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NEWS & ANALYSIS

Foxes Guarding the Henhouse: How to Protect Environmental Standing From a Conservative Supreme Court

by Amy L. Major

Editors' Summary: The U.S. Supreme Court's decisions in Lujan v. National Wildlife Federation and Lujan v. Defenders of Wildlife effectively restricted the liberalized standing that environmental plaintiffs previously enjoyed. Recent appointments of conservative Justices to the Court indicate that environmental standing will continue to narrow in the future. However, modern doctrines like informational standing may offer plaintiffs assistance in asserting environmental claims. In this Article, Amy Major investigates the Court's historical treatment of environmental standing, discusses the evolution of informational regulation and informational standing, analyzes the Court's reaction to informational and statutory standing, and reveals how lawyers can utilize informational injury to circumvent conservative standing principles and bring successful claims under the ESA.

I. Introduction

"As Government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition."

—Justice Anthony M. Kennedy, concurring in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580, 22 ELR 20913 (1992)

Throughout the 1970s, liberalized standing for environmental plaintiffs and inclusion of citizen suit provisions in most federal environmental statutes allowed the U.S. Congress to implement a national program of environmental protection.¹ However, led by Justice Antonin G. Scalia, the U.S. Supreme Court's decisions in *Lujan v. National Wildlife Federation (Lujan I)*² and *Lujan v. Defenders of Wildlife (Lujan II)*³ requiring increasingly detailed showings of particularized injury to plaintiffs for environmental claims resurrected private law theories of standing, greatly hampering public efforts to enforce the nation's environmental laws and making standing a nearly impossible hurdle at times.⁴ While the Court's deci-

sion in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*⁵ reexpanded the boundaries of standing by allowing plaintiffs to enforce environmental laws without requiring them to produce scientific evidence that environmental harm had actually occurred, President George W. Bush's recent Supreme Court appointments of conservative Chief Justice John G. Roberts Jr., and Justice Samuel A. Alito Jr. provide reason for environmentalists to worry that standing for environmental claims will once again be narrowly confined to *Lujan*'s parameters.

Narrow concepts of standing should be of particular concern to citizens seeking to enforce the Endangered Species Act (ESA)⁶—when endangered wildlife is the natural resource that citizens seek to protect, it may be especially difficult for plaintiffs to demonstrate the existence of the injury that *Lujan II* requires.⁷ However, by utilizing various public law theories of standing, environmentalists and wildlife conservationists may still be able to defend and protect America's national treasures. Specifically, the Court's recognition of informational standing in *Federal Election Commission v. Akins*⁸ could offer new hope to citizens seeking to enforce the ESA. This Article advances the theory that plaintiffs must utilize new concepts of standing, including informational standing, to maneuver around private law notions of standing imposed on them by a conservative Supreme Court in order to bring suit under the ESA. Facing the potential threat of a Supreme Court that is overtly unsympa-

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1. Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of Laidlaw*, 12 DUKE ENVTL. L. & POL'Y F. 119, 120 (2001).
2. 497 U.S. 871, 20 ELR 20962 (1990).
3. 504 U.S. 555, 22 ELR 20913 (1992).
4. Percival & Goger, *supra* note 1.

5. 528 U.S. 167, 30 ELR 20246 (2000).

6. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

7. 504 U.S. at 560.

8. 524 U.S. 11 (1998).

thetic to environmental interests and could now have the necessary votes to defeat plaintiffs by using private law concepts of standing, the use of informational injury could become an important tool for concerned citizens and organizations hoping to protect wildlife under the ESA.

Part I of this Article provides a brief history of the doctrine of standing, with particular emphasis on environmental standing. Part II discusses how informational regulation and informational standing have evolved throughout the past quarter-century. Part III analyzes the conservative Justices' views of statutorily created standing and the general ramifications that their attitudes may have on environmental standing law. Finally, Part IV examines how informational injury could be used to assist plaintiffs in obtaining standing when suing under the ESA.

II. A Brief History of Standing in Environmental Cases

The doctrinal component of standing has its roots in Article III's "case or controversy" requirement,⁹ which denies parties access to the federal courts unless they have a "real" or "actual" dispute for the court to hear.¹⁰ The U.S. Constitution itself contains no reference to standing; the standing requirements of injury-in-fact, causation, and redressability are legal doctrines created by the Court as an articulation of the case or controversy requirement.¹¹ Before the modern concept of standing became prevalent, courts focused on whether a litigant had based his cause of action on a common law or statutory right.¹² Contemporary notions of standing did not emerge until the New Deal, when courts invoked the doctrine in an attempt to facilitate President Franklin Delano Roosevelt's regulatory reforms.¹³ Hoping to "insulate progressive and New Deal legislation from frequent judicial attack," Justices Louis D. Brandeis and Felix Frankfurter utilized standing and other justiciability doctrines to limit the number and types of plaintiffs that could bring suit in the federal courts.¹⁴

Traditional private law principles of standing continued to broaden during the Civil Rights Era as individuals used the courts to protect themselves from "legal" abuses by the government,¹⁵ and they received significant expansion with the Supreme Court's decision in *Sierra Club v. Morton*.¹⁶ In *Morton*, the Court reiterated that plaintiffs must show injury to a cognizable interest in order to have standing, and then announced that harm to aesthetic and recreational interests met that requirement.¹⁷ Though the *Morton* Court ultimately found that plaintiff Sierra Club did not have standing in this

case,¹⁸ the Court's recognition of noneconomic injuries allowed people to use the judicial system to protect public interests and to enforce national policies.¹⁹ In conjunction with citizen suit provisions provided in major environmental statutes like the Clean Air Act (CAA),²⁰ Clean Water Act (CWA),²¹ and the ESA, plaintiffs used this liberal concept of standing to their advantage to address environmental concerns²²; in response, the Court appeared to account for and accept the "inevitable, uncertain, and speculative" nature of the injuries present in environmental lawsuits as well as the generally more attenuated chain of causation.²³

Not everyone was pleased with this new concept of standing, however. During the late 1980s and early 1990s, Justice Scalia expressed his dissatisfaction with the public rights model of standing that had been recognized in environmental cases, arguing that the liberalization of standing was an unconstitutional expansion of the judiciary's power.²⁴ Even before his appointment to the Court in 1986, then U.S. Court of Appeals for the District of Columbia Circuit Judge Scalia had begun crusading for the restriction of this liberalized theory of standing and the resurrection of narrower private law models of standing in environmental cases.²⁵ Invoking the constitutional separation-of-powers doctrine, Justice Scalia argued that the courts needed to "accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large."²⁶ Quoting *Marbury v. Madison*'s ideal that "the province of the court is, solely, to decide on the rights of individuals,"²⁷ Justice Scalia opposed the Supreme Court's willingness to give "existing standing provisions in substantive statutes a new breadth by interpretation."²⁸ He felt this expansion of standing had turned the courts into political forums by allowing them the opportunity to address issues that were previously beyond their jurisdiction, "at the behest of almost anyone who has an interest in the outcome."²⁹

9. U.S. CONST. art. III, §2, cl. 1.

10. Martin A. McCrory, *Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication*, 20 STAN. ENVTL. L.J. 73 (2001).

11. *Id.* at 86.

12. See Percival & Goger, *supra* note 1, at 121.

13. See McCrory, *supra* note 10, at 87.

14. See Percival & Goger, *supra* note 1, at 122.

15. See McCrory, *supra* note 10, at 88. McCrory notes that civil rights abuses by state governments cast doubt that governments were acting to protect their citizens, so the courts loosened standing barriers to give individuals a forum in which to defend themselves against such abuses.

16. 405 U.S. 727, 2 ELR 20192 (1972).

17. *Id.* at 734-35.

18. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights From the Blackmun Papers*, 35 ELR 10637, 10657 (Oct. 2005). Prof. Robert Percival notes that Justice Blackmun's conference papers for the *Morton* case revealed that Chief Justice Warren E. Burger expressed concern that if the "Sierra Club could get into every environmental case," the end result would be "immobilization of government," and Justice Byron R. White commented that "everyone in the [United States] is not a private Attorney General." However, Justice Blackmun, concerned about the growing onslaught of environmental problems that the country faced, noted the Court's expansion of standing principles in cases like *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and formed the opinion that "with the broad environmental purposes of Sierra and with the members of Sierra enjoying the particular region in which this project is to be placed, it seems to me that there ought to be enough here for standing."

19. See McCrory, *supra* note 10, at 89.

20. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

21. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

22. McCrory, *supra* note 10, at 91.

23. Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 19 PACE ENVTL. L. REV. 619 (2002).

24. See McCrory, *supra* note 10, at 96.

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

26. *Id.* at 881-82.

27. 5 U.S. (1 Cranch) 137 (1803).

