PUBLIC GOODS V. PRIVATE RIGHTS: ANALYZING GOVERNMENT INEFFICIENCIES IN ENVIRONMENTAL PROTECTION

by

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In this project, I describe the intergenerational nature of environmental public goods, and argue that the Supreme Court's inconsistent doctrine of legal standing is as an obstacle to the enforcement of environmental laws that provide these public goods. Public goods are goods that do not diminish as they are used or consumed and those that cannot be restricted in who consumes them, such as stable soil, an ecosystem, or clean air.

Environmental public goods are particular in that they are intergenerational, meaning their provision is dependent upon consistent and long term commitment. Although Congress has passed numerous statutes that protect environmental goods, the executing agencies are often unmotivated or unable to uphold these laws and provide these goods. Though the courts offer a way for citizens to become involved in ensuring the consistency of an agency's official commitment, the Supreme Court's application of the standing doctrine poses three challenges to external actors seeking legal review. An institutional difference between the private nature of the Court and the public nature of environmental legislation explains the challenges groups have in demonstrating standing under environmental protection laws. These challenges are made increasingly difficult as the Court inconsistently applies this doctrine to limit access to rigorously demonstrated injuries felt by only a minority of the population.

Finally, this paper proposes that by changing the definition of the injury or the injured, Congress can reconcile this public-private tension in a way that ensures access to the courts while meeting the Court's standing requirements.

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LIST OF ABBREVIATIONS

Administrative Procedures Act……..APA

Clean Air Act…….CAA

Clean Water Act……...CWA

Defenders of Wildlife……...DOW

Endangered Species Act…….ESA

Environmental Protection Agency…….EPA

Environmental Public Good……...EPG

Fish and Wildlife Service……..FWS

Food and Drug Administration……..FDA

Friends of the Earth……FOE

Greenhouse Gas…….GHG

Marine Mammals Protection Act……...MMPA

National Environmental Protection Act……..NEPA

National Pollution Discharge Elimination System……NPDES

National Public Radio……NPR

Students Challenging Regulatory Agency Procedures …….SCRAP

PREFACE

In the Pacific Northwest, the Western Red Cedar is considered by many a “tree of life.” It is believed that if one stands with their back to the trunk and gazes through its branches, she can gain the strength of the tree. I am fortunate to be in a forest of such wisdom at the University of Pittsburgh. Foremost, I would like to offer thanks to my thesis advisor Professor Jennifer N. Victor for her enthusiasm and support as an advisor and mentor. I am grateful for her dedication of time to this undergraduate project and for her interest not only in the production of this thesis, but in the academic development of its author. I would also like to thank Professor Steven Bilakovics, whose initial encouragement and captivating class inspired this work, and whose continuing support saw to its completion. To Mark Collins whose expert and critical eye helped me to polish both the writing and the ideas. And to Edward McCord who demonstrated that my love of the outdoors need not stop outside of academics, and in so doing inspired a more fulfilling undergraduate experience.

That experience and this project have been in whole encouraged by Dean Alec Stewart and the entire staff of the University Honors College. Each person has been individually influential in the development of this project. The UHC consistently provides opportunities and support for undergraduates to pursue their curiosities in a productive and rewarding manner—it is a gathering place for passionate people to foster captivating ideas, and I offer my deepest gratitude to all those with whom I have spent time in the UHC.

I would like to sincerely thank Washington State Park rangers Janet Shonk and Stacy Czebotar, as well as the Washington State Parks and Recreation Commission and the Student Conservation Association. My internship working for State Parks and with these two friends provided me my most powerful outdoor experiences and gave me the endurance to complete this thesis. Finally, thank you to my friends and family who have been interested in, and tolerant of, this endeavor. I am quite lucky to have parents and an aunt and uncle who not only have supported this project, but have read this thesis. Thank you.

1.0 INTRODUCTION

"Our responsibility as life tenants is to make certain that there are wilderness values to honor after we have gone." –Supreme Court Justice William O. Douglas[1]

"The province of the court is, solely, to decide on the rights of individuals." Chief Justice Marshall[2]

In 1969, the Sierra Club sued the Secretary of the Interior, Rogers Morton, when the National Forest Service permitted the development of Mineral King Valley, part of Sequoia National Forest. Walt Disney Enterprises, Inc. had won the permit, and planned to develop an enormous ski resort, including an access highway cutting through the valley. In court, the Sierra Club argued that Walt Disney's development "would destroy or otherwise affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations."[3] The District judge blocked the Disney development, but upon appeal both the Court of Appeals and then the Supreme Court found that the Sierra Club had not demonstrated how it or its members would be harmed by the development of the valley. Justice Stewart, writing for the majority, explained, "[N]owhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any

[1] William O Douglas, *A Wilderness Bill of Rights* (Little, Brown and Company: Boston, 1965), 26.
[2] *Marbury v. Madison*,5 U.S. 137 (1803).
[3] *Sierra Club v. Morton* 405 U. S. 734 (1972).

way that would be significantly affected by the proposed actions of [Disney]."[4] In other words, the Sierra Club failed to demonstrate that it had been "injured in fact" by the agency's grant of the permit. In order for the Sierra Club to be granted standing to make the argument that Mineral King Valley should remain a remote area of wilderness, the Club had to demonstrate that its members *used* the Valley to a significant extent and therefore would be injured by its development.

Sierra Club v. Morton (1972) was significant to citizen efforts to protect natural entities such as rivers, valleys, and species. In *Sierra Club,* the Supreme Court recognized that threats to *intangible* interests might be grounds for standing to sue, holding that "aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society."[5] These interests had only recently been recognized as justiciable,[6] and the holding in *Sierra Club* allowed conservation-minded citizens who had been injured to have standing in court.[7] After the Supreme Court's ruling, the Sierra Club returned to the lower courts and presented a slew of members who hiked, fished, or otherwise spent time in Mineral King Valley who could demonstrate that the Disney development would actually harm their interests. The citizens were able to demonstrate the required injury in fact. Not interested in a lengthy environmental impact study, Disney withdrew the proposal. In this way, Mineral King Valley has remained undeveloped, and hundreds of citizen suits have secured protection for natural entities since.

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[4] 405 U.S. 735 (1972).
[5] 405 U.S. 734 (1972).
[6] *Data Processing Service Organizations* 397 U.S. 154 (1970) citing *Scenic Hudson Preservation Conf. v. FPC,* 354 F.2d 608, 616; *Office of Communication of United Church of Christ v. FCC,* 123 U.S.App.D.C. 328, 334-340, 359 F.2d 994, 1000-1006; *Abington School District v. Schempp,* 374 U. S. 203.
[7] For a detailed study of the dynamics of environmental legislation in the 1970s, see generally Lettie M. Wenner, *The Environmental Decade in Court* (Bloomington: Indiana University Press, (1982). Notably, the Supreme Court was less favorable to environmental cases than were lower courts.

Still, the court's denial of standing in *Sierra Club v. Morton* based on the "injury in fact" test exemplifies challenges that groups like the Sierra Club face when they seek judicial review of an agency action (like the Forest Service's permit grant) that threatens environmental protection. The court's description of an aesthetic interest suggests a straightforward solution, as evidenced by the Sierra Club's second, and successful, attempt to demonstrate standing. But consider a case in which plaintiffs have visited and expressed that they wish to return to the habitat of a species that international agency action threatens. How discrete must their injury be? Is the injury to their *opportunity* to view endangered species? Must the plaintiffs have actual travel plans to the area, even though the immediate harm to the species will persist? The Endangered Species Act clearly calls for the protection of endangered species, and the species is injured-in-fact. But a plaintiff who failed to demonstrate how the agency action harmed *her* will not meet stricter criteria for standing. Or, consider a case in which the Environmental Protection Agency (EPA) has refused to regulate greenhouse gas emissions from new automotive vehicles. A group of citizens sues the EPA for refusing to perform a mandatory action under the Clean Air Act, arguing that the EPA is mandated to decide if greenhouse gases (GHGs) affect climate change and if so, to regulate emissions. Even before the citizens testify, the citizens themselves must demonstrate that climate change exists, is caused at least in part by the emission of GHGs from automobiles, that climate change will injure *them* in an imminent way, and that the citizen's injury would be at least partially redressed by EPA regulations.[8]

Both of these instances were brought before the Supreme Court, in *Lujan v. Defenders of Wildlife* (1992) and *Massachusetts v. EPA* (2007), respectively.[9] In the first, the Court held that because the plaintiffs could not demonstrate their imminent return to the area where the species

[8] See *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992); see *Massachusetts v. EPA* 549 U.S. 497 (2007).
[9] *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992).

were harmed, the plaintiffs did not have standing.[10] In the second, none of the citizens were granted standing because each had failed to demonstrate how global warming would harm her/him more discretely than it would any other citizen.[11] These cases elucidate potential problems that groups face when they bring suit to protect environmental public goods. Consider the scenic view of Mineral King as a public good. Disney wanted to build a ski resort (a private good) in the valley. This threatened the scenic view (a public good). Paradoxically, the scenic view would have to be rendered a private good before the Court would intervene to protect it. This paper elucidates this dilemma.

Recognizing government's failures in protecting environmental public goods, this paper is motivated by the question: why has government ineffectively provided environmental protection? The answer is twofold. First, although Congress has passed laws that protect environmental resources, the execution of those laws has been insufficient. Second, although external actors can use the courts to compel the execution of the law, the courts have restricted access to this legal review. The latter point is evident in the above examples, and is particularly significant because of the nature of environmental resources.

To answer this question, I begin in Chapter 2.0 by describing public goods, explaining why government often serves as a mechanism for their provision, and the particular challenges to the provision of environmental public goods. In Chapter 3.0 I demonstrate (a) that Congress has passed environmental legislation that protects certain environmental public goods and (b) that agency administration of environmental law has been insufficient to the provision of these goods. As is evident in *Sierra Club,* interest groups seek to use the Court's power of judicial review to

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[10] *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992).

[11] *Mass v. EPA* The citizens that sued were joined by Massachusetts and various other governments. Massachusetts was the only party to be granted standing. The merits of the case were heard, but because of Massachusetts' standing, and not the standing of any citizen.

examine these agency actions. However, as is also evident in *Sierra Club*, the Court's doctrine of standing proves a challenge to groups bringing suit to protect these environmental public goods. In Chapter 4.0 I identify three factors that explain why groups face particular challenges when bringing suit under environmental public goods legislation. These are (a) the tension between public goods and private rights (b), the Court's inconsistent application of "injury in fact" and (c), the Justices' different emphasis on "adverseness." Finally, in Chapter 5.0, I propose two ways in which the legislature could change environmental protection in order to enable groups to obtain effective judicial review of agency action in regards to environmental legislation, by (1) changing the conception of "injury" and (2) by granting legal standing to the protected natural entities.

