent the chartered groups; the Secretary could simply appoint attorneys who were hesitant to bring suit, or who were not best suited to represent the groups' interests. This could be mitigated by empowering any attorney who meets the "best friend" factors to represent a chartered group in court. Although this would not completely mitigate the political pressures, it would certainly lessen them.

Additionally, opponents might argue that these provisions would simply shift litigation from the standing requirements to the Rule 17(c) factors. This is true; and, any attorneys who meet the 17(c) factors would likely be those who could satisfy the standing requirements, anyway. However, litigation surrounding the 17(c) factors has different focus: who can best represent the environmental interests, *not* to

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279 See *supra* notes 24–30 and accompanying text. Of course, part of the reason why no such objections have been raised is because standing to environmental resources has *not* been statutorily granted. However, it remains true that the concerns of the Court in applying the doctrine of standing do not relate to the identity of the parties, but rather to separation of powers.

280 See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 209–10 (2000) (Scalia, J., dissenting) (lamenting the deprivation of executive discretion by overly lenient standing rules); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (discussing the separation of powers justification for the doctrine of standing).

281 See, e.g., *Lujan*, 504 U.S. at 559; *Sierra Club v. Morton*, 405 U.S. 727, 729–30 (1972).

282 *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004).

whom the cognizable injury is done. Thus, the purpose of the statutes is preserved, while still ensuring that those who can best represent the interests of the environmental resources are those bringing suit.

Certainly, this proposal does not do away with courts' standing inquiry. Plaintiffs will still have to prove injury-in-fact, causation, and redressability, and overcome any prudential barriers raised by the courts. However, the terms of the standing inquiry will be transformed: the injury-in-fact conveying standing will be injury *to the environment*, which is the harm Congress sought to prevent in passing the statute. Thus, the disconnect between injury-in-fact and congressional purpose will be solved. Environmental plaintiffs will be able to harness the full rhetorical value of couching their claims in terms of harm to the environment, thus transforming an attempt to remedy Thomas Rider's inability to watch elephants in the circus show into a campaign against the abuse of elephants.<sup>283</sup> Perhaps most importantly, this transformation would occur without requiring Article III courts to reconsider their asserted role in our system of government.

#### CONCLUSION

From the purposes and structure of environmental statutes, it is clear that Congress sought to protect the environment from man-made threats.<sup>284</sup> To enforce these protections Congress empowered individuals to bring suit in Article III courts, thus bypassing the problems inherent in agency enforcement.<sup>285</sup> Article III standing requirements interfere with these goals, barring plaintiffs who are unable to assert a cognizable injury to their own interests.<sup>286</sup> Even when plaintiffs do assert a cognizable injury-in-fact, they are forced to posture their citizen suits in terms of personal interest, seriously undermining the rhetorical power and effectiveness of their claims.<sup>287</sup> Phrased differently: in environmental statutes, Congress attempted to protect trees in the forest, but courts only permit enforcement when someone is around to hear the trees fall.

The tension between the doctrine of standing and congressional intent in environmental statutes stems from the judiciary's understanding of its role in our constitutional system of governance.<sup>288</sup> Courts generally serve as adjudicators of "private rights" disputes,

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283 See notes 132–34 and accompanying text.

284 See *supra* Part II.A.

285 See sources cited *supra* note 131.

286 See *supra* Part II.B.2 for examples of plaintiffs who were unable to assert cognizable injuries-in-fact.

287 See *supra* notes 132–34 and accompanying text.

288 See *supra* notes 15–18 and accompanying text.

while leaving the vindication of public rights to the political branches.<sup>289</sup> Citizen suits do not fit the classical paradigm of private rights disputes; indeed, they were created as an alternative to enforcement actions—a role traditionally played by the executive branch. Additionally, Congress sought to prevent harm to the environment, yet only persons or groups of persons are empowered to enforce statutory protections in court. Taking this into account, the tension between congressional intent and the doctrine of standing is understandable.

Although most critics urge the courts to reformulate the doctrine of standing,<sup>290</sup> this Note urges Congress to take it upon themselves to heal the divergence. Congress could do so in two manners: providing a “public rights” forum, in the form of an Article I tribunal, or granting environmental resources the right to bring citizen suits. An Article I tribunal would probably be constitutional; however, there would be serious concerns about the political independence of such a tribunal. Notably, these concerns are substantially similar to those which drove Congress to create citizen suits in the first place. Therefore, creating an Article I tribunal would be an unsatisfactory solution to resolving the disconnect highlighted in this Note.<sup>291</sup>

Congress could, and should, remedy this disconnect by granting environmental resources the limited right to bring citizen suits under environmental statutes. The paradigm of federal corporations reveals a long and well-established history of creating legal entities to achieve specific policy ends.<sup>292</sup> Drawing on this paradigm, Congress should empower the Secretary of the Interior to grant “citizen-suit charters” to environmental resources, thus giving them the ability to bring citizen suits under environmental statutes.<sup>293</sup> This would ensure that violations of environmental statutes conveyed standing regardless of the existence of an incidental injury to third parties. Further, citizen-suit charters would preserve enforcement power outside of the political branches, foster participation in environmental law, and permit issues to be litigated in the name of resources themselves, thus furthering the original goals of citizen suits. Perhaps most importantly, this would all be accomplished without requiring the Article III courts to reconsider the nature of their role within the American tripartite system of governance.

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289 See *supra* notes 15–18 and accompanying text.

290 See sources cited *supra* note 19.

291 See *supra* Part III.A.3.

292 See *supra* Part III.B.2.

293 See *supra* Part III.B.3 for the specific proposal.