28. See Scalia, *supra* note 25, at 886.

29. *Id.*

Justice Scalia declared that

the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.³⁰

In his opinion, the “concrete injury” requirement was the only thing that could “separate the plaintiff from all the rest of us who can also claim benefit of the social contract, and can thus entitle him to some special protection . . .” from the courts.³¹ Discussing the “concrete injury” requirement further, Justice Scalia noted, “when an individual who is the very *object* of a law’s requirement or prohibition seeks to challenge it, he always has standing.”³² This particular view of standing conveniently enables him to consistently rule in favor of regulated industries in environmental cases without appearing to be blatantly partisan to their interests, as the regulated entities of environmental statutes are almost always corporations.³³

After his appointment in 1986, Justice Scalia began using his position on the Supreme Court to slowly chip away at the principles of liberalized standing that had previously allowed environmental plaintiffs to protect their interests.³⁴ Justice Scalia delivered a one-two punch to environmental standing when he authored the Court’s opinions in *Lujan I* and *Lujan II*.³⁵ In *Lujan I*, the environmental organization brought suit challenging the Bureau of Land Management’s (BLM’s) “land withdrawal review program.”³⁶ The *Lujan I* plaintiffs alleged that the BLM’s reclassification and return of certain lands to the public domain would open up the area to mining activities, and that these actions violated both the Federal Land Policy and Management Act (FLPMA)³⁷ and the National Environmental Policy Act (NEPA).³⁸

Since they regularly used land “in the vicinity” of the area affected by two of the listed BLM actions, the plaintiffs claimed that their aesthetic and recreational interests were injured by the agency’s decision to reclassify these lands.³⁹ Though it recognized that “recreational use and aesthetic interests are among the *sorts* of interests” that FLPMA and NEPA were designed to protect, the Court held that the plaintiffs’ claims were insufficient to show that they were actually injured.⁴⁰ Because their affidavits only indicated that the plaintiffs used land “in the vicinity” of the area affected by the BLM’s actions and did not specify which particular parcels of land that they currently used would be affected, the Court stated their claims were not specific enough to satisfy the injury requirement of the Article III

standing test and denied standing.⁴¹ Justice Harry A. Blackmun, authoring a dissent that was joined by Justices William J. Brennan, Thurgood Marshall, and John Paul Stevens, stated that although the plaintiffs’ affidavits “could have been more artfully drafted,” they “definitely were sufficient” to establish their standing.⁴²

Two years later, Justice Scalia struck his most decisive blow to environmental standing when he wrote the Court’s opinion for *Lujan II*.⁴³ In *Lujan II*, the Secretary of the U.S. Department of the Interior had promulgated a regulation under the ESA that only required government agencies to consult with him per ESA §7(a)(2) if a federally funded project was located in the United States or on the high seas; under the Secretary’s rule, federally funded projects located on foreign soil were exempt from the ESA’s provisions.⁴⁴ Because they felt that this regulation violated the Act’s mandate that all federal agencies must ensure, in consultation with the Secretary, that any action “authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in destruction or adverse modification of habitat” of an endangered or threatened species,⁴⁵ the Defenders of Wildlife filed suit challenging the regulation.⁴⁶

While still acknowledging that aesthetic injury satisfied the standing inquiry,⁴⁷ the Court held that the plaintiffs here lacked standing because they had failed to demonstrate an “actual or imminent” injury—to have standing, plaintiffs needed to show not only an injury to a cognizable interest, but also that they would be directly threatened by the government’s actions.⁴⁸ After demanding that the plaintiffs submit detailed affidavits explaining how the Secretary’s rule would directly harm their interests, the Court then held that these affidavits were insufficient to prove injury in fact. Since none of the plaintiffs had stated a specific time when they intended to revisit the foreign countries in which the projects were being completed, the imminence of their alleged harm was “speculative” in the Court’s mind.⁴⁹

In *Lujan II*, the Court set out the detailed requirements that are observed for standing today:

The irreducible constitutional minimum of standing contains three elements: First the plaintiff must have suffered an “injury in fact”—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”⁵⁰

30. *Id.* at 894.

31. *Id.* at 895.

32. *Id.* at 894.

33. Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1036-37 (1993).

34. See McCrory, *supra* note 10, at 96.

35. *Id.* at 105.

36. 497 U.S. 871, 875, 20 ELR 20962 (1990).

37. 43 U.S.C. §§1701-1785, ELR STAT. FLPMA §§102-603.

38. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209. 497 U.S. at 879.

39. 497 U.S. at 886-87.

40. *Id.*

41. *Id.*

42. *Id.* at 904 (Blackmun, J., dissenting).

43. See McCrory, *supra* note 10, at 96. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 22 ELR 20913 (1992).

44. 504 U.S. at 558.

45. 16 U.S.C. §1536(a)(2).

46. 504 U.S. at 558.

47. *Id.* at 562.

48. *Id.* at 563-64.

49. *Id.* at 564.

50. *Id.* at 560-61 (citations omitted).

With these requirements in place, Justice Scalia indicated the Court's intent to reign in the boundaries of standing and return to a more traditional, private law model of jurisprudence.⁵¹ The *Lujan II* decision illustrated Justice Scalia's belief that courts should decide the rights of individuals and that the executive and legislative branches of the government should determine public rights.⁵²

Ironically, while many environmentalists probably agreed with Justice Blackmun that the majority's opinion in *Lujan II* was a "slash and burn expedition through the law of environmental standing,"⁵³ the Blackmun Papers reveal that Justice Scalia originally wanted to use the case to make it "virtually impossible" for private citizens to enforce environmental statutes through citizen suit provisions.⁵⁴ Had it not been for the efforts of Justices Kennedy and David H. Souter, who concurred in the majority opinion, Justice Scalia might have been able to advance his original draft opinion that attempted to turn the prudential ban on hearing generalized grievances into a constitutional requirement that would "bar environmental plaintiffs from establishing standing if their injuries were widely shared."⁵⁵ Six weeks after Justice Scalia's original draft opinion for *Lujan II* was circulated, Justices Kennedy and Souter had still not committed themselves to a position in the case, leaving Justice Scalia without a majority for his opinion.⁵⁶ Justice Souter sent Justice Scalia a memo asking him to modify the language used in his discussion of the "particularized injury" requirement because he felt the "concrete and particularized" language made it unclear whether plaintiffs had to satisfy one requirement (with "particularized" merely clarifying "concrete" to show that plaintiffs must allege that the injury affects them in a personal and individual way) or two requirements (with plaintiffs having to show that an injury was both "concrete," or tangible, and "particularized," in that it affected them in a personal way, before they could gain standing).⁵⁷ Justice Souter also asked Justice Scalia to remove the "particularized" language he had used in footnote 1 of the opinion in order to dispel the suggestion implicit in the original draft that the "universality of an injury deprived anyone of standing."⁵⁸ Justice Kennedy agreed with Justice Souter and declared that he would not join Justice Scalia's majority opinion unless Justice Souter's requested changes were made, and Justice Scalia agreed to the changes and revised the majority opinion.⁵⁹

Shortly after the *Lujan II* decision was released, current Chief Justice Roberts, who was then serving as the Principal Deputy Solicitor General of the U.S. Department of Justice (DOJ), wrote an article for the *Duke Law Journal* that heralded *Lujan II* as a "sound and straightforward decision applying the Article III injury requirement."⁶⁰ Arguing that the

legitimacy of an "unelected, life-tenured judiciary" was "bolstered by the constitutional limitation" of Article III standing,⁶¹ Chief Justice Roberts defended Justice Scalia's opinion, saying that the Court had recognized the constitutional nature of the injury requirement "for some time," and that it would have been an "extraordinary adventure in judicial activism" for the Court to suddenly announce "that it no longer regarded the injury requirement as an Article III restriction."⁶²

According to Chief Justice Roberts, in order to maintain proper constitutional separation of powers, the Court had to insist upon "meaningful limitations on what constitutes injury for standing purposes."⁶³ Chief Justice Roberts also reiterated the idea expressed by Justice Scalia that Congress could, through legislation, expand standing to the full extent permitted by Article III but could not abrogate the Article III requirements in any way—if a plaintiff could not show he met the constitutional requirements of injury-in-fact, causation, and redressability, he would not have standing.⁶⁴ Further, Chief Justice Roberts wrote that if Congress tried to sidestep these standing requirements by legislatively directing the federal courts to hear a case in which the requirements of Article III were not met, the courts would declare that act unconstitutional.⁶⁵

Since Congress was afforded many other avenues for implementation and enforcement of its regulatory programs, such as direct oversight of executive agencies and more limited delegations or revocation of existing congressional power to these agencies, Chief Justice Roberts argued that standing requirements stood for the principle that Congress cannot ask the courts to "exercise such oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue."⁶⁶ He concluded by saying that the *Lujan II* Court had protected the judiciary from "efforts to render the standing limitation meaningless" and that the Court's continued insistence on plaintiffs showing they have suffered an injury-in-fact ensures that the Court "will more properly remain concerned with tasks that are, in [James] Madison's words, 'of a Judiciary nature.'"⁶⁷ Though during his confirmation hearings Chief Justice Roberts would not specifically comment on his opinion of rulings in particular Supreme Court cases or discuss in any detail the ideology he would advance as Chief Justice,⁶⁸ it is likely he will not abandon the conservative views he expressed in that article. His statements at that time indicated that Justice Scalia had a powerful ally in then Deputy Solicitor General Roberts, and it is likely that alliance will remain strong now that both men are members of the Court.