2.0 ENVIRONMENTAL PUBLIC GOODS AND THE TRAGEDY OF THE COMMONS

In order to understand government insufficiencies in environmental protection, it is necessary to recognize the nature of environmental resources. Congressional statutes that provide environmental protection provide intergenerational environmental public goods. Section 2.1 describes public goods theory, and provide a taxonomy of environmental public goods. Section 2.2 explains the collective action problem that surrounds the provision of public goods. Section 2.3 elucidates the particular difficulties in providing environmental public goods.

2.1 AN ENVIRONMENTAL PUBLIC GOODS TAXONOMY

Historically, two criteria have been used to classify goods: rivalry and excludability. A good is rival when consumption of the good by one limits consumption of the same good by another. For instance, if I eat an orange, that orange is then unavailable to you. A good is excludable when the benefits of the good can be restricted by its owner.[12] For instance, if I choose not to share my guitar, no one else can play it. A good that is both excludable and rival is identified as a private good. If a craftsman makes a certain number of guitars, the number of

[12] Scott H. Ainsworth, *Analyzing Interest Groups: Group Influence on People and Policies* (New York: W.W. Norton & Company, 2002) 15.

consumers is limited by the number of guitars made. A good that is neither rival nor excludable is a public good – consumption of a public good by one cannot limit the consumption of that good by another, and access to the good cannot be limited as to prevent access by another. For instance, my "consumption" of public radio does not limit anyone else's consumption, and after I have purchased a radio, nothing prevents me from listening to National Public Radio (NPR).[13]

Natural entities provide an array of goods. Environmental private goods would include lumber, areas for energy development, water for private use, food, and a depository for toxic waste. These are all goods that are rival in consumption and excludable in benefits. Where one lumber company farms, another company can necessarily not. One's use of water for irrigation purposes necessarily reduces the amount of water available for her neighbor's crops.

The areas and entities that provide these private goods also provide many public goods, like stable soil for erosion prevention, a healthy watershed, a stable atmosphere, and an inspiration for wilderness values. Consider a stable climate as an environmental public good (EPG). When one citizen benefits from the stability of the climate, the stability of the climate does not change in response. Each citizen can enjoy a stable climate simultaneously without affecting that stability. A stable climate is thus non-rival and non-excludable. Similarly, the stability of a watershed and of an ecosystem can be considered public goods.[14] Integral to the stability of an ecosystem is the integrity of the biota, or the sum of the living organisms living within a given area.[15] Biointegrity can therefore also be considered an environmental public

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[13] For an explanation of public goods theory and as it relates to environmental public goods, see Alkuin Koelliker, "Globalisation and National Incentives for Protecting Environmental Public Goods: Types of Goods, Trade Effects, and International Collective Action Problems," in *A Handbook of Globalisation and Environmental Policy* ed. Frank Wijen, Kees Zoeteman, and Jan Pieters (Cheltenham, UK: Edward Elgar, 2005) 58.

[14] Integral to the stability of an ecosystem is the integrity of the biota, or the sum of the living organisms living within a given area. Biointegrity can therefore also be considered as an environmental public good in the same vein as other stabilizing entities.

[15] David Sadava et al., *Life: the Science of Biology, 8th ed*. (USA, Sinauer Associates, Inc. 2008) 472.

good in the same vein as other stabilizing entities.[16] These public goods—the stability of the climate, a watershed, or an ecosystem—are provided by forests, wilderness areas, or other natural areas.

Tangible environmental public goods also provide intangible public goods. Historical environmentalists like Aldo Leopold and John Muir maintained that wilderness areas were areas of immense freedom, promoters of intellectual diversity, and fundamental to American democracy. [17] Former Supreme Court Justice William O. Douglas promoted a *Wilderness Bill of Rights*, arguing that although wilderness areas were physically only enjoyed by a few, wilderness values should be recognized by a diverse population.[18] According to Douglas, even if a citizen does not or cannot visit a wilderness area, she finds a certain identity and comfort in the wilderness' existence. Fifty years later, Mark Sagoff argues that wilderness areas provide symbols of American nationality.[19] Sagoff concludes "our obligation toward nature is an obligation toward the expressive qualities we value and feel toward nature."[20] Sagoff argues these expressive entities must be continually provided or the concept of those expressive qualities changes,[21] and therefore, "one way to keep our concept of freedom intact is to respect the objects that express it."[22] It follows from these arguments that if one American finds comfort

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[16] Consider Edward O. Wilson, described in Roderick Nash, *Wilderness and the American Mind* (New Haven: Yale University Press, 1982) 260. See generally, Paul Ehrlich and Anne Ehrlich, *The Dominant Animal: Human Evolution and the Environment* (Washington, Island Press: 2008) and Amery B. Lovins, L. Hunter Lovins, and Paul Hawkin, "A Road Map for Natural Capitalism" *Harvard Business Review* May-June (1999) 146 who argue that ecosystems provide certain free environmental services available to all that are not reproducible by humans.
[17] Roderick Nash, *Wilderness and the American Mind* (New Haven: Yale University Press, 1982) 204.
[18] William O Douglas *A Wilderness Bill of Rights* (Boston: Little, Brown, 1965) "Even though a wilderness is thought of in terms only of those who canoe or hike or backpack of ride horses or climb mountains, the values are important in our pluralistic society." 86 "When it comes to wilderness we need a similar Bill of Rights to protect those whose spiritual values extend to rivers and lakes, the valleys and the ridges, and who find life in a mechanized society worth living only because those splendid resources are not despoiled" 87.
[19] Mark Sagoff, "On Preserving the Natural Environment," *Yale Law Journal* 84 (1974).
[20] Ibid., 245.
[21] Ibid., 259. ("The destruction of symbols is a step toward ignorance of the qualities those symbols express.")
[22] Ibid., 228.

in knowing the Grand Canyon is unblemished by the trappings of civilization, of course another American is able to appreciate the same free nature of the canyon. Thus, the consumption of these symbols is non-rival and furthermore non-excludable. Indeed, one's appreciation for the canyon may be augmented as the canyon becomes a national symbol.

Often goods are not easily identifiable as purely public or purely private. Consider a town's public square. Any citizen or visitor to the town can use the square, and throughout the summer, many visitors do. The carousel is broken and the lawn worn. In the evenings, the quiet atmosphere is often disrupted by the chatting of visitors. Consequently, a visitor who comes to the square on a late-summer evening does not enjoy the same green and peaceful square as does the first spring visitor. In this example, consumption of the good is non-excludable, for access to the square was not restricted. Consumption of the good is, however, rival; one visitor to the square affects the visit of another visitor. A good that is rival in consumption but non-excludable can be called a common pool resource.[23] Consider high-sea fisheries as a common pool resource—without international treaties, anyone can fish, but each catch reduces the pool. On the other hand, a good that is excludable in consumption but non-rival within the consuming group is called a club good.[24] The good is non-rival within a particular "club" of people. Consider cable television—no one who installs a cable box is interrupting another's television viewing opportunities. The benefits of cable television are available only to those who purchase the service, but once the service has been purchased, consumption is non-rival.

Consider the goods taxonomy of a national park. The stability of the soil, of the ecosystem, and of the climate are arguably pure public goods, but the park institution and land

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[23] Alkuin Koelliker, "Globalisation and National Incentives for Protecting Environmental Public Goods: Types of Goods, Trade Effects, and International Collective Action Problems," in *A Handbook of Globalisation and Environmental Policy* ed. Frank Wijen, Kees Zoeteman, and Jan Pieters (Cheltenham, UK: Edward Elgar, 2005) 61.
[24] Ibid.

itself are not purely non-excludable and non-rival. Because Yellowstone National Park does not currently have a quota system to limit the number of visitors, the roads are often subject to congestion, and increased visitation leads to widened trails, polluted air, disturbed wildlife, and a decrease in the wilderness and outdoor experience. Access to the park is non-excludable, but consumption is somewhat rival, meaning that visitation is not limited and visitation by some disturbs visitation (consumption) by others. The park, like other public lands, is an impure public good.[25]

Table 1. Goods Taxonomy

	Excludable	**Non-Excludable**
Rival	**Private Goods** Timber Energy Development Furs	**Common Pool Resources** Public Land Wild Fish Stock
Non-Rival	**Club Goods** Research and Development	**Public Goods** Clean Air Stability—climate, biota, watershed

[25] See generally, William Lowry, *Preserving Public Lands for the Future: The Politics of Intergenerational Goods* (Washington D.C.: Georgetown University Press, 1998).

2.2 THE RATIONAL ACTOR

The value of a public good is necessary but not sufficient for citizens to take actions to protect it.[26] As Mancur Olson argues in *The Theory of Collective Action,* no individual has an incentive to contribute to the provision of public goods.[27] In *The Tragedy of the Commons,* Garrett Hardin demonstrates that it is wrong to assume that "decisions reached individually will, in fact, be the best decisions for an entire society."[28] He then describes the tragedy of a free commons in which no individual has an incentive to protect the public good of the commons. An example commons is the public square in section 2.1, or Yellowstone National Park. The tragedy unfolds in this way: imagine a given pasture is common to all shepherds in the area. The commons is large enough to sustain one sheep per shepherd. Any sheep added above this number will reduce the viability of the field. Each shepherd wants to maximize her gain, and so she compares (a) the utility of adding one sheep to the field to (b) the damage done to the field that she will experience. The utility to the shepherd is 1 for each additional sheep that she will add, and she only experiences a loss of utility a tiny fraction of -1. This loss is much smaller because the overgrazing affect that single sheep has will be divided among all of the shepherds. The rational shepherd concludes that it is in her best interest to continually add sheep to the field. Each rational shepherd reaches this conclusion—the tragedy is that each shepherd is "locked into a system that compels [her] to increase [her] herd without limit—in a world that is limited."[29] Thus, Hardin concludes, "freedom in a commons brings ruin to all."[30] He explains that for

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[26] Alkuin Koelliker, "Globalisation and National Incentives for Protecting Environmental Public Goods, 57.
[27] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1971).
[28] Garrett Hardin, "The Tragedy of the Commons" *Science,*162 December 13, 1968, 1244.
[29] Ibid.
[30] Ibid.

pollution, the rational interest is putting something into the commons that alters the nature of the commons. The tragedy here is that, "[Every] rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them."[31]

Hardin argues that each user of a public commons has a strategic interest in exploiting the commons.

Author David Humphreys argues that neither unregulated use nor private ownership of the forest commons promotes conservation because they focus on the short term and the market. This is because the short-term rewards of market-based mechanisms "tend to generate only those forest private goods with monetary value that can be traded for profit." They are unable to "capture the full public goods value of forests and thus [market mechanisms] promote a reductionist view of forests."[32]

Hardin, Olson, and Humphreys argue that rational actors have incentive to take actions that are beneficial in the short term. In the tragedy of the commons, we see that these rational actions undermine the maintenance of the commons. In order to protect the commons, or provide other public goods, citizens need to collectively agree to take certain actions. The community of shepherds could collectively agree to limit each's flock to one sheep. Humphreys describes the common nature of forests, and how outside interests can undermine the balance of communal checks in the maintenance of a commons. He argues that Hardin's argument is a convincing explanation of the dynamics of use (of a commons) when access is not restricted by communal rights or rules (or the rules are broken.)