A review of environmental case law reveals that yet another future Supreme Court Justice also fully supported the opinion articulated by Justice Scalia in *Lujan II*. After the

51. See McCrory, *supra* note 10, at 105.

52. *Id.*

53. 504 U.S. at 606.

54. See Percival, *supra* note 18, at 10658.

55. *Id.* at 10659.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. John G. Roberts Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993). The Office of the Solicitor General had represented Secretary of the Interior Manuel Lujan before the Supreme

Court in *Lujan v. Defenders of Wildlife*, and argued *Lujan v. National Wildlife Federation* on Secretary Lujan's behalf.

61. *Id.* at 1220.

62. *Id.* at 1222-23.

63. *Id.* at 1224.

64. *Id.* at 1226.

65. *Id.*

66. *Id.* at 1229.

67. *Id.* at 1232 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1966)).

68. *Too Much of a Mystery*, N.Y. TIMES, Sept. 18, 2005, at D11, available at 2005 WLNR 14702921.

Court's landmark decision was announced, *Lujan II*'s ripple effect was evident in a decision by the U.S. Court of Appeals for the Third Circuit in *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*^{69,70} The opinion, written by Judge Jane Richards Roth and joined by then Circuit Judge Samuel Alito, concluded that plaintiff Public Interest Research Group (PIRG) lacked standing to sue defendant corporation Magnesium Elektron (MEI) for violating its national pollutant discharge elimination system (NPDES) permit under the CWA because scientific evidence failed to show that pollution from the corporation's discharges had caused actual harm to the waterways that plaintiffs used for swimming and fishing.⁷¹

In *Magnesium Elektron*, the plaintiffs claimed that MEI had repeatedly violated the terms of its NPDES permit under the CWA.⁷² Individual affidavits submitted by the plaintiffs stated that they engaged in "various recreational activities along the Delaware River" and the Wickecheoke Creek, that their enjoyment of these activities was lessened because they "knew" the Delaware River and Wickecheoke Creek "contain[ed] pollution," and that they avoided eating fish caught in the river and drinking water taken directly from the river because they were concerned "that the water might be contaminated" due to the defendant's pollutant discharges in excess of its NPDES permit limitations.⁷³

In response to the plaintiff's allegations, the Third Circuit stated that while it had no doubt that PIRG's members had recreational and aesthetic interests in the Delaware River and Wickecheoke Creek, in light of district court findings that MEI's excess pollutant discharges had not caused any actual harm to the waterways or the marine life therein, it was not confident that plaintiffs had asserted any actual injury.⁷⁴ Therefore, unless PIRG could demonstrate that MEI's permit violations had actually caused harm to the waterway in question, they did not have standing because the court did not believe that the CWA authorized private causes of action "absent some showing of injury or threat of injury."⁷⁵ The court then categorized PIRG's argument that its members were injured by knowledge of MEI's pollution in the river and creek as a generalized grievance and held that the claim was nonjusticiable as a result: "The knowledge that a corporation has polluted waters is an 'injury' suffered by the public generally Therefore, PIRG's members must show more than a 'mere exceedence of a permit limit' to prove a judicially cognizable injury."⁷⁶ Like Chief Justice Roberts, Justice Alito was remarkably tight-lipped about his opinions on various issues and Supreme Court precedents during his confirmation hearings.⁷⁷ While a change of heart is always possible, then Judge Alito's decision to vote with the majority in requiring a showing of specific environmental harm in *Magnesium Elektron* indicates that he will not

likely be a Justice that environmentalists can look to for support on the Supreme Court with respect to standing issues.

In 2000, the Supreme Court gave environmental plaintiffs some relief from this restrictive view of standing created by the *Lujan* rulings when it announced its decision in *Laidlaw*.⁷⁸ The *Laidlaw* opinion stated that the relevant showing for Article III standing in environmental cases was injury to the plaintiff, not injury to the environment.⁷⁹ Plaintiffs' assertions that they suffered a direct injury to their recreational, aesthetic, and economic interests because of Laidlaw's pollutant discharges and the plaintiffs' genuine concerns about the effects of those discharges on these interests were held to be concrete injuries-in-fact sufficient to confer standing.⁸⁰ Furthermore, the Court used *Laidlaw* to remedy a redressability issue that had been created by its earlier ruling in *Steel Co. v. Citizens for a Better Environment*,⁸¹ in which it held that civil fines payable to the U.S. Treasury did not serve as effective relief for a plaintiff's injuries. In *Laidlaw*, the Court held that civil penalties payable to the U.S. Treasury served as sufficient redressability for plaintiff's injuries in suits brought under the CWA because the fines would serve a deterrent function and enhance future compliance, thereby confining its previous decision in *Steel Co.*⁸² The *Laidlaw* decision thus signaled to the public that the Court may be reconsidering liberalized standing and gave environmental plaintiffs hope for the future.

Not surprisingly, Justice Scalia authored a vigorous dissent in *Laidlaw* that was joined by Justice Clarence Thomas. Justice Scalia argued that the Court's decision violated traditional principles of federal standing and permitted private individuals to carry out law enforcement, which was the exclusive province of the executive branch.⁸³ He insisted that actual harm to the environment needed to be shown for injury-in-fact to exist, and even then, the plaintiffs still needed to demonstrate how that environmental harm specifically injured them.⁸⁴ The dissent stated, "By accepting plaintiffs' vague, contradictory, and unsubstantiated allegations of 'concern' about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham."⁸⁵ Finally, Justice Scalia warned that Congress did not have the constitutional power to give a private plaintiff the right to invoke a public remedy because this amounted to the conversion of an "undifferentiated public interest" into an "individual right" that was vindicable in the courts.⁸⁶

Although *Laidlaw* has made it easier to satisfy the Court's Article III standing requirements, the future of environmental standing is uncertain at best. The appointment of two conservative Justices to the Court—both of whom have publicly expressed that plaintiffs asserting environmental interests must demonstrate with significant detail that they

69. See Percival & Goger, *supra* note 1, at 137.

70. 123 F.3d 111, 27 ELR 21340 (3d Cir. 1997).

71. *Id.* at 121.

72. *Id.* at 115.

73. *Id.*

74. *Id.* at 120.

75. *Id.*

76. *Id.* at 121.

77. Jeffrey Rosen, *Alito vs. Roberts, Word by Word*, N.Y. TIMES, Jan. 15, 2006, at D1, available at 2006 WLNR 915088.

78. See Percival & Goger, *supra* note 1, at 141.

79. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181, 30 ELR 20246 (2000).

80. *Id.* at 183-84.

81. 523 U.S. 83, 28 ELR 20434 (1998).

82. *Id.* at 187.

83. *Id.* at 198 (Scalia, J., dissenting).

84. *Id.* at 199.

85. *Id.* at 201.

86. *Id.* at 204-05.

have suffered a concrete injury before they can gain standing—raises concern by those who wish to protect the environment that the existence of standing will become increasingly more difficult for plaintiffs to prove in the future.⁸⁷ With this in mind, the burden falls upon environmental lawyers to find innovative ways to bring suit in the federal courts. One such method, informational standing, has been used successfully in other areas of law and is well-suited to do the same in the environmental arena.

III. The Development of Informational Regulation and Informational Standing

Informational regulation has been one of the most significant administrative developments in the last 25 years.⁸⁸ As the federal bureaucracy has grown and agencies have sought new ways to regulate various entities, informational regulation has become an increasingly useful tool and has taken many forms—private companies are regulated through required disclosures of information about a variety of subjects, mandatory production and disclosure of information is key for control of federal agencies through statutes such as NEPA, and laws under the Freedom of Information Act (FOIA)⁸⁹ and the Federal Advisory Committee Act (FACA)⁹⁰ allow for public monitoring of government actions through obligatory releases of information.⁹¹ The advent of the Internet Age has allowed for speedy and low-cost dissemination of information to millions of people at the click of a mouse button, and internet-based disclosure tools like the Emissions “Scorecard” available under the U.S. Environmental Protection Agency’s (EPA’s) Toxic Release Inventory (TRI) Program⁹² have allowed agencies to regulate corporate behavior through public pressure rather than through more internally costly mechanisms such as inspections.⁹³

Congress has demonstrated its commitment to informational regulation by making information disclosure a central focus of prominent federal statutes like FOIA, FACA, the Federal Election Campaign Act (FECA),⁹⁴ and the Government in the Sunshine Act (Sunshine Act).⁹⁵ FOIA was adopted to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny” by estab-

lishing a presumption that most government records would be accessible to the American public.⁹⁶ Similarly, FACA and the Sunshine Act require that significant regulatory meetings be announced in advance and open to the public.⁹⁷ Under the Administrative Procedure Act (APA),⁹⁸ regulatory agencies must provide reasons for policy decisions and base their decisions on materials found in the administrative record, which is available to the public, the courts, and Congress.⁹⁹

Increased use of informational regulation has been met with both high praise and intense criticism. Proponents of its use argue that widespread availability of information age technologies like the Internet, e-mail, and digital communication networks makes data easier to collect, analyze, and disseminate, and that this makes informational regulation less expensive than many other forms of regulation.¹⁰⁰ By making it easier to access agency information and to communicate with government entities quickly, these same technologies also give citizens “outside the Beltway” the power to challenge established regulations and to express their policy preferences, thus giving agencies access to a broader forum of views, values, and policy options upon which to base their decisions.¹⁰¹

Supporters view informational regulation as a mechanism for creating a more democratic, as well as an increasingly transparent, process of government decisionmaking in which uninformed or blatantly partisan choices will be more difficult for agencies to make and hide without providing adequate explanations to the general public.¹⁰² Many advocates of informational regulation argue that the increased transparency afforded by this process will minimize “agency capture” by special interest groups and private industry because the increased level of public scrutiny provided by public access to vast amounts of government information will pressure agencies to pursue goals that more closely reflect the general public’s preferred courses of action.¹⁰³

Critics of informational regulation argue that the widespread availability of information technology could actually make regulation more difficult for agencies to conduct in the future. Because the value of any type of regulatory analysis depends upon the quality and reliability of the information on which it is based,¹⁰⁴ agency decisions could actually be manipulated through “concerted disinformation campaigns” by special interest groups.¹⁰⁵ Also, in addition to sometimes imposing heavy administrative burdens on regulated entities, floods of information representing only a small cross-section of interests could lead agencies to conduct narrowly focused decisionmaking and result in the much-feared “agency capture” that this kind of regulation

87. See *Rapanos v. United States*, 126 S. Ct. 2208, 36 ELR 20116 (June 19, 2006). While the case does not concern issues of environmental standing, Chief Justice Roberts and Justice Alito joined Justice Scalia’s plurality opinion supporting a conservative interpretation of the term “navigable waters” under the CWA. Justice Kennedy concurred in the judgment but stated that the plurality’s opinion was “inconsistent with the Act’s text, structure, and purpose” and declined to support their interpretation of the term.

88. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613 (1999).

89. 5 U.S.C. §552.

90. 5 U.S.C. App. 2.

91. Sunstein, *supra* note 88, at 614.

92. Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 126 (2004). The TRI Program requires corporations to disclose releases of specific toxic chemicals. An inventory of these releases is available to the American public on the Internet at <http://www.scorecard.org>.

93. Esty, *supra* note 92, at 160.

94. 2 U.S.C. §431.

95. 5 U.S.C. §552b. Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 335 (2004).

96. Coglianese et al, *supra* note 95, at 335.

97. *Id.*

98. 5 U.S.C. §§500-596, available at ELR ADMIN. PROC.

99. Coglianese et al., *supra* note 95, at 336.

100. See Esty, *supra* note 92, at 118, 167.

101. See *id.* at 167, 169.

102. *Id.* at 167-69.

103. William F. Pedersen, *Regulation and Information Disclosure: Parallel Universes and Beyond*, 25 HARV. ENVTL. L. REV. 151, 183 (2001).

104. See Coglianese et al., *supra* note 95, at 278.

105. See Esty, *supra* note 92, at 171.

was supposed to prevent.¹⁰⁶ To its opponents, informational regulation seems to merely create more burdensome compliance requirements for regulated entities without creating a corresponding benefit to regulatory agencies and the general public. Congress, however, appears to disagree.

Most major federal environmental statutes include provisions requiring some form of information collection or disclosure by regulated entities.¹⁰⁷ In light of this comprehensive inclusion of information disclosure requirements, it is obvious that Congress recognizes the important role that informational regulation can play in protecting the environment. This was first apparent in 1969, when Congress created NEPA, the first major environmental statute in the United States. NEPA was passed to ensure that federal agencies considered the likely environmental consequences of their actions. To achieve this result, it created a procedural requirement that federal agencies must prepare an environmental impact statement (EIS) for all major projects.¹⁰⁸ This EIS requirement serves two main purposes: (1) it ensures that the agency will carefully consider detailed information concerning the significant environmental impacts of its proposed course of action in reaching its decision; and (2) it guarantees that the information the agency has considered will be available to the public so that they too can play a role in the decisionmaking process and monitor agency choices.¹⁰⁹

Informational regulation provisions serve related purposes in other environmental statutes. For example, by requiring corporations and other entities to conduct mandatory reporting of releases of more than 600 toxic chemicals, the Emergency Planning and Community Right-To-Know Act provides the public with information about the kinds of hazardous chemicals that are being released into the environment in their local communities.¹¹⁰ Using this information, citizens can then pressure both industry and Congress to take measures to reduce these hazardous discharges, resulting in less pollution. Similarly, §10 of the ESA requires persons seeking to perform activities that may result in violations of the Act's prohibition on "takings" of endangered and threatened species to file applications seeking permits to allow these otherwise prohibited actions.¹¹¹ Since the Act also requires the Secretary of the Interior to publish

notice of and invite comments on such applications in the *Federal Register* before a decision is made, the provision allows the public to monitor compliance with the ESA and to have a voice in the decisionmaking process so that endangered and threatened species are protected to the extent that Congress intended.¹¹² Though certainly not a comprehensive list, these two examples demonstrate ways that Congress has utilized informational regulation to facilitate public oversight of agency decisionmaking in the area of environmental protection.

Just as Congress revolutionized regulatory programs through information collection, production, and disclosure, the federal judiciary has created similar innovations in standing jurisprudence. Informational injury, a relative of procedural injury, occurs when an agency fails to provide or collect information and this failure deprives a party of information it seeks under a statute that explicitly grants a right to that information.¹¹³ The underlying principle is that the deprivation of statutorily required information injures an individual's or organization's ability to collect, analyze, or disseminate information, and that this creates a judicially cognizable injury when the information is essential to the injured party's activities.¹¹⁴

To gain standing under a theory of informational injury, a plaintiff must demonstrate a reasonable link between the organization's informational purposes and the challenged agency action; when an organization's primary function is to disseminate information to its members, it can demonstrate injury exists from an agency's failure to provide or collect that information.¹¹⁵ Informational injury has several distinct advantages. Because the existence of causation in an informational injury claim generally turns on whether denial of the requested information has hindered the plaintiff's ability to protect his own interests, it shifts the analysis of the causation burden placed on the injured party.¹¹⁶ Also, since informational injury characterizes the denial of information as the alleged harm to a person's concrete interests, plaintiffs can bypass the traditional redressability problems posed by procedural standing—since the injury is a denial of information, a court order requiring the agency to disclose the requested information provides relief for a party's inability to inform itself or its members.¹¹⁷

Informational injury was first recognized¹¹⁸ in a footnote in a 1973 D.C. Circuit case, *Scientists' Institute for Public Information, Inc. (SIPI) v. Atomic Energy Commission*.¹¹⁹ In *SIPI*, the court noted that because the Scientists' Institute distributed scientific information to the public, the Atomic Energy Commission's failure to prepare an EIS as NEPA re-

106. *Id.* at 172.

107. ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* (4th ed., Aspen Publishers 2003). A summary review of federal environmental regulatory programs reveals that environmental statutes containing provisions requiring disclosure of information to regulatory agencies include the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6992k (§6925), ELR STAT. RCRA §1001-11011 (§3005); the Toxic Substances Control Act (TSCA), 15 U.S.C. §§2601-2692 (§2607), ELR STAT. TSCA §§2-412 (§8); the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. §§11001-11050 (§11021-11023), ELR STAT. EPCRA §§301-330 (§§311-313), the CAA, 42 U.S.C. §§7401-7671q (§7661), ELR STAT. CAA §§101-618; the CWA, 33 U.S.C. §§1251-1387 (§§1341-1344), ELR STAT. FWPCA §§101-607; NEPA, 42 U.S.C. §§4321-4370d (§4332), ELR STAT. NEPA §§2-209; and the ESA, 16 U.S.C. §§1531-1544 (§§1536 & 1539), ELR STAT. ESA §§2-18.