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[31] Garrett Hardin, "The Tragedy of the Commons."
[32] David Humphreys, *Logjam: Deforestation and the Crisis of Global Governance* (London: Earthscan, 2006) 14.

An external institution can often solve the collective action problem by coercing rational actors to protect the commons.[33] The government often serves as this coercive force. In regards to environmental public goods, the government passes regulations that restrict actions that would harm the environmental commons. Even though a state does not only provide public goods—for instance military contracts are private goods awarded by the state— "a state is first of all an organization that provides public goods for its members."[34] For example, the military contracts, private goods, are awarded in order to secure military protection, which is a public good. Hardin argues that administrative law can legislate temperance in a way that can protect environmental commons.[35] Humphreys also concludes that administrative law is necessary to the provision of environmental public goods. The focus of this paper is on those environmental public goods that the government legally protects.

2.3 THE SPECIAL DILEMMA WITH EPGS

Before examining the government's role in the provision of environmental public goods, it is necessary to identify several characteristics of EPGs that make them particularly challenging to provide. First, the *same* forests or wilderness areas can provide both private and public goods. As the nature of the good changes, the group that benefits from it does as well. The recipients include the private lumber company, the local citizenry, and the global population that benefits

[33] Hardin, 1245.
[34] Mancur Olson, *The Logic of Collective Action*, 15. Scott H. Ainsworth, *Analyzing Interest Groups: Group Influence on People and Policies* (New York : W.W. Norton & Company, 2002) 16. He also notes that states are not the only entities that provide public goods.
[35] Hardin, 1245.

from the forest's contributions to a stable climate.[36] Those who live near a forest benefit from the water purification, watershed stability, and recreation opportunities that the forest provides. Citizens that live in another country may not visit the forest and thus not benefit from these goods. The global citizens still benefit from its carbon capture and purification of the air.

The provision of public goods for the benefit of one citizenry will alter the nature of the other goods, and often constrain the availability of a private good. This makes solving the collective action problem more difficult. If a forest is designated as wilderness by the government, the private good of lumber is no longer available. EPGs are only available to "use" when they remain "unused" in a traditional sense of raw materials consumption. This creates clear conflict between consumers of environmental private goods and consumers of public goods, evidenced by the conflict in *Sierra Club v. Morton*. A forest does not only prevent erosion and capture carbon, but it potentially offers lumber or farm land. In order to provide wilderness recreation, there can be no ski resort.

A second characteristic that makes environmental public goods especially challenging to provide is that these goods are *intergenerational* in nature. This means their provision is dependent upon continual collective action. Dr. William Lowry identifies three factors that are necessary (though not sufficient) to the governmental provision of intergenerational goods. These factors are consistent public support for the good, political stability, and an official commitment by the providing government.

If a president was particularly anti-public radio and his/her appointee did not provide the public funding for National Public Radio, the public good would no longer be provided. But, if such a president was succeeded by a public radio supporter, the first president's anti-public radio

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[36] David Humphreys, *Logjam* 4.

policy could be easily remedied with new funds. A similar situation does not hold for environmental public goods. A clear-cut forest cannot regenerate on inauguration day. Neither can the bonding properties of Ozone depleting compounds disappear, nor can the ice caps refreeze simply because of new agency commitment. Environmental protection efforts need only fail once for depletion of the intended public good to occur, potentially for generations.

It cannot be assumed that the government will be an able provider of intergenerational public goods. In the following chapter, I demonstrate how government environmental protection is subject to short-term influences and therefore is ineffective.

3.0 EPGS LEGISLATION AND ITS INSUFFICIENT EXECUTION

"Any decision against development can always be overturned later by a new law, a new policy, or a new mood in the country. Preserving national treasures such as Yellowstone, the Grand Canyon, the redwoods, or Alaskan lands may be a temporary expedient. As long as a parcel of land goes undeveloped, the potential for a change in government policy exists."[37]

In this chapter I demonstrate that, although Congress has recognized the government's responsibility for the continual provision of certain EPGs, political appointments to agency administration have lead to inconsistent application and execution of these environmental protection laws, and therefore, insufficient commitment to the protect of environmental public goods. Statutes that protect environmental public goods theoretically solve the collective action problem. By regulating environmentally damaging activities, these statutes compel citizens, businesses, and the government itself to protect environmental public goods.

3.1 COLLECTIVE ACTION BY ADMINISTRATIVE LAW

Shortly after the creation of Yellowstone National Park (1872), Cinnabar and Clark Fork's Railroad Company attempted to secure a right-of-way across the park. Supporters of the development argued that hallowed American values centered on the accumulation of property

[37] Lettie M. Wenner, *The Environmental Decade in Court* (Bloomington: Indiana University Press, 1982) 173-174.

and commercial enterprise. In a 107 to 65 vote, the House of Representatives rejected the railroad's application. In describing the floor debate, historian Roderick Nash asserts that "never before had wilderness values withstood such a direct confrontation with civilization."[38] Indeed, this debate centered around Yellowstone's purpose—should it be a park that primarily protects environmental public goods, or should it foremost encourage tourism and development? As evidenced by this anecdote, society does not recognize all public goods as significant enough to be provided.[39] Since this early debate over Yellowstone, Congress has passed numerous statutes that protect certain environmental public goods. Theoretically, these statutes solve the collective action problem that surrounds the provision of EPGs. An examination of these statutes reveals language that considers the intergenerational nature of public goods. The statutes define the public goods they intend to provide, recognize the government's role in their provision, and affirm an intergenerational commitment to their provision.

The passage of the Wilderness Act in the middle of the century demonstrates Congress's acknowledgement of government's necessary commitment to the provision of certain environmental public goods. The passage of environmental protection statutes does not, however, signify Congressional consensus, and therefore does not imply that these protections will ensure the protection of these goods. For example, the debate regarding the Wilderness Bill involved seven years, nine separate hearings, more than six thousands pages of testimony, and sixty-six re-written submissions.[40] According to Nash, the strongest opposition to the bill was a fear that a wilderness system would be too rigid and inflexible. Nash summarizes the defense of the bill in the significant words of David Brower, founder of the Sierra Club: "the wilderness we

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[38] Roderick Nash, *Wilderness and the American Mind* (New Haven: Yale University Press, 1982) 114-115.
[39] David Humphreys, *Logjam: Deforestation and the Crisis of Global Governance* (London: Earthscan, 2006) 2. ("society plays a role in determining what is important enough to be provided as a public good.")
[40] *See* Roderick Nash, *Wilderness and the American Mind* 222.

now have is all…men will ever have."[41] A wilderness system must be rigid in order to ensure intergenerational provision. Since this early debate, conflict between short-term pursuits and the long-term provision of intergenerational environmental goods continued, but in that time, congress passed a wealth of statutes that protect environmental public goods. The maintenance of these statutes is important to the continual protection of EPGs.

The statutory language defines the environmental public goods the Government recognizes as important to provide. For instance, the "Purpose" of the Clean Air Act (CAA) is "to protect and enhance the quality of the Nation's *air resources.*"[42] The Act recognizes the importance of biological diversity, and includes a research program that evaluates "the effects of air pollution on forests, materials, crops, biological diversity, soils, and other terrestrial and aquatic systems exposed to air pollutants."[43] The first provision of the Clean Water Act (CWA) also recognizes the Government's role in the maintenance of system integrity: "the objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[44] The Marine Mammals Protection Act (MMPA) places the health and stability of the marine ecosystem as the primary reason for the protection of endangered marine species. The MMPA asserts that species and population stocks in danger of extinction "should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part."[45] These passages demonstrate the representation of the public health and the importance of a healthy biosphere and balanced biota.

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[41] Roderick Nash, *Wilderness and the American Mind* 223.
[42] Clean Air Act § 101 (b)(1)
[43] Clean Air Act § 103 (e)(5)
[44] Clean Water Act §101 (a) [33 U.S.C. 1251]
[45] The Marine Mammals Protection Act § 2 (6), 2(2) 16 U.S.C. 1361

Along with biological diversity or integrity, environmental protection statutes also recognize the diverse aesthetic and recreational goods a healthy environment can provide. The MMPA describes the anthropocentric concerns regarding marine mammal protection: "[M]arine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management."[46] A wilderness, as defined by the Wilderness Act (1964), "has outstanding opportunities for solitude or a primitive and unconfined type of recreation" and "may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."[47] The Act recognizes the character of wilderness, referring to it as a "resource," and specifying any use should leave these areas "unimpaired for future use and enjoyment *as wilderness*" (emphasis added). [48] The statute further provides that, "wilderness areas shall be devoted to the *public purposes* of recreational, scenic, scientific, educational, conservation, and historical use"[49] (emphasis added). This statute provides that these opportunities are more important than the private goods uses of these wilderness areas. The following substantiates the Act's promotion of public goods over private pursuits: **"**Except as specifically provided for in this Act, and subject to *existing* private rights, there shall be *no commercial enterprise* and no permanent road within any wilderness area designated by this Act" (emphasis added).[50] The only private rights recognized in declared wilderness areas are those already established, and the Act bans all commercial enterprise. Furthermore, it severely

[46] The Marine Mammals Protection Act § 2 6
[47] The Wilderness Act §2(c)(2) and (c)(4)
[48] The Wilderness Act, Section 2(a) (16 U.S. C. 1131-1136)
[49] The Wilderness Act §4(b)
[50] The Wilderness Act §4(c)

limits any temporary structure or motorized vehicle use to those necessary for concerns of health and safety.[51]

The opening language of the National Environmental Protection Act (NEPA) of 1969 also recognizes EPGs. NEPA reveals that the public benefits of broad environmental protection are "safe, healthful, productive, and aesthetically and culturally pleasing surroundings."[52] Significantly, NEPA recognizes environmental benefits beyond recreational, aesthetic and cultural, asserting that environmental quality is necessary to "the overall welfare and *development*" of man (emphasis added).[53] It implies that a healthy environment is necessary to the "social, economic, and other requirements of present and future generations."[54] The MMPA provides that the integrity of the ecosystem is essential to a productive economy: "the protection and conservation of marine mammals and their habitats is therefore necessary to insure the continuing availability of those products which move in interstate commerce."[55] The Endangered Species Act (ESA) recognizes the "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people" of endangered or threatened species of fish, wildlife, and plants.[56] As established, these goods provided by diverse species are public goods. The Act further recognizes the government's role in protecting endangered