108. 42 U.S.C. §4332.

109. *See* Gerschwer, *supra* note 33, at 1001-02.

110. *See* Percival, *supra* note 107, at 483-84. *See also* EPCRA, 42 U.S.C. §11023. The information contained in these reports is known as TRI and is available on the Internet at <http://www.scorecard.org>.

111. 42 U.S.C. §1539(a).

112. *Id.* §1539(c) & (d).

113. Christopher T. Burt, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275, 290 (1995).

114. *Id.*

115. Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After Lujan v. Defenders of Wildlife*, 12 UCLA J. ENVTL. L. & POL'Y 345, 349 (1994).

116. Adrienne Smith, *Standing and the National Environmental Policy Act: Where Substance, Procedure, and Information Collide*, 85 B.U. L. REV. 633, 661 (2005).

117. *See* Burt, *supra* note 113, at 290.

118. Brian J. Gatchel, *Informational and Procedural Standing After Lujan v. Defenders of Wildlife*, 11 J. LAND USE & ENVTL. L. 75, 82-83 (1995).

119. 481 F.2d 1079, 3 ELR 20525 (D.C. Cir. 1973).

quired could hinder the organization's ability to gather relevant information successfully and that this may qualify as sufficient injury-in-fact to confer standing.¹²⁰

Many years later, the Supreme Court officially recognized informational injury in *Public Citizen v. Department of Justice*,¹²¹ when it held that plaintiffs seeking information under the FACA had standing to sue.¹²² *Public Citizen* concerned a challenge to the DOJ's use of the American Bar Association's (ABA's) Standing Committee on the Federal Judiciary for evaluations of the qualifications of various federal judicial nominees.¹²³ FACA had been adopted to provide increased oversight of advisory committees—Congress incorporated numerous procedural requirements into the Act that all federal advisory committees must follow in order to implement FACA's goal of keeping Congress and the public apprised of the committees' existence, activities, and cost.¹²⁴ Because *Public Citizen* sought to compel the DOJ and the ABA Committee to comply with FACA's charter, notice, and open meeting requirements, and because they had specifically been denied the information and access that they sought under the Act, the Court held that this denial of information qualified as injury-in-fact for standing.¹²⁵ In doing so, the Court analogized *Public Citizen's* injury to the injury created by agency denial of information requests under FOIA, which only required a showing that the plaintiffs had sought specific public records and were denied access to them.¹²⁶ As with FOIA suits, the Court held here that the plaintiffs had met redressability requirements because they had demonstrated that they would gain significant relief in the form of the information they sought under FACA if they were to prevail in the litigation.¹²⁷ The *Public Citizen* decision paved the way for the Court's decision in *Akins* in 1998.¹²⁸

In *Akins*, a group of voters filed an administrative complaint that alleged that the American Israel Public Affairs Committee (AIPAC) was a "political committee" as defined by FECA, and asked the Federal Election Commission (FEC) to find that AIPAC had violated the Act and to require the group's compliance with FECA's registration and reporting requirements.¹²⁹ Because it was questionable whether AIPAC was a "political committee" under the Act, the FEC exercised its discretion and ruled that AIPAC was not subject to FECA's registration and disclosure requirements.¹³⁰ The voters then filed a petition in the district court seeking review of the FEC's determination, and the FEC challenged the plaintiffs' standing to sue.¹³¹ In reaching its decision, the Court considered the purpose of FECA, noting that Congress had adopted the Act to remedy any actual or perceived political corruption of the election process.¹³² To

make the political process more transparent, Congress had imposed a variety of recordkeeping and disclosure requirements on groups that met FECA's definition of a "political committee," and made all information received by the FEC under the Act a matter of public record.¹³³

Much to the FEC's dismay, the Court held that the voter plaintiffs had standing.¹³⁴ In FECA, Congress had specifically provided that "any person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission" and that "any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition . . ." in a federal district court seeking review of that dismissal.¹³⁵ Quoting its earlier opinion in *Scrapps-Howard Radio, Inc. v. FCC*,¹³⁶ the Court noted that history associates the word "aggrieved" with a "congressional intent to cast the standing net broadly—beyond the common law interests and substantive statutory rights upon which 'prudential' standing traditionally rested."¹³⁷ The Court also found that the plaintiffs met prudential standing requirements because the injury that they complained of—failure to obtain relevant information under FECA—was the kind of injury that FECA sought to address and therefore was within the statute's zone of interests.¹³⁸

Discussing its findings, the Court stated that the injury-in-fact that the plaintiffs had suffered consisted of "their ability to obtain information" that "the statute requires that AIPAC makes public."¹³⁹ Because the Court believed the plaintiffs' claims that the information they sought would help them and others to whom they would disseminate it to evaluate candidates for public office and to evaluate the role that the group's financial contributions might have played in an election, it found that their injury seemed "concrete and particular."¹⁴⁰ Since this was exactly the kind of injury that FECA was enacted to prevent, the Court held that violation of the statute conferred injury-in-fact on the plaintiffs.¹⁴¹

Responding to the FEC's arguments that the plaintiffs' claims were a nonjusticiable generalized grievance, the Court stated: "The informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."¹⁴² The Court noted that while political processes in the legislative and executive branches of government might provide a more appropriate remedy in some cases, where the injury was concrete, judicial resolution was appropriate.¹⁴³ The majority opinion, written by Justice Stephen G. Breyer, said that the plaintiffs also satisfied the standing requirements of causation and redressability—since the FEC's decision not to require AIPAC's compliance with the Act was "fairly traceable" to the plaintiffs' claimed injury of denial of infor-

120. *Id.* at 1086-87 n.29.

121. *See* Smith, *supra* note 116, at 655.

122. 491 U.S. 440, 449 (1989).

123. *Id.*

124. *Id.* at 445-46.

125. *Id.* at 449.

126. *Id.*

127. *Id.* at 451.

128. *See* Smith, *supra* note 116, at 656.

129. 524 U.S. 11, 15-16 (1998).

130. *Id.* at 17-18.

131. *Id.*

132. *Id.* at 14.

133. *Id.*

134. *Id.* at 19.

135. *Id.*

136. 316 U.S. 4 (1942).

137. 524 U.S. at 19.

138. *Id.* at 20.

139. *Id.* at 21.

140. *Id.*

141. *Id.* at 22, 24-25.

142. *Id.* at 24-25.

143. *Id.* at 23-24.

mation, and a ruling in the plaintiffs' favor would at least require the FEC to reconsider its decision, the fact that the FEC might still find that AIPAC was not a political committee under the terms of FECA did not destroy plaintiffs' causation or redressability claims.¹⁴⁴

Justice Scalia authored the dissenting opinion in *Akins*, which was joined by Justices Thomas and Sandra Day O'Connor.¹⁴⁵ The dissent argued that the APA does not allow suits like this because it puts discretion for enforcement actions in public hands and simultaneously takes power from the executive branch.¹⁴⁶ In the dissent's opinion, the majority's ruling expands judicial power at the expense of executive power and is unconstitutional as a result.¹⁴⁷ Notably, Justice Scalia recharacterized the plaintiffs' injuries in *Akins*: He said that the injury here was not a deprivation of information, as the majority had found, but rather the refusal to commence an agency enforcement action against a third party.¹⁴⁸ This recharacterization allowed Justice Scalia to then argue that the refusal to commence an enforcement action against a third person does not render a person "aggrieved" under FECA and that Congress could not have intended such a broad recognition of standing with its "any party aggrieved" language because the majority's reading of the statute would essentially confer standing to sue on anyone.¹⁴⁹ Justice Scalia further supported his arguments by noting that the majority ignored the "particularized" and "undifferentiated" language of the standing requirements articulated in *Lujan II*, and that the majority's omission of this language demonstrated that the plaintiffs' injury here was a generalized grievance that did not affect them in a personal or individual way.¹⁵⁰ The remainder of Justice Scalia's dissent on standing issues concerned how the majority's ruling violated constitutional principles of separation of powers:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty . . . If today's decision is correct, it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper. This is not the system we have had, and is not the system we should desire.¹⁵¹

While a narrow reading of *Akins* would find that informational injury is only sufficient for standing purposes if the injury is to a citizen's voting rights, a broader reading would find that plaintiffs should be entitled to sue an agency for depriving them of information to which they are legally entitled by statute.¹⁵² This suggests that if Congress says that people have a right to a certain kind of information, and that

information is denied to them, Congress is constitutionally permitted to say that the deprivation of information counts as injury-in-fact for purposes of standing.¹⁵³ A broad reading of *Akins* solves other traditional justiciability problems as well. First, it alleviates the concern that plaintiffs are asserting a generalized grievance—given an express grant of standing by Congress, the generalized nature of an informational injury will not impede standing because the generalized grievance limitation is prudential and can therefore be overruled explicitly by an act of Congress.¹⁵⁴ This is important, since informational injury frequently affects a large group of people in the same way, and claims that arguably affect many other citizens similarly would generally be characterized as nonjusticiable generalized grievances.¹⁵⁵

Additionally, a broad reading of *Akins* enables recognition of informational injury as a kind of procedural injury, and under a footnote in *Lujan II*, when plaintiffs are suing for a violation of procedural rights, causation and redressability standards can be somewhat relaxed.¹⁵⁶ This is probably because courts acknowledge that the inclusion of required procedures in a statute creates "structures, incentives, and increased or decreased probabilities" of certain behaviors that Congress finds desirable and through which it hopes to produce better outcomes.¹⁵⁷ Accepting different requirements for causation and redressability in procedural injury cases demonstrates that courts are honoring congressional intent and deciding cases in a manner consistent with the legislative vision inherent in the statute in question.¹⁵⁸

Currently, the long-term impact of *Akins* and its related cases on the law of standing is uncertain. While the Court's holdings in *Public Citizen* and *Akins* definitely recognize that informational injury is a legitimate way to gain standing under FOIA, FACA, and FECA, its extension to other information-generating statutes is still controversial because of conservative Justices' concerns about its possible implications for constitutional law.

IV. How Will the Supreme Court Deal With Future Claims of Informational Injury?

The broad language used by the Court in the *Akins* decision is credited with creating the idea in the legal community that informational injury "arguably applies" to other information-generating statutes, such as NEPA.¹⁵⁹ Since the Court based its decision of the standing question in *Akins* on the fact that FECA explicitly granted a public right to information, legal scholars argue that Congress can confer on citizens the right to obtain information under a statute, as well as a right to bring suit to vindicate that interest.¹⁶⁰ But opponents of this idea, such as Justice Scalia, have frequently argued that allowing deprivation of information to qualify as injury-in-fact basically removes responsibility for enforcement of the nation's laws from the executive branch and

144. *Id.* at 25.

145. *Id.* at 29-30 (Scalia, J., dissenting).

146. *Id.*

147. *Id.* at 30.

148. *Id.* at 31.

149. *Id.*

150. *Id.* at 35.

151. *Id.* at 36.

152. See Sunstein, *supra* note 88, at 636.

153. Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1343 (2000).

154. See Sunstein, *supra* note 88, at 636.

155. *Id.* at 644.

156. 504 U.S. 555, 598 n.7, 22 ELR 20913 (1992).

157. See Sunstein, *supra* note 88, at 650.

158. See Gatchel, *supra* note 118, at 88.

159. See Smith, *supra* note 116, at 655.

160. See Sunstein, *supra* note 88, at 637.

places it in public hands.¹⁶¹ Given that Chief Justice Roberts and Justice Alito have already demonstrated their support of the private law models of standing championed by Justice Scalia, the Court's formal recognition of informational injury in the future is uncertain at best.

While Article III's case or controversy requirement does impose limits on cases for issues such as ripeness and mootness, nothing in the Constitution explicitly limits Congress' power to grant standing to citizens through legislative acts.¹⁶² In fact, since American colonial times, legislatures have conferred standing on taxpayers and citizens for certain causes of action, and courts generally have not found these grants of standing to violate the Constitution.¹⁶³ Moreover, several current members of the Court do not consider this congressional power to be a novel idea—even when *Lujan II* was decided nearly 15 years ago, Justice Kennedy noted in his concurrence, which was joined by Justice Souter, that Congress has the power to “define injuries and to articulate chains of causation that will give rise to a case or controversy where none existed before.”¹⁶⁴ Additionally, Justice Stevens' concurrence in *Lujan II* recognized an expanded vision of injury-in-fact that appears to be receptive to statutorily created injuries.¹⁶⁵ If a vote were taken today, it is likely that Chief Justice Roberts and Justices Alito, Scalia, and Thomas would refuse to expand the private law theories of standing that they ascribe to in order to recognize informational injury's legitimacy. Justice Breyer, who wrote the *Akins* opinion and would therefore be apt to support the extension of informational injury to other contexts, could probably count on votes from Justices Ruth Bader Ginsburg, Souter, and Stevens to uphold the *Akins* Court's recognition of informational injury. Justice Kennedy's vote in support of informational injury is a possibility but not a certainty given his comment in the *Laidlaw* concurrence that hinted at his apprehension with the idea of broadly granting private citizens the right to enforce public statutes.¹⁶⁶ Depending on how he characterizes informational injuries, he could potentially either view them as a legitimate exercise of legislative power or as an illegitimate means of forcing the government to enforce the law. A great deal of uncertainty centers around this question, and there is a good chance that the probability of Justices voting in support of informational injury would depend on the context of the suit in question and the statute under which it was brought.

With that in mind, how likely is it that the Court will recognize other congressionally created injuries and causes of action in the future? To date, the Court's most prominent acceptance of congressional power to create causes of action is likely demonstrated by the lack of successful challenges to citizen suit provisions included in various environmental statutes. Through these provisions, congressional grants of standing to “any citizen” to enforce the statute have become a way for people to redress public injuries and address social

issues, particularly environmental concerns.¹⁶⁷ The legislative histories of statutes with citizen suit provisions show that these provisions were included because Congress did not trust administrative agencies to properly enforce the law.¹⁶⁸ As a result, Congress granted a right of enforcement to citizens so that people could act as “private attorneys general” and oversee agency actions to force agencies to be accountable to Congress and the public.¹⁶⁹

Judicial recognition of congressionally created causes of action is particularly crucial in a government where Congress must delegate power to administrative agencies to successfully implement its laws.¹⁷⁰ A lack of judicial enforcement of these provisions takes power from Congress, who lacks the oversight capabilities to monitor every agency action, and gives it to the executive branch.¹⁷¹ In addition to aggrandizement of judicial and executive power, decreased judicial review of agency actions has other dangerous consequences, including uncontrolled bureaucracy, regulatory capture by industry and special interests, and a general lack of agency accountability to the public.¹⁷² Luckily for environmentalists who use the citizen suit provisions to advance their goals of environmental protection, and despite a note in Justice Scalia's opinion in *Lujan II* that implicitly challenged the constitutionality of citizen suit provisions,¹⁷³ attempts to have citizen suits declared unconstitutional as a violation of separation of powers have been universally rejected.¹⁷⁴

Justice Scalia's apparent dislike of citizen suit provisions is based on his belief that the executive branch should be largely free from judicial review and interference.¹⁷⁵ His ruling in *Lujan II*, where he basically refused to give effect to an Act of Congress through the tightening of standing requirements, exemplifies this attitude perfectly, and his distaste for statutorily created causes of action was noted by the dissent.¹⁷⁶ However, Justice Scalia's separation of powers argument has its own flaws. Judicial review of agency action is one method of ensuring that democratic balance exists in a highly bureaucratic state, and by refusing to perform a judicial “check” on executive action, Justice Scalia actually strengthens the executive and judicial branches at the expense of the legislative branch.¹⁷⁷ Additionally, his contempt for citizen enforcement of federal laws ignores the very important fact that all of the statutes that include citizen suit provisions have already met the constitutional requirements of bicameralism and presentment to the Executive.¹⁷⁸ Where Congress has concluded that citizen enforcement is

167. See McCrory, *supra* note 10, at 91.

168. *Id.*

169. *Id.* at 91-92.

170. See Gerschwer, *supra* note 33, at 1035.

171. *Id.*

172. *Id.* at 1036.

173. 504 U.S. 555, 576-77, 22 ELR 20913 (1992). Justice Scalia notes that vesting power in the judicial branch to “vindicate the public interest” would offend the “Take Care” Clause of Article II, Section 3 of the Constitution that provides the executive branch with sole responsibility for faithful execution of the laws.

174. David Sive, *Environmental Standing*, 10 NAT. RESOURCES & ENV'T 49, 57 (Fall 1995).

175. See Gerschwer, *supra* note 33.

176. *Id.* at 1031.

177. *Id.* at 1029-30.

178. See Sunstein, *supra* note 88, at 646.

161. 524 U.S. 11, 36 (1998) (Scalia, J., dissenting).

162. See Sunstein, *supra* note 153, at 1361.

163. See Sunstein, *supra* note 88, at 639. See also Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

164. See Abate & Myers, *supra* note 115, at 366 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580, 22 ELR 20913 (1992)).

165. 504 U.S. at 582 (Stevens, J., concurring).