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[51] The Wilderness Act §4(c)
[52] NEPA §101(b) ("assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;")
[53] NEPA §101(a) "The Congress, recognizing the profound impact of man's activity on the *interrelations of all components* of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to *the overall welfare and development of man*, declares that it is the *continuing* policy of the *Federal Government*, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and *maintain conditions* under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and *future generations* of Americans." (emphasis added)
[54] NEPA §101(a)
[55] MMPA §2 5(B)
[56] Endangered Species Act §1531 (a)(c)

species, the Act's "Purpose" reading: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section." The Act sets up specific roles for the Secretaries of Interior and Commerce, and federal agencies.[57] Consider the proscriptive language here: "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species."[58]

The statutes themselves protect public goods, and furthermore, the language articulates the importance of government provision of these goods. In the Clean Air Act, Congress found that "Federal financial assistance and leadership is *essential* for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution"[59] (emphasis added). Arguably, in this instance the government is solving the collective action problem surrounding the provision of clean air. Significantly, several statutes include language that demonstrates congressional consideration of the *intergenerational* needs of environmental protection, and the government's role in providing that continued official commitment. In NEPA, the language suggests recognition of the intergenerational nature of environmental public goods, enlisting each generation "as *trustee* of the environment for succeeding generations,"[60] and declaring that, "it is the *continuing* policy of the Federal Government…to *maintain*

[57] See, for example, ESA §1536
[58] ESA §1536
[59] Section 101 (a)(4)
[60] NEPA §101(b)

conditions under which man and nature can exist in productive harmony" (emphasis added).[61] The Wilderness Act articulates the competition between private and public consumption of environmental goods, and through the passing of the statute, recognizes the Government's role in protecting the public good:

> In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for *the American people of present and future generations* the benefits of an *enduring* resource of wilderness (emphasis added). [62]

The statute is clear that the character of wilderness is to be preserved for enjoyment of that character by present and future generations. NEPA requires consideration of long-term productivity in potentially environmentally damaging pursuits. [63] Significantly, NEPA provides that "The Federal Government shall…recognize the worldwide and *long-range* character of environmental problems" and furthermore "maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment" (emphasis added).[64] These global and long-range environmental problems can be similarly labeled threats to global and long-range environmental public goods.

Significant to the following discussion in Chapter 4.0 the above statutes protect third parties. Although they recognize the anthropocentric reasons for environmental protection, they

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[61] NEPA §101(a)
[62] The Wilderness Act, Section 2(a) (16 U.S. C. 1131-1136)
[63] Section 102 C (iv) *see also*¸ the Clean Air Act (Section 103 (d)(1) ("The Administrator, in consultation with the Secretary of Health and Human Services, shall conduct a research program on the short-term and long-term effects of air pollutants, including wood smoke, on human health.") *and* Section 103 (e) ("[T]he Administrator, in cooperation, where appropriate, with the Under Secretary of Commerce for Oceans and Atmosphere, the Director of the Fish and Wildlife Service, and the Secretary of Agriculture, shall conduct a research program to improve understanding of the short-term and long-term causes, effects, and trends of ecosystems damage from air pollutants on ecosystems.)
[64] Sec. 102 [42 USC § 4332].

recognize no rights or legal interests of the citizens. The public goods that the statutes protect receive no rights or legal interests.

3.2 INCONSISTENCY OF OFFICIAL COMMITMENT TO ENVIRONMENTAL PUBLIC GOODS

Despite statutory commitments to the provision of intergenerational EPGs, it cannot be assumed that the government will be an able provider of these public goods. As Dr. William Lowry has demonstrated, the stability of the political system, continual public support for the good, and a consistent, official commitment to that good's provision are three necessary factors to the government's provision of intergenerational environmental goods. The often short-term focus of the government conflicts with the long-term dedication needed to protect EPGs. Congressional support is difficult to maintain[65] and furthermore, the appointed leadership of the American bureaucracy threatens the consistent agency dedication to the provision of intergenerational EPGs. [66] For an agency to be effective in its provision of intergenerational goods, it must be divorced from partisan politics and consistently exercise scientific expertise. Career civil servants are motivated for several reasons to provide intergenerational goods.[67] However, the top bureaucratic leadership is often motivated by shorter-term concerns; appointments are made

[65] *See* Anwar Hussain and David N. Laband. "The Tragedy of the Political Commons: Evidence from U.S. Senate Roll Call Votes of Environmental Legislation," *Public Choice* 124:3/4 (Sept. 2005) in which authors demonstrate that Senators are "significantly less likely to vote pro-environment when the costs are largely internalized to his state than when the costs are externalized to other states. 359

[66] William R. Lowry, *Preserving Public Lands for the Future: the Politics of Intergenerational Goods* (Washington DC: Georgetown University Press, 1998) 53. Note that Chapter 3 is titled *United States: Political Reality vs. Scientific Desire*

[67] William R. Lowry, *Preserving Public Lands for the Future* 11.

in accord with political expediency and politicians can continue to exercise influence in agency decisions.[68]

It is important to note that agencies have extensive authority over implementation of statutes. A lack of resources often influences which projects and regulations an agency chooses to pursue.[69] Furthermore, the Court grants a considerable amount of deference to agency actions and interpretations of statutes. In all of these instances, there are opportunities for experts to exercise scientific discretion, and for political appointees to assert conflicting influence.

Political appointments to agency leadership demonstrably affect the integrity of agency environmental commitments. Under President Ronald Reagan and President George H.W. Bush and President George W. Bush, political appointees to positions that dictated environmental policy were often interested in changing the focus of their agencies and favored business interests above those of science. The most demonstrative case in which a political appointee threatened to and did in fact dramatically alter the management of public goods was that of Reagan's appointment of James Watt of Secretary of the Interior. Previously head of the Mountain States Legal Foundation, a foundation that specialized "in opposing the Departments of Interior and Agriculture in their efforts to conserve natural resources on public lands,"[70] Secretary Watt was adamantly pro-development at the cost of environmental public goods. Data collected from government scientists during the administration of George W. Bush provides further evidence that political forces can undermine the consistency of an official commitment. From 2005-2007, the Union of Concerned Scientists surveyed government scientists at seven

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[68] William R. Lowry, *Preserving Public Lands for the Future* 53.
[69] David R. Hodas, in "Standing and Climate Change: Can Anyone Complain About the Weather?" *Land Use and Environmental Law* 451 (1999-2000) concludes that, given the choices agencies will have to make, "some sort of citizen suit enforcement will be necessary" 453-454.
[70] Lettie M. Wenner *The Environmental Decade in Court* 55. Because of his controversial policy decisions, Watt was forced to resign several years later.

agencies and the EPA. The survey reveals that 60 percent of respondent climate scientists (1,028 scientists) had personally experienced interference with their work, and 213 scientists reported that they had been directed to "provide incomplete, inaccurate, or misleading information" to the public.[71] Not only were scientists encouraged to doctor information to justify decisions, but agency decisions were sometimes influenced by non-agency individuals. For example, 49 percent of respondents at the EPA "knew of many or some cases in which political appointees at other federal agencies were inappropriately involved in the EPA's decisions."[72] Furthermore, many scientists suggested "that political interference is compromising the ability of their agencies to protect the environment and public health."[73] The report found that:

> "522 EPA scientists (33 percent of respondents) disagreed that the EPA was acting effectively to 'clean up and/or mitigate existing pollution or environmental problems.' 378 FDA scientists (39 percent) disagreed that the 'FDA is acting effectively to protect public health.' 285 FWS scientists (69 percent) disagreed that the FWS is acting effectively to preserve endangered or threatened species."[74]

Evident from these first hand testimonies, the political dependence of the regulating agencies can undermine the missions of those agencies.

Based on the above evidence, it is insufficient to argue that a change in government attitude or ethic toward the environment will sufficiently alter the course of government conservation and ensure the provision of intergenerational goods. This is because there is no guarantee that the next elected official will be consistent in dedication to that provision. The

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[71] Union of Concerned Scientists "Voices of Federal Scientists" (accessed 29 May 2009) http://www.ucsusa.org/assets/documents/scientific_integrity/Voices_of_Federal_Scientists.pdf
[72] Ibid.
[73] Ibid.
[74] Ibid.

dedication to organizational effectiveness of William D. Ruckelshaus, the first EPA Agency Administrator, did not prevent Reagan from appointing a corporate lawyer to dismantle the program, and President Reagan's policies did not prevent President George H.W. Bush from again changing the direction of the EPA.[75]

3.3 CONCLUSION

Institutions, like the government, often solve collective action problems by serving as external enforcement mechanisms. Congress has passed numerous statutes that establish rules and regulations to protect environmental goods, in so doing, theoretically solving the collective action problem surrounding the provision of those goods; however, the intergenerational nature of environmental public goods makes provision and protection dependent upon consistent executive commitment, independent of the electoral calendar. The agencies charged with enforcement of these laws are often unmotivated to provide these goods.

Just as Congress provided an external institution to solve the collective action problem surrounding environmental public goods, groups and individuals can serve as compelling forces to *maintain* the provision of these goods. The courts offer one way for the citizens to become involved in ensuring the consistency of an agency's official commitment. Groups get involved with the judicial branch in several ways, including becoming plaintiffs of their own. Not only can a court compel the involved agency to act legally, but a case can incite future compliance.[76]

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[75] Anne Gorsuch Burford was appointed by President Ronald Reagan to head the EPA only to resign after 22 months for being found in contempt of Congress. Ruckelshaus was then asked to return to the agency.
[76] Kevin A. Coyle "Standing of Third parties to Challenge Administrative Agency Actions" *California Law Review* 76:5 (Oct., 1988) 1102.

In environmental public goods legislation, Congress has even provided for citizen-suits to challenge agency actions under said statutes. But, as I will demonstrate in the following section, the court's parameters regarding who can bring their case to court have aggravated congressional and citizen efforts to hold agencies accountable to the laws that govern them.

4.0 PUBLIC GOODS AND PRIVATE RIGHTS: "STANDING" CHALLENGES FOR ENVIRONMENTAL PLAINTIFFS

As established above, execution of EPG legislation has been insufficient in providing EPGs. Interest groups are able to encourage government provision of EPGs by gaining access to Congresspersons, the administrating agencies, and the courts. Interest groups can become involved in judicial proceedings in several ways, including by filing *amicus curie* (friend of the court) briefs, by lobbying for or against judicial nominees, and by suing as a plaintiff in their own right.[77] This chapter focuses on this third method of group participation—specifically bringing suit against government agencies. This particular method of group participation is interesting because, although Congress has facilitated groups in this regard, recent holdings by the Supreme Court have restricted the access groups have to bring suit. In order for a group (or association) to have standing, at least one member of the group must have standing apart from the group.[78] Without standing, groups are unable to have the court review agency actions that threaten the provision of EPGs.

[77] Jeffrey M. Berry and Clyde Wilcox, *The Interest Group Society, Fifth Ed.* (New York: Pearson Longman, 2009) 146-152.
[78] *Hunt v. Washington State Apple Advertising Comm'n* 432 U.S. 333 (1977).