166. 528 U.S. 167, 197, 30 ELR 20246 (2000) (Kennedy, J. concurring).

necessary to ensure effective implementation of a statute, and its judgment has received the president's approval, all of the constitutionally required democratic processes have been fulfilled and the judiciary should honor this decision and provide review as Congress intended.¹⁷⁹

Despite Justice Scalia's arguments to the contrary, it appears, at least for now, that the Court considers citizen suit provisions to be constitutional, although recognition of other types of statutorily created injuries or causes of action may be hard to obtain as the ideological composition of the Court shifts back to the right with the appointments of Chief Justice Roberts and Justice Alito. While there is no legitimate constitutional reason to believe that Congress could not include provisions defining new causes of action, including informational injury, in the nation's environmental statutes that would expand the manner in which plaintiffs in environmental suits could gain standing, several members of the Court may try to find ways to nullify these provisions because they violate these Justices' conservative notions of standing.

In response, environmental organizations must continue to bring challenges to the restriction of environmental standing and lobby Congress to try and find legislative vehicles to maneuver around the Court's narrow standing boundaries for environmental plaintiffs. One such tactic may be for Congress to legislate more explicitly so that less room is left for judicial interpretation of substantive law and congressional intent can be more fully recognized. For example, through NEPA's informational and procedural requirements, Congress sought to utilize public participation as a way of achieving environmental protection and demonstrated its commitment to public involvement in oversight of agency actions under the Act.¹⁸⁰ Legal scholars argue that this congressional intention to include public participation in the enforcement of NEPA creates a right to informational standing for plaintiffs to bring suit under the Act when agencies fail to create an EIS or prepare an EIS that fails to sufficiently account for all available information.¹⁸¹ Under this theory, plaintiffs would satisfy standing requirements by showing that the organization's core functions rely on information generated by NEPA and contained in an EIS and that they have been denied the information they need to perform those functions.¹⁸²

However, because Congress did not include a provision in NEPA expressly conferring this informational right to the public, courts have never formally extended the right to informational standing under the Act¹⁸³ and the Court's current members would not be likely to do so without an explicit directive from Congress (and even then, it may still be questionable). Congress could try to remedy this by amending NEPA to include either an explicit citizen suit provision, which would make it more similar to the other major federal environmental statutes, or by including an amendment that expressly declares that informational injury under the Act is sufficient to satisfy the "concrete injury" requirement and by then defining what scenarios would qualify as "informational injury" under NEPA. Both of these solutions could in-

crease the success rate of enforcement actions brought under NEPA, as they would make it more difficult for the Court to deny standing, particularly if the text of the statute was unambiguous in its directives—an express textual mandate would force a strict textualist like Justice Scalia to either look elsewhere for ways to dismiss the plaintiff's action or to temporarily abandon his textualist beliefs and look outside the words of the statute for clues to its interpretation.

Unlike NEPA, which has no citizen suit provision and requires parties to file suit under the APA, several environmental statutes, including the ESA, explicitly provide for enforcement by private citizens. Although having an express citizen suit provision in a statute like the ESA facilitates citizen enforcement,¹⁸⁴ both informational standing and congressional amendment of the statute's provisions to expressly define "concrete" injuries could further enhance a person's chances of satisfying the increasingly narrow standing requirements of a conservative Supreme Court. Both of these options are discussed more fully in the next section.

V. Statutory Rights, Informational Injury, and the ESA

The ESA is the "cornerstone of U.S. efforts to conserve biological diversity."¹⁸⁵ Through a set of action-forcing mechanisms included in the Act,¹⁸⁶ Congress set out to implement a comprehensive statute that would make preservation of endangered species of animals and plants a top priority for the federal government.¹⁸⁷ Inclusion of a citizen suit provision in the Act granting the right to "any person" to commence a civil suit to enforce the ESA's provisions demonstrates Congress' intent to include the public in oversight of enforcement of the Act to ensure that its goals are implemented.¹⁸⁸

Due to narrow standing requirements articulated in the *Lujan* rulings, however, it appears that even the broad congressional grant of standing to "any person" designed to abrogate the prudential limitation imposed by the Court's "zone of interests" test¹⁸⁹ may be hindered by the courts if plaintiffs do not set out specific details demonstrating how an agency action under the Act specifically harms them.¹⁹⁰ Proving the existence of standing can be particularly difficult when plaintiffs choose to advocate for wildlife because it is not always easy to show how harm to wildlife can create

179. *Id.* at 647.

180. See Gerschwer, *supra* note 33, at 999, 1005.

181. See *id.* at 999.

182. See Smith, *supra* note 116, at 653.

183. Abate & Myers, *supra* note 115, at 350.

184. 16 U.S.C. §1540(g).

185. See PERCIVAL ET AL., *supra* note 107, at 853.

186. See Abate & Myers, *supra* note 115, at 376-77. Randall Abate and Michael Myers note that the principal action-forcing mechanisms in the Act are found in ESA §§4 (16 U.S.C. §1533) and 7 (16 U.S.C. §1536), which control procedures for species listing and review of federal actions.

187. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 175, 8 ELR 20513 (1978) ("But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.").

188. 16 U.S.C. §1540(g).

189. In addition to constitutional requirements imposed by Article III, several prudential standing requirements exist that plaintiffs must satisfy before standing can be granted. One of these, the "zone of interests" test, requires that the plaintiff's claimed injury falls within the realm of injuries that the statute was designed to protect against.

190. *Lujan II*, 504 U.S. 555, 563, 572, 22 ELR 20913 (1992).

a “concrete and particularized” injury to a plaintiff, especially if the species in question lives in a remote area that is not frequented by many people. Because of these issues, environmental lawyers must find new ways to try to enforce the Act’s provisions so that endangered wildlife in the United States actually receives the comprehensive protection that Congress intended when it initially passed the ESA in 1966.¹⁹¹

Since the Court requires increasingly specific claims of injury in order to gain standing under the ESA, one possible remedy for this problem would be for Congress to amend the ESA to include provisions categorically defining those injuries that would qualify as “concrete” under the Act, including informational injury. In addition to broad, generally phrased categories of actions that would be sufficient to confer injury on plaintiffs under the Act, Congress could also include a nonexclusive list of scenarios to illustrate the types of interests or actions it intended to protect in the statute’s zone of interests. To include an express grant of recognition of informational injury under the ESA, it would be prudent for Congress to focus on amending the sections of the Act that already require public access to information produced under its provisions, since the ESA does not currently contain an explicit right to information in the way that FECA or FACA does.

The Act’s current information-driven sections could provide plaintiffs with an opportunity to challenge a federal action under a theory of informational standing. The two most prominent sections of the ESA that could be utilized to allege informational injury for standing purposes are §7(g), which governs agency applications for exemption from the Act’s provisions,¹⁹² and §10, which authorizes the Secretary to grant exemptions for activities that are otherwise prohibited by the provisions of §9.¹⁹³ Though each section deals with a separate issue under the Act, both provide that certain information must be made publicly available.

- ESA §7(g)(2)(B)(ii): “Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly . . . publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.”¹⁹⁴
- ESA §7(g)(8): “All meetings and records resulting from activities pursuant to this subsection shall be open to the public.”¹⁹⁵
- ESA §10(c): “The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this subsection. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application . . . Information received by the Secretary as part of any appli-

cation shall be available to the public as a matter of public record at every stage of the proceeding.”¹⁹⁶

Importantly, Congress included the public notice and participation components of these provisions, along with several other procedural requirements, as a way to “limit substantially the number of exemptions that may be granted under the act.”¹⁹⁷ The demonstration of congressional intent to provide public access to this information as a way of forcing agency compliance with the Act’s provisions through general oversight and public accountability opens the door for plaintiffs to use these two sections to assert informational injury. These informational provisions, in fact, are already being used to challenge a regulation promulgated by the U.S. Fish and Wildlife Service (FWS) under the ESA in *Cary v. Hall*.¹⁹⁸

In *Cary*, plaintiffs are challenging a regulation promulgated by the FWS that granted a broad §10 exemption to all entities that engage in captive-breeding of three species of antelope that are currently listed as endangered under the ESA.¹⁹⁹ The ESA allows an exemption from §9’s prohibitions for a variety of reasons—such an allowance is made for captive-breeding establishments (like zoos and wildlife preserves) if the purpose of the breeding is to “enhance the propagation or survival of the affected species.”²⁰⁰ Here, the FWS reasoned that its broad exemption for any facility engaged in captive-breeding of these three antelope species met §10’s exemption standards because it was granted in order to “enhance the propagation of these species by providing an incentive to continue to raise animals in captivity,” regardless of the exempted entity’s reason for breeding these species.²⁰¹ The loophole created by this exemption made it possible for canned-hunting establishments to breed endangered antelopes that would then be used as living, breathing targets for sport-hunting at these facilities. Essentially, the regulation allows captive-breeding of these three endangered species so that they are populous enough at canned-hunting facilities to provide a steady stream of targets for hunters who are willing to pay top dollar to kill them. Ironically enough, even the FWS’ preamble to the final regulations acknowledges this fact: “Without this new regulation, individuals subject to the jurisdiction of the United States would need individual permits to engage in various otherwise prohibited activities, including domestic and international trade in live and sport-hunted captive-bred specimens for commercial purposes.”²⁰²

In response to the FWS’ actions, a group of individual and organizational plaintiffs, which include the Humane Society of the United States, Defenders of Wildlife, the Kimya Institute, and Born Free USA, filed suit to challenge this regulation under a theory of informational and procedural standing.²⁰³ The plaintiffs allege that the FWS’ promulga-

191. See *supra* note 187.

192. 16 U.S.C. §1536(g).