4.1 CITIZEN SUITS

Congress considered citizen-suits as an important way to ensure that environmental laws were upheld.[79] All but one environmental protection statute (along with the Administration Procedure Act) include a provision under which citizens are granted standing to obtain judicial review of agency action in violation of the statute. [80] These "citizen-suit" provisions give opportunities for citizens to sue agencies because of construction of rules, regulations, or failure to enforce part of the statute. If a statute provides a plaintiff a right to sue it is often referred to as a "private right of action." At times this phrase refers only to this particular statutory grant to sue, and other times its use includes the right to challenge administrative action granted under 10(a). Either way, a plaintiff can bring suit under the provision. [81]

The Clean Water Act provides that:

> "any citizen may commence a civil action on his own behalf-- (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency… who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (b) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of

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[79] See, for instance, *Friends of the Earth v. Carey* 535 F.2d 165, 172 (2nd Cir. 1976) ("Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests. Fearing that administrative enforcement might falter or stall, the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." (internal citations removed) *and* "The Senate Committee responsible for fashioning the citizen suit provision emphasized the positive role reserved for interested citizens: 'Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.'")

[80] *See e.g.* Toxic Substances Control Act, 15 U.S.C. § 2619(a); Endangered Species Act, 16 U.S.C. § 1540(g)(1); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a); Marine Mammals Protection, Research and Sanctuaries Act, 33 U.S.C. (g)(1); Deepwater Port Act, 33. U.S.C. § 1515(a); Safe Drinking Water Act, 42 U.S.C. § 300(j-8)(a); Noise Control Act, 42 U.S.C. § 4911(a); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a); Superfund Amendments and Reauthorization Act, 42 U.S.C. § 9659(a); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a); Clean Air Act, 42 U.S.C. § 7604(a).

[81] See *Cetacean Community v. Bush*

> the Administrator to perform any act of duty under this Act *which is not discretionary* with the Administrator" (emphasis added).[82]

The CWA provides broad standing. Other provisions are more specific. In *Sierra Club v. Morton*, the Sierra Club based their argument for standing on a statutory provision in the Administrative Procedure Act. Section 10(a) of the Administrative Procedures Act (APA) reads "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[83] *Data Processing* recognized the grant of standing in the APA to be broad.

Legal scholars recognize these provisions as a Congressional hedge against bureaucratic failure to uphold the statutes.[84] The inclusion of these provisions attests to the role that groups play in ensuring agency provision of EPGs. However, the court has held that these citizen suit provisions are insufficient to a group's standing. In *Lujan v. Defenders of Wildlife* (1992), the Court rejected Defenders of Wildlife's claim of a procedural injury. The Endangered Species Act provides that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."[85] The District Court held that the ESA citizen-suit provision conferred a procedural right to consultation upon all citizens. The Supreme Court rejected this view of procedural rights, and held that procedural rights can only be claimed if the failure to follow that procedure threatens a concrete interest of the plaintiff. One legal scholar has referred to *Lujan* as "a virtual death knell for citizen-suits in US Federal

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[82] Section 505 of CWA, 33 U.S.C. § 1365(a)
[83] Administrative Procedures Act 5 U.S.C. § 702.
[84] *See* Stephen Lanza, "The Liberalization of Article III Standing: The Supreme Court's Ill-Considered Endorsement of Citizen Suits in *Friends of the Earth v. Laidlaw Environmental Services Inc.*," *Administrative Law Review* 52:4 (2000) 1454 and notes 50-51, citing, for example, "*Friends of the Earth v. Carey,* 535 F.2d 165, 172 (2d Cir. 1976) ('Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.')".
[85] 16 U.S.C. § 1540(g)

courts."[86] In what follows, I explain why the doctrine of standing renders these statutory grants of standing impotent, and furthermore, I identify three factors that determine if a group will have standing to seek judicial review of agency actions that violate EPG legislation.

4.2 STANDING: DETAILS AND DEVELOPMENT

In order to understand the significance of the courts' current doctrine of standing, it is first necessary to understand the details and development of that doctrine. The status of the US doctrine of standing has been called "one of the less enviable aspects of our judicial system."[87] Indeed, the current doctrine derives not from either English or early American history, but from the early part of the twentieth century.[88] "Standing" is often criticized for having little or no constitutional foundation,[89] for being a tool of the judiciary to further personal political values, and for restricting otherwise legitimate plaintiffs from access to the court.[90] Justice Scalia has

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[86] Matt Handley "Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue" *The Review of Litigation* 21:1 (Winter 2002) 98.
[87] Ibid., 100.
[88] See Cass Sunstein, *What's Standing After Lujan?* ("But we will see that the modern understanding of standing is insufficiently self-conscious of its own novelty, even of its revisionism 170) See Stephen Lanza, "The Liberalization of Article III Standing" 1452 citing *Stark v. Wickard* 321 U.S 288, 309-310 (1944) as the Court's "first mention of standing as a limitation on judicial power to entertain certain 'cases and controversies.'"
[89] *See* Cass Sunstein, "Standing Injuries," *The Supreme Court Review* (1993) 38, calling the "injury in fact" test an "extraordinarily novel development."
[90] Kevin A. Coyle "Standing of Third parties to Challenge Administrative Agency Actions" *California Law Review* 76:5 (Oct., 1988) (1067 "standing has become detached from its original purpose, so detached that it now creates barriers to adjudication that have no sound doctrinal or normative basis." And at 1097) See Matt *The Review of Litigation* "Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue" 21:1 (Winter 2002) ("It is important to note that such reluctance to allow private attorneys general to enforce laws is not firmly rooted in tradition" 109 "Yet another, and possibly more cynical, explanation for the current status of the standing doctrine is that it can be used as a proxy for a judgment of the merits. Judges can use their own political ideologies by using as a pretext for disfavoring the merits of the plaintiffs' case and dismissing it before it is heard" 110) See Christopher T. Burt Procedural Injury Standing after *Lujan v. Defenders of Wildlife University of Chicago Law Review* 62 (1994) Also, Blackmun's dissent in *Lujan v. Defenders of Wildlife* calling standing "standardless."

acknowledged that the standing doctrine is founded on Article III "for want of a better vehicle" and is not "a linguistically inevitable conclusion."[91]

As *Sierra Club* established, the question of standing asks "whether a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[92] Justice Antonin Scalia has described standing as the rude question asked, "what's it to you?"[93] The standing doctrine is one of three criteria that a case must meet in order to be justiciable—a case must also meet ripeness and mootness criteria.[94] The doctrine consists of two parts—constitutional standing requirements, and statutory (or prudential) standing requirements. The Court roots the constitutional requirements of standing in Article III, in which the power of the Court is limited to hearing "cases" or "controversies."[95] The Cases and Controversies clause in Article III, section 2, clause 1 reads:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State,--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[96]

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[91] Antonin Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers" *Suffolk Law Review* 17 (1983): 882.
[92] *Sierra Club v Morton*
[93] Antonin Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers" *Suffolk Law Review* 17 (1983): 882.
[94] Richard L. Pacelle Jr., *The Role of the Supreme Court in American Politics: The Least Dangerous Branch?* (Boulder CO: Westview, 2002) 87. See *Warth v, Seldin* 422 U.S. 490, 498 (1975) (justiciability asks "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of [Article] III"). See also, *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("It is well established…that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue.")
[95] US Constitution Article III
[96] U.S. Constitution Article III § 2 clause 1

The modern Article III criteria for standing, as applied in *Sierra Club v. Morton*, were established in a 1970 case, *Data Processing Service Organizations v. Camp.*[97] In *Data Processing*, the Court held that standing considers, (a) if there is a "case" or "controversy" as articulated in Article III, and (b) if "the interest sought to be protected by the complainant is arguably within the *zone of interests* to be protected or regulated by the statute or constitutional guarantee in question"[98] (emphasis added). In this case, the Supreme Court rejected its previous "legal interest" test[99] and instead articulated a version of standing that defined a case or controversy by the "injury in fact" of the plaintiff—regardless of what the law prescribed. In this case, the ruling of the Court of Appeals was consistent with previous Supreme Court rulings,[100] that the standing inquiry asked if the plaintiff had a "personal stake legally sufficient 'to assure [a] concrete adverseness' which avoids merely abstract determinations."[101] In its *Data Processing* opinion, the Supreme Court criticized the Court of Appeals' doctrine of standing for requiring examination of the merits of the case to determine standing and thus rejected its own previous doctrine—for example, the doctrine applied in *Tennessee Elec. Power Co. TVA.*[102]

In *Sierra Club*, the Court defined the "zone of interests" test, holding that if there is a specific statute, "inquiry as to standing must begin with a determination of whether the statute in question *authorizes review at the behest of the plaintiff*" (emphasis added). [103] The zone of interests question asks if the particular plaintiff's concern is within the zone of interests protected

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[97] *Association of Data Processing Service Organizations v. Camp* 406 F.2d
[98] *Assn. of Data Processing Service Organizations v. Camp* 406 F.2d 837 153
[99] Kevin A. Coyle, in his "Standing of Third Parties to Challenge Administrative Agency Actions" *California Law Review* 76:5 (Oct., 1988) describes that the legal interest test recognizes two aspects to a legal claim: "courts look to the 'law' to determine if a duty has been violated" and "to determine if the plaintiff has a right to enforce that duty." (1068-69)
[100] *Tennessee Elec. Power Co. v. TVA* 306 U.S. 118
[101] *Association of Data Processing Service Organizations v. Camp* 406 F.2d 837
[102] 306 U.S. 118
[103] *Sierra Club v. Morton*

by the statute. The zone of interests test was not intended to limit standing. As argued in *Data Processing*, a statute is considered to limit standing only if it explicitly precludes it.[104] The Court found that the Administrative Procedure Act (1946) served a "broadly remedial purpose"[105] and had provided broad standing for judicial review.[106] The Court found that the statutory trend was "toward enlargement of the class of people who may protest administrative action."[107] The opinion in *Data Processing* follows that trend; the Court found the legal interest test to be limiting because it barred citizens from court who did not have a common law mandate to protect their interests.[108]

4.3 THREE DIFFICULTIES TO THIRD-PARTY STANDING

As established above, citizen suit provisions recognize that the Courts are important enforcement mechanisms. However, the Court itself has found these citizen suits insufficient in cases like *Sierra Club v. Morton*. In this section I examine three factors that influence a group's ability to be granted standing in court to bring suit under third party legislation. First (4.3.1), the Court has found citizen suit provisions insufficient because the Court is concerned with private rights. These environmental statutes protect third parties from injury (and not the plaintiffs), so the plaintiffs must demonstrate how injury to the public good is "injury in fact" to the plaintiff. This tension between the public-goods legislation and the Court's concern for private rights is the

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[104] *Assn. of Data Processing Service Organizations v. Camp* 406 F.2d 837 156 *citing* APA 5 U.S.C. § 701(a)
[105] *Assn. of Data Processing Service Organizations v. Camp* 406 F.2d 837 156
[106] See, for instance, APA 5 U.S.C. § 701(a)
[107] *Assn. of Data Processing Service Organizations v. Camp* 406 F.2d 837 155
[108] *See* Kevin A. Coyle "Standing of Third parties to Challenge Administrative Agency Actions" 1070, citing *Flast v. Cohen* 392 U.S. 83 (1968) and *Baker v. Carr* 369 U.S. 186 (1962) as cases in which the court recognized the limits of a legal interest test.

primary explanation for the difficulties groups face in third-party legislation. There are two additional factors that compound this difficulty. For one, (4.3.2), the Court has been inconsistently rigorous in defining "injury," often exacerbating the challenge presented by an "injury in fact" test. Furthermore, (4.3.3), the Court disagrees as to whether the injury must be felt by a minority of the population. I will explain the implications of these discrepancies on efforts to establish standing.

4.3.1 *Public Goods v. Private Rights*

Since *Data Processing*, a plaintiff must demonstrate that she has been injured in fact in order to bring suit. The Court has since derived three criteria from the language of Article III: that a plaintiff must claim an "injury in fact" which is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; that the injury must be fairly traceable to action taken by the defendant;[109] and that a ruling in favor of the plaintiff should be likely (and not speculative) to redress the injury.[110] In order to satisfy these Article III requirements, a "plaintiff must generally assert his own legal rights and interests, and cannot rest claim to relief on the legal rights or interests of third parties."[111] This is often difficult for groups to do in

[109] For instance, see *Linda R.S. v. Richard D.* 410 U.S. 614 (1973) in which plaintiff (an unwed mother) was denied standing to challenge a Texas law that only provided criminal sanctions to parents of legitimate children. The court argued that the plaintiff failed to demonstrate that the law was the source of her child's lack of support. Furthermore, the court did not find redressability because if plaintiff's child's father failed to pay support, he might be put in jail and her child would still be unsupported.

[110] *Lujan v. Defenders of Wildlife*, 560 (1992) (internal citations omitted). Joseph T. Phillips in "Friends of the Earth v. Laidlaw Environmental Services: Impact, Outcomes, and the Future viability of Environmental Citizen Suits," *University of Cincinnati Law Review* 68 (1999-2000) explains the three prong test well: "if the plaintiff cannot allege sufficient facts to demonstrate "injury in fact" caused by the defendant's unlawful actions that can be redressed through the inherent power of the court, the court must not allow eh case to go forward" 1291.

[111] *Warth v. Seldin* 422 U.S. 490, 499 (1975).

environmental cases, because a citizen must prove that injury to the protected public good is injury to the plaintiff.

This dilemma is rooted in a conflict between the legislature's consideration of public goods and the courts consideration of private injuries. The difficulty arises from the statutory language committing the government to environmental protection. Although the statutes recognize anthropocentric reasons for the provision of these public goods, they do not articulate how the public could be injured by the good's failed provision. Consider that the Sierra Club was denied standing when it failed to demonstrate how it had been injured in fact.

A decision in 1997 highlights the Court's emphasis on private rights. In *Bennett v. Spear*, the court held unanimously that a group of irrigation districts and ranch operators who opposed actions taken by the Fish and Wildlife service had standing under the citizen-suit provision of the ESA.[112] Although the Court of Appeals held that the plaintiff's claim was not within the "zone of interests" of the statute, the Supreme Court held unanimously that it was. Respondents could demonstrate injury in fact because their injury was economic. Justice Scalia is especially adamant that the role of the Court is to hear these cases, in which the plaintiff is injured by regulatory action and should be defended from the majority.[113] This case, where the ranchers were able to sue under the citizen-suit provision to undermine the effectiveness of the act, comes five years after a decision in *Lujan v. Defenders of Wildlife* in which the Court rejected standing for plaintiffs who sued to protect the species under the law.[114] Defenders of Wildlife were denied standing because their members failed to produce plane tickets that would

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[112] 502 U.S. 154

[113] See his Suffolk Law Review Article and subsequent court opinions

[114] Joseph T. Phillips "Friends of the Earth v. Laidlaw Environmental Services: Impact, Outcomes, and the Future viability of Environmental Citizen Suits," *University of Cincinnati Law Review* 68 (1999-2000) (1288 "this decision grants access to the courts to adversaries of the environmental legislation under the very citizen suit provision that was created to further environmental interests.")

prove their intentions to return to the area where the species were endangered. Compare the ease plaintiffs had in *Bennett v. Spear* to the difficulty Defenders of Wildlife had in demonstrating injury. The ranchers were defending private interests, for which injury is easily demonstrable. The Defenders of Wildlife, although expressing personal interests, were defending a public good. These two decisions demonstrate how citizens have difficulty proving injury to public goods in injury to them.

A recent case demonstrates the difficulty groups can have in protecting intergenerational environmental goods in court. In *Massachusetts v. EPA* (2007), the state of Massachusetts, a collection of other state and local governments, and private individuals sued the Environmental Protection Agency. The Environmental Protection Agency had denied the group's petition that called for EPA to regulate four greenhouse gases from new motor vehicles under the Clean Air Act, and plaintiffs filed suit under the CAA's citizen-suit provision. The Clean Air Act authorizes challenges to agency action or inaction in regards to a nondiscretionary statutory action.[115] The Supreme Court had two questions in *Massachusetts:* whether the Clean Air Act gives EPA authority to regulate greenhouse gases from new motor vehicles, and, if so, whether EPA's stated reasons as to why it would not regulate had it the authority are consistent with the Clean Air Act. Of the plaintiffs, the court granted standing specifically to Massachusetts. The state claimed a procedural injury that threatened concrete interests as a semi-sovereign entity and as a property owner.

In order to establish standing in this case, the plaintiffs would have to prove that the failure to regulate greenhouse gas emissions from new vehicles would cause them injury. Thus, in order to compel EPA to determine if greenhouse gases caused climate change, the plaintiffs

[115] Clean Air Act 42 U. S. C. 7607(b)(1) and (2)

themselves had to demonstrate that GHGs were contributing to climate change. Furthermore, they need demonstrate that this climate change would harm them particularly (for Massachusetts, it demonstrated a rise of sea level that would harm Massachusetts' coastline.) EPA argued that a causal link between the release of greenhouse gases and climate change could not be "unequivocally established," and used this scientific uncertainty, among other arguments, to justify its refusal to regulate greenhouse gases. EPA, the supposed agency expert on this issue, had articulated this scientific uncertainty, yet in order for the plaintiffs to meet the standing requirements, they had to provide evidence that EPA's refusal to limit greenhouse gases caused them injury in fact. Had Massachusetts not joined the plaintiffs, the case would not have been heard—none of the individuals had standing.

In these cases, groups try to protect public goods in an institution concerned with private rights. Under statutes that, like the Endangered Species Act, protect *third parties,* it is especially difficult for a plaintiff to establish standing.[116] A citizen must prove that injury to the third party is injury to the plaintiff. The injury in fact test required for a citizen to gain statutory standing is particularly problematic for obtaining judicial review regarding environmental legislation, in which the protected is a natural entity and not granted legal personhood. The group that best reconciles these differences by demonstrating such a chain of injury will have the most convincing argument for standing. Often, these standing difficulties prevent an otherwise straightforward legal question from being heard before the court.[117] This institutional tension is compounded by two factors of a political nature.

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[116] Lujan v. Defenders of Wildlife 504 U.S. 555 (1992)
[117] Kevin A. Coyle, "Standing of Third parties to Challenge Administration Agency Actions," *California law Review* 76:5 (Oct. 1988) 1063.

4.3.2 Inconsistent Rigor in Application

The "injury in fact" requirement of the Court is a consistent consideration among all of the justices. The Court, however, has not specifically defined the rigor with which it will examine a plaintiff's injury. Within "injury in fact," the court has not consistently defined "imminent" or "particularized." Despite the holding in *Data Processing*, the Court has sometimes transformed its Article III test—the standing requirements based on the "case" and "controversy" clause—from a broad grant of standing expressed in *Data Processing* to a quite particularized definition of standing.

The Court has recognized its decision in *United States v. SCRAP* (1973) as its broadest grant of standing.[118] The Court granted standing to a group of law students who challenged the Interstate Commerce Commission's (ICC) decision to deny an optional seven-month period between the proposal and the implementation of freight rate raises. Specifically, SCRAP argued that the failure to allow the seven-month suspension period would cause the students "'economic, recreational and aesthetic harm,' and specifically, that the new rate structure would discourage the use of 'recyclable' materials and promote the use of raw materials that compete with scrap, thus adversely affecting the environment."[119] SCRAP argued "that each of its members was caused to pay more for finished products, that each of its members uses the forests, rivers, mountains, and other natural resources of the Washington, D.C., area, and at his legal residence for camping, hiking, fishing, and other purposes, and that these uses have been

[118] 412 U.S. 670
[119] 412 U.S. 670

adversely affected by increased freight rates."[120] The ruling in *SCRAP* considers "injury in fact," but grants standing based on an admitted "attenuated line of causation to the eventual injury."[121]

The Court's decision in *Lujan v. Defenders of Wildlife* (1992) signaled a shift to a demanding application of the standing doctrine. Defenders of Wildlife (DOW) claimed that the failure of agencies to consult with the Secretary of the Interior regarding the potential threat to endangered species by funded activities internationally "increas[es] the rate of extinction of endangered and threatened species."[122] The Court focused on the testimony of two members of the organization who had previously traveled to an international site that was now the location of a development project that threatened endangered species in the area. Each project was in part funded by an American agency. Each respondent articulated intent to return to the location with hopes of seeing said endangered animals. Neither could demonstrate when exactly they intended to return to the site—one of the plaintiffs citing the ongoing civil war in Sri Lanka as a preventative factor in her return.

According to a plurality of the Court, the respondents had insufficiently demonstrated how they would be imminently harmed by the disappearance of the species. Scalia, writing the majority opinion, recognized that "of course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing."[123] However, Scalia argued, citing *Sierra Club*, the respondents failed to prove how the environmental injury was injurious to *them*. In his concurring opinion, Justice Kennedy (with Justice Souter joining) suggested that had the members of DOW presented plane tickets

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[120] 412 U. S. 670
[121] 412 U. S. 688
[122] *Lujan v. Defenders of Wildlife*
[123] *Lujan v. Defenders of Wildlife*

indicating their imminent return, they could have demonstrated sufficient injury.[124] Regardless of when the harm to the species occurred, the harm to the plaintiffs was not imminent unless they were traveling to the location very soon. Justice Stevens disagreed, arguing that DOW had standing based on their affidavits. Assured that the members would return to the area at some point based on their aesthetic and scholarly interests, Stevens argued that the individual is injured when the action is taken against the species or the habitat.[125] In this part of the case, it was the "imminent" requirement that prevented Defenders of Wildlife from having standing. Compare the accepted injury in *SCRAP* to the rejected injury in *Defenders of Wildlife.* In *Defenders of Wildlife,* the members had professional interests in the threatened species and had visited before, and had the financial means to return. The Court found the testimonies of DOW to be mere generalized grievances. That demonstrated use of the good was insufficient because of the rigorous application of a demanding Article III test.