193. *Id.* §1539.

194. *Id.* §1536(g)(2)(B)(ii).

195. *Id.* §1536(g)(8).

196. *Id.* §1539(c).

197. H.R. REP. NO. 93-412, at 17 (1973), reprinted in A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 156 (97th Cong. 1982).

198. No. C 05-4363 (VRW) (N.D. Cal. filed Oct. 26, 2005).

199. 70 Fed. Reg. 52310, 52310-11 (Sept. 2, 2005).

200. 44 Fed. Reg. 54002, 54007 (Sept. 17, 1979); see also 50 C.F.R. §17.21(g)(1)(ii).

201. 70 Fed. Reg. at 52312.

202. *Id.* at 52317.

203. Federal Defendants’ Motion to Dismiss at 5, *Cary v. Hall*, No. C-05-4363 VRW (N.D. Cal. filed Dec. 23, 2005).

tion of this regulation caused them to suffer informational injury under the ESA—by granting a broad §10 exemption to an entire category of captive-breeding facilities without requiring each facility to file individual applications for incidental take permits as the ESA requires, plaintiffs claim that the FWS has deprived of them of information that they are entitled to receive and disseminate to their members.²⁰⁴ Plaintiffs also claim that by eliminating the permit requirements for all facilities that breed endangered antelopes, the FWS is “necessarily depriving the organizational plaintiffs and their members of their statutory right to all of the information that is required to be submitted to the FWS and made available to the public under Section 10”²⁰⁵

Further, the organizations allege that they are subsequently “impaired in their ability to collect and disseminate such information to their members and the public in general, and to receive the statutory ‘findings’ that Congress required the FWS to provide, as a means of ‘limit[ing] substantially the number of exemptions that may be granted under the act.’”²⁰⁶ Because the organizational plaintiffs alleged in their complaint that they “monitor applications for Section 10 permits and rely on information provided by the FWS to keep their members and the general public informed about these matters, and to provide comments to the agency,”²⁰⁷ it appears that they meet the basic requirements for informational standing set out in *Akins*. They have been denied information that they are statutorily entitled to receive, and this deprivation has resulted in an injury to their organizational ability to collect and disseminate that information to their members and the public.²⁰⁸

If the court recognizes plaintiffs’ informational injury as sufficiently concrete for standing purposes, proving causation and redressability should not be difficult. Both of these Article III requirements can be easily satisfied because plaintiffs allege that if the FWS had not issued this broad exemption for captive-bred antelopes under §10 of the ESA, entities like canned-hunting establishments who wish to breed these animals for the sole purpose of killing them would “each have to apply for a Section 10 permit . . . and plaintiffs would be able to obtain—and comment upon—all of the information that is required to be submitted in support of ‘each’ application.”²⁰⁹ As such, causation is directly traceable from the FWS’ promulgation of this regulation to the plaintiffs’ informational injuries. Redressability would be easily satisfied by a court order directing the FWS to set aside this regulation, which would force the agency to consider incidental take permits for these establishments individually and provide plaintiffs with the published information they seek and the opportunity to participate in the decisionmaking process.

204. Plaintiffs’ Opposition to Defendants’ Motion to Dismiss and Proposed-Intervenors’ Brief in Support Thereof at 27, *Cary v. Hall*, No. C-05-4363 VRW (N.D. Cal. filed Feb. 2, 2006).

205. *Id.*

206. *Id.* at 28 (citing H.R. REP. NO. 93-412, at 17 (1973), reprinted in A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 156 (97th Cong. 1982).

207. *Id.* at 28 (citing Plaintiffs’ Complaint ¶¶ 13-22, *Cary v. Hall*, No. C-05-4363 VRW (N.D. Cal. filed Oct. 26, 2005)).

208. 524 U.S. 11, 21 (1998).

209. Plaintiffs’ Opposition to Defendants’ Motion to Dismiss and Proposed-Intervenors’ Brief in Support Thereof at 34, *Cary v. Hall*, No. C-05-4363 VRW (N.D. Cal. filed Feb. 2, 2006).

Cary has not yet been decided. Plaintiffs are awaiting a ruling on the FWS’ motion to dismiss, and if they survive that jurisdictional challenge, they may then face a summary judgment challenge on issues of standing. Because informational standing has been granted in cases where the governing statute explicitly granted a right to information, the plaintiffs may be successful in demonstrating informational standing since the sections of the ESA they challenge explicitly provide for information generated under it to be provided to the public and since the FWS’ regulation has basically eradicated this requirement for certain captive-breeding facilities. However, it is also possible that the court will not recognize informational injury as a legitimate claim under the ESA and will dismiss the plaintiffs’ suit for lack of standing. If the challenge is successful, environmental lawyers could use *Cary* as a springboard for other informational challenges to regulations promulgated under the ESA. Their efforts would obviously be enhanced, however, by a congressional amendment to the Act that expressly recognized informational injury as a sufficiently concrete injury to confer standing.

By providing express statutory language conveying possible causes of action and sources of injury, including informational injury, available under the ESA, Congress could further clarify its legislative intent while taking the guesswork—and some judicial discretion—out of statutory interpretation of the Act. This could increase the chances that plaintiffs would be granted standing to enforce the ESA’s provisions, and it would give prospective plaintiffs a better idea of what types of “harm” would likely gain them entrance to the federal courts.

Given that some members of the Court already feel that congressionally created injuries and causes of action intrude into the provinces of the judiciary and the executive, the above-suggested amendments would likely be controversial. However, if Congress used the Court’s current parameters of standing, i.e., recognizing aesthetic, environmental, and informational interests, as the basis for its amendments, the Court would have to search more extensively to find ways to discredit the provisions. Using previous court decisions as the foundation for amendments to the Act defining new causes of action and sources of injury would force the Court to either overrule previous opinions, to distinguish them, or to rule on the constitutionality of the amendments themselves.

None of these options is particularly desirable. While distinguishing previous opinions would be the easiest maneuver for the Court, it would also create more uncertainty for judges in the lower federal courts. Additionally, the Court would not be eager to overrule itself and would likely only do so for an extremely significant reason. Its only other option, therefore, would be to rule on the constitutionality of the provisions themselves. Doing so would require a case to come before the Court that explicitly challenged the constitutionality of Congress’ actions, as doctrines of judicial restraint require that the Court avoid issues of constitutional questions if the case can be decided on a different basis.

While it may take significant time and effort to effectively implement these changes in the current legal climate, the long-term success of the ESA may depend on Congress creating new causes of action or more specifically defining injuries like informational injury that are protected by the Act so that judges have less room to interpret the ESA in a way that harms, rather than protects, endangered wildlife in the United States.

VI. Conclusion

Since its inception, standing boundaries have been broadened and narrowed as the composition of the Supreme Court has changed from conservative to liberal and back again. Environmentalists currently function in an era where the Supreme Court has generally chosen to narrow standing requirements and to demand a detailed showing of specific injury to plaintiffs before standing can be conferred. This requirement can be extremely difficult to fulfill when the objects that plaintiffs are choosing to protect are the nation's trees, rivers, air, and wildlife.

However, given the recognition of informational standing in cases like *Akins* and *Public Citizen*, it is possible that

environmental lawyers will be able to find ways to utilize allegations of informational injury to gain standing when bringing suit under major environmental statutes, including the ESA. In order to prevent Justice Scalia and his conservative brethren from further limiting citizen access to the courts in environmental suits, it is essential that environmentalists be vigorous in their search for and assertion of innovative concepts of injury in fact for standing, like informational injury. By developing new ways of demonstrating that plaintiffs have suffered concrete injuries that were not previously recognized by the courts, environmental lawyers may be able to unearth a strategy that will allow more liberalized standing principles to remain intact despite the presence of a conservative Supreme Court that wishes to return to private law models of standing.