The Court's holding in *Laidlaw Environmental Services v. Friends of the Earth* (2000) might signal a broadening of standing.[126] Friends of the Earth (FOE) sued Laidlaw after it had continually discharged treated water containing various pollutants (especially mercury) into the North Tyger River repeatedly in excess of the limits established by its National Pollution Discharge Elimination System (NPDES) permit. FOE filed a citizen-suit, "alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties."[127] Citing its definition of standing in *Defenders of Wildlife*, the Court found that FOE had demonstrated injury in fact. The District Court found that FOE had standing (although barely), based on the testimony of several members who lived on or near the river and

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[124] *Lujan v. Defenders of Wildlife,* Kennedy concurring
[125] *Lujan v. Defenders of Wildlife,* Stevens concurring
[126] 528 U.S. 167 (2000)
[127] *Laidlaw Environmental Services* 528 U.S. 167 (2000)

had refrained from using the river because of concerns about illegal discharges.[128] The Court found injury in fact in the affidavits and testimony "asserting that Laidlaw's pollutant discharges, and the affiants' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests."

Laidlaw supported its claim by citing the District Court's discovery that there had been "no demonstrated proof of harm to the environment" by Laidlaw's violations of the permit.[129] The Supreme Court, however, argued that standing considered injury to the plaintiff and not injury to the environment. The court argued, "To insist upon the former rather than the latter as part of the standing inquiry (as the dissent in essence does, *post*, at 2—3) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit."[130] Even though the environment providing the recreational good was not decidedly harmed, the violation of the permit harmed the plaintiff's consumption of the good. Legal scholars agree that the decision in *Laidlaw* lowered the threshold for citizen-suits standing, "thereby liberalizing access to federal courts."[131] These cases demonstrate that the court has inconsistently looked for injury in fact. The stricter the requirements for injury, the more difficulty groups will have in establishing standing.

The Court furthermore has inconsistently considered an "environmental nexus" argument sufficient for standing. An "ecosystem nexus" theory proposes that any citizen who uses part of a contiguous ecosystem has standing when any part of that ecosystem is harmed. In *Defenders of Wildlife* (1992) and a case two years before, *Lujan v. National Wildlife Federation,* the court

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[128] *Laidlaw*
[129] *Ibid.* citing District Court
[130] *Laidlaw*
[131] Stephen Lanza, "The Liberalization of Article III Standing: The Supreme Court's Ill-Considered Endorsement of Citizen Suits in *Friends of the Earth v. Laidlaw Environmental Services Inc.*," *Administrative Law Review* 52:4 (2000) 1462.

rejected this argument.[132] As Justice Blackman highlights in his dissent in *Defenders of Wildlife*, the court rejected an "ecosystem nexus" argument in *National Wildlife Federation* because the claimed injury was to a scenic view. He writes that of course, "one cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined."[133] The Court has, however, in other cases recognized the validity of a nexus argument. Consider *Japan Whaling Association v. American Cetacean Society* (1986) in which the court granted standing to American whale watchers who arguably would be affected by Japanese whaling activities.[134] This decision recognized that reverberations throughout the marine environment could be grounds for standing, for a violation in one area of a contiguous ecosystem could indeed harm a citizen's interests elsewhere in that ecosystem. Again, a group's access to the Court is dependent upon the Court's parameters for injury.

4.3.3 Purpose: 'Adverseness' or 'Individualized'?

The prominent standing cases since *Data Processing* demonstrate considerable inconsistency among justices, and subsequent holdings, regarding the goal of standing. According to the Court in part, the primary goal of standing is to encourage the adverse presentation of the issues. In *Data Processing*, the Court of Appeals emphasized that concrete adverseness assured by a particular legal interest would avoid "abstract determinations."[135] Often the majority has emphasized the importance of concrete adverseness in the Court's use of standing, arguing that regardless of how widely felt the injury is, the presentation of the issues

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[132] *Lujan v. National Wildlife Federation* 497 U.S. 871 (1990)
[133] *Lujan v. Defenders of Wildlife*, Blackmun dissenting
[134] 478 U.S. 221
[135] 406 F.2d 837

will be precise and charged if there is a concrete injury.[136] In *Sierra Club v. Morton,* the court asserted, "[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[137] *SCRAP* reaffirmed that decision. Significantly, the Court also held that standing is not denied simply because the injury is felt equally by all who use a certain resource.[138] The Court argued further that in this case, "all persons who utilize the scenic resources of the country, and indeed all who breathe its air" could also have standing by claiming a similar harm.[139] Clean air is a good, when provided, that is equally consumed. With a generalized consideration of injury, citizens can prove that the failed provision of a public good injures them in a generalized manner. This is much easier for a citizen to do than for her to meet the criteria defined by Justice Scalia.

According most vehemently to Justice Scalia, the standing doctrine should allow the court to hear only controversies of the *minority*, and thus standing is a necessary tool to uphold the separation of powers. He strongly defends that the position of the court is to hear only suits from those with an individualized injury, and should disregard those concrete injuries that are felt broadly, regardless if the injury is of a concrete nature.[140] Those injuries felt by a broader public should be taken up in the political arena. The Court, in *Marbury v. Madison,* held that it is beyond the Court's jurisdiction to hear claims of generalized grievance against the executive's failure to execute the law. [141] Scalia writes, "To permit Congress to convert the undifferentiated

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[136] See *SCRAP, Sierra Club v. Morton*
[137] Sierra Club v. Morton Majority Opinion
[138] 412 U. S. 687
[139] 412 U. S. 687
[140] See Antonin Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers" *Suffolk University Law Review* 17 (1983). See also, *Fed. Election Comm'n v Akins* 524 U.S. 11 (1998).
[141] *Marbury v. Madison, Stark* v. *Wickard*, 321 U.S. 288, 309-310 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is

public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3."[142] But Scalia connects all generalized grievances with failure to uphold the law. Ultimately, it is important for the Court to distinguish between particularized injuries and general grievances to maintain the separation of powers between the branches of government.[143]

This difference in conceptions of standing speaks to the Court's role in public goods cases. Just as Scalia consistently maintains his position, so does Justice Stevens. The inconsistent rulings of the court demonstrate that there is tension among justices regarding the proper role of "injury in fact" for standing. The ability of plaintiffs to get judicial review of agency action that threatens the provision of statutorily provided public goods is dependant upon the way the Court resolves this conflict regarding the nature of the injury. As mentioned, a general complaint as to the failed provision of a public good is insufficient to have standing in court. The plaintiff must demonstrate that the failed provision injures the plaintiff in some way. In *Sierra Club*, it was easy for Sierra Club members to demonstrate their use of Mineral King would be injured by Disney's development and therefore by the action of the Forest Service

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circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. . . . This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. . . . But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.") See also, *Lujan v. Defenders of Wildlife*, citing *Fairchild* v. *Hughes*, 258 U.S. 126, 129-130 (1922), *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), *Ex parte Lévitt*, 302 U.S. 633 (1937), *United States* v. *Richardson*, 418 U.S. 166 (1974)

[142] *Lujan v. Defenders of Wildlife*

[143] An argument made with particular vehemence by Justice Antonin Scalia

which sold Disney the permit. In many instances, it will be possible for a plaintiff to demonstrate injury by a violation of a public goods statute.

Under an 'adverseness' model for standing, a plaintiff needs simply to demonstrate that she will be injured by the statutory violation. In other words, the plaintiff need demonstrate that they consume or use the protected public good, and thus if the public good is not provided, the plaintiff will be injured. A citizen need demonstrate that they are injured by the polluted air, or ocean plastic, or climate change. These injuries are already potentially difficult injuries to demonstrate, and a "minority interest" test requires something further. In order to meet a "separation-of-powers" criterion, a plaintiff need demonstrate that her consumption of the public good is greater than the consumption of that good by the majority, or that her consumption will be more adversely impacted by the failure to provide the good. This test will also be easily passed in cases that involve local environmental degradation. Consider a plaintiff who would like to swim and fish in a local river, but cannot because of a film of pollution in the top. This plaintiff can demonstrate that her recreational interest is injured, *and* that her injury is only felt by the minority of people who wish to use the river for that purpose. The "minority interest" test becomes difficult when the public good is equally consumed by the entire population. Consider the public good of a stable climate. Let us assume that climate change will affect every citizen in a generalized manner. Can any one citizen demonstrate that they will be more adversely affected by climate change than any other?[144] Scalia, in his famous Suffolk Law Review article, rejects

[144] David R. Hodas, in "Standing and Climate Change: Can Anyone Complain About the Weather?" ("Although the effects of climate change may be more devastating than nuisance-based air pollution, with climate change everyone experiences weather changes, rather than the nuisance which has identifiable, particular victims.")

the 'adverseness' argument in *SCRAP* and criticizes the Court for undermining the power of the executive by considering such broad injuries.[145]

This debate between the minority and majority interest bears heavily on the public goods issue. The 'adverseness' model considers injuries to the public as justiciable, as long as those who stand in court are actually injured. The 'individualized' model considers injuries to public goods skeptically. Combined with a strict interpretation of "injury in fact," the 'individualized' model can grant the Court authority to deny standing very broadly in EPG cases.

[145] Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers *Suffolk University Law Review* 17 (1983) 890.

5.0 PARTICULARIZED INJURY AND PUBLIC GOODS: A RECONCILIATION

This paper articulates the difficulties in citizens bringing suit to protect public goods because the citizens are often unable to demonstrate sufficient "injury in fact." These suits are necessary to government provision of public goods. Because no individual has an incentive to restrict her consumption of the environmental commons, external institutions are necessary to solve the collective action problem. Gaining impressive momentum in the 1960s, public outcry for government provision of environmental public goods led to a body of environmental protection statutes that established the government's role in the provision of environmental public goods. EPGs are especially exigent to provide because of the intergenerational nature of the protection required. In order for environmental public goods to be provided for future generations, it is necessary that the regulating agencies continually commit to this goal. As the previous chapter demonstrated, the court's application of the standing doctrine poses challenges to groups that seek to provide external checks on agency administration.

It becomes apparent that the decisions made on the Court regarding standing are influenced by justices' particular interpretations of court doctrine and precedent. It seems that ideology influences a justice's consideration of the severity of an injury and of the model they will choose. Regardless, the Court has consistently looked for an "injury in fact." Although some justices are more specific than others in their consideration of this injury, the Court consistently demands the plaintiff be injured in some personal way. This suggests that a

universal grant of standing under a citizen-suit provision is insufficient for standing regardless of which way the swing-Justice swings. This conclusion raises the question: Is it constitutionally and legally possible to reconcile the protection of public goods with the court's private rights concerns so that plaintiffs can seek judicial review of agency actions that violate these EPG statutes while meeting the Court's "injury in fact" test?

Although the Court held in *Defenders of Wildlife* that Congress could not confer standing upon *any* citizen as it provided in the ESA's citizen-suit provision, the Court also recognized Congress's ability to create new legal rights not yet codified.[146] Justice Kennedy (concurring), echoing the plurality, recognizes that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[147] Kennedy specifies that "in exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[148] The citizen suit in the ESA failed to explain how *any citizen* would be injured by a failure of the statute to prevent the endangerment of species. While the citizen-suits are insufficient as they stand, Congress has the authority to modify them so that they are effective.

This modification can happen in two ways. The first would require a change in the Court or the legislature's consideration of what constitutes an injury. The second would require a change in the legislature's consideration of what constitutes an injured person. This conclusion proposes two theoretical mechanisms that could reconcile the legislature's public-goods consideration and the Court's private injury consideration that should be further researched for

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[146] *Lujan v. Defenders of Wildlife* ("Nothing in this contradicts the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of `statutes creating legal rights, the invasion of which creates standing.' " *Warth*, 422 U. S., at 500 (quoting *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617, n. 3 (1973)))."

[147] *Lujan v. Defenders of Wildlife*, Kennedy concurring

[148] *Lujan v. Defenders of Wildlife*, Kennedy

the practicality of their implementation. It further comments on the limitations of a national focus on the provision of EPGs.

5.1 A DIFFERENT "INJURY IN FACT"

"If the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem." –Rachel Carson, *Silent Spring*[149]

The Supreme Court has, *since Marbury v. Madison* (1803), consistently established that concern for the proper functioning of the executive is insufficient to establish a "case" or "controversy" as defined by Article III.[150] The Supreme Court has, since *Data Processing* (1970), consistently established that a procedural right is insufficient to demonstrate standing, and plaintiffs must also demonstrate how the failed procedure threatens a citizen's interest. Environmental protection statutes now define federal policy, but do not recognize specifically what the citizen's interests in those policies are. The court recognizes aesthetic and recreational interest as potential grounds for standing, but under the current legislation, the Court is able to interpret this injury, and deny or grant standing as it sees fit.[151] As demonstrated, the Court has inconsistently defined "injury," and thus produced a confusing and inconsistent body of environmental standing cases.

This problem can be articulated in the following way. The court has inconsistently determined which methods of public-goods consumption are sufficient to be granted standing.

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[149] Rachel Carson, *Silent Spring,* (Boston: Houghton Mifflin Company, 1962), 17.
[150] *Marbury v. Madison* 5 U.S. 137 (1803).
[151] Cass R. Sunstein in "Standing for Animals (with notes on animal rights)" *UCLA Law Review* 47 (2000) (1352 "the legal system is denying that people suffer injury in fact for reasons that involve not facts but judgments about what facts, and what harms, ought to count for legal purposes.")

The Court can interpret what constitutes a "recreational or aesthetic" interest, and the Court has held that an injury can only be felt if it is physically and temporally close. In *Sierra Club*, the Court recognized that, "the alleged injury will be felt directly *only by those* who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort" (emphasis added). It affirmed that solidary happiness that a citizen finds purely by knowing the valley exists is insufficient to establish an "aesthetic interest." In *Defenders of Wildlife*, the standard required exact physical location and imminence. Kennedy's concurring opinion suggested that plane tickets demonstrating imminent return would be a sufficient demonstration of the level of consumption of the good.

Given that "injury in fact" is a consistent consideration of the Court, how can citizens have standing under these environmental statutes? As Justice Kennedy articulates, Congress cannot create new plaintiffs without recognizing new injuries. Congress must change what injuries are considered legitimate. In order to ensure the justiciability of environmental cases while adhering to the Court's standing doctrine, a new environmental right or interest must be codified that would recognize a less particular injury as the only injury "in fact." If Congress was to indentify a new kind of right and statutorily prevent injury to it, more plaintiffs would have standing to sue.

This right or interest would be a clear definition of a citizen's interest in the provision of environmental public goods. A new conception of injury could include ecosystem nexus arguments, professional interests, or symbolic concerns. These injuries are all dependent upon recognition of mechanisms of consumption of public goods that do not require immediate physical proximity. Because the court has not clearly defined its position regarding ecosystem

nexus arguments,[152] this is one area in which a changed consideration of "injured" is possible. If this change in perception of injury occurred, a citizen need not demonstrate that they use the specific area where the harm occurred, but rather, because they enjoy part of a contiguous ecosystem, can demonstrate that their area of recreational interest will be injured. In *Defenders of Wildlife*, the Court rejected DOW's argument of harm due to an "ecosystem nexus," or an argument that anyone who used part of a contiguous ecosystem was harmed when part of that ecosystem was harmed. However, as Stevens demonstrated, there are still demonstrable injuries in many "ecosystem nexus" cases.[153] *Japan Whaling Association* demonstrated how an ecosystem nexus argument may be considered by granting standing to American whalers injured by Japanese whaling practices.

Mark Sagoff articulates the symbolic importance of natural entities. If a symbolic injury were recognized, citizens who are unable to physically hike in the Grand Tetons could defend their interest in the preservation of the mountains. This change in the conception of "injury" is precedented and possible. It was not until the 1960s when injuries to aesthetic and recreational interests were recognized as justiciable.[154] As the Court develops environmental expertise, it may again change its conceptions of injury.

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[152] See *Japan Whaling Assn*, *National Wildlife Federation*, *Defenders of Wildlife*, and *Defenders of Wildlife*, Stevens concurring

[153] See Christopher T. Burt, "Procedural Injury Standing after *Lujan v. Defenders of Wildlife*," *University of Chicago Law Review* 62 (1994) ("Just as injuries resulting from dirty air or depleted animal species have only recently become cognizable, perhaps the Court might one day recognize as concrete the environmental interest of concerned citizens who do not live near or plan to visit a threatened area. Until then, environmentalists and all procedural plaintiffs are bound by current conceptions of injury." 299)

[154] Sunstein, in "Standing for Animals" (2000) reminds us that not all aesthetic injuries are justiciable, writing, "people in California might well feel disgust, distaste, or offense, if they hear of racial discrimination, or a commercial development, on Long Island, but this does not give them standing" (1353). He argues that "plaintiffs claiming aesthetic injuries should have standing if they are complaining about the government's failure to issue or enforce regulations that, if issued or enforced, would eliminate those injuries" (1357).

A new conception of injury still has its limitations in court. Under an "adverseness" model, citizens would have new legal tools with which to define their injuries. This would be effective when the public good is something that can be unevenly consumed, and demonstrably so. Consider the injuries in *Sierra Club* (public land) and even *Defenders of Wildlife* (scholarly and personal interest in the observance of endangered species). Had a scholarly interest been recognized as legitimate grounds, it would have been easier for plaintiffs to demonstrate injury. But under an "individualized" model, a differently conceived injury might still be rejected. Consider a citizen's potential right to a stable climate. According to *Defenders of Wildlife* and Chief Justice Roberts' dissent in *Massachusetts*, no citizen would have standing because the grievance is still general.[155] Regardless of what sort of injury the three-prong standing test considers, an "'individualized' model would reject a citizen claiming a generalized injury. Who can demonstrate she will be more affected by the lack of biointegrity than her neighbor?

Still, this argument offers a way in which many of these standing conflicts could be resolved. Until Congress or the Court redefines its conception of injury—in other words, considers different methods of consumption as sufficient--environmental plaintiffs will need to continue to demonstrate injury in fact to a potentially strict consideration of injury parameters.[156]

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[155] *Massachusetts v. EPA* 549 U.S. 497 (2007) (The Chief Justice writes, "Global warming may be a "crisis," even "the most pressing environmental problem of our time." Pet. for Cert. 26, 22. Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.")

[156] See Christopher T. Burt, "Procedural Injury Standing after *Lujan v. Defenders of Wildlife*" (1994) ("Just as injuries resulting from dirty air or depleted animal species have only recently become cognizable, perhaps the Court might one day recognize as concrete the environmental interest of concerned citizens who do not live near or plan to visit a threatened area. Until then, environmentalists and all procedural plaintiffs are bout by current conceptions of injury." 299)

Often, before the federal government makes changes, states take the lead. This case is no different. Several states already recognize a citizen's right to a healthy environment. The environmental right granted takes a public interest or good and converts it into a private right. The states that recognize a specific, constitutional environmental right are Pennsylvania, Hawaii, and Illinois.[157] For example, the Pennsylvania state constitution Bill of Rights is the most specific, recognizing the right of the people to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Furthermore, it recognizes that "Pennsylvania's public natural resources are the *common property* of all the people, including *generations yet to come*," and that, "As *trustee* of these resources, the Commonwealth shall conserve and maintain them for the benefit of *all the people*" (emphasis added).[158] In order to protect the commons for future generations, the Commonwealth, as trustee, has adopted a policy for the provision of intergenerational public goods.

The constitutions of Hawaii and Illinois recognize the right of the citizens to a healthful environment.[159] Significantly, these two constitutions also include very similar citizen-suit provisions that offer, "[a]ny person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."[160]

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[157] 11 states grant the right to hunt and fish or provide for the maintenance of wildlife and fish for such purposes. This very specific provision was not considered an environmental right. Interestingly, all but one of these states had other environmental provisions, suggesting that the reserved right to hunt and fish was in response to conservation legislation.

[158] PA Constitution Article I Section 27

[159] Illinois Article XI Section 2 Hawaii Article IX Section 9. Hawaii defines what that right entails: "Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources."

[160] Hawaii Article IX Section 9. Illinois' provision reads: "Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law." Article XI Section 2

Judge Richard A. Posner argues that the public good and private rights are inseparable, that, "the private right is conferred in order to promote the public good."[161] In the case of these state constitutions, this is what occurred. The state found provision of these public goods threatened and now recognize a right of the citizens to these public goods. Congress and the courts could recognize a new interest without a constitutional amendment, as it did with recreational and environmental interests in the 1960s. Still, because of the Court's deference to the Constitution, "[a]n activity would be more likely deemed the subject of a case or controversy if it were actually in conflict with an express Constitutional right."[162] Currently, it has been argued that the Constitution has been used as both a sword and a shield in regards to environmental rights. The constitution is used as a sword by those who interpret a previously unrecognized right in the same document, and as a shield by those who claim that if the Constitution does not recognize the right, there is no cause of action. [163] If Congress recognizes an environmental right of citizens, groups would have more leverage in court. A constitutional right would help to take a public interest and change it to a private right defendable in court. Of course, this right would have to recognize the specific parameters of the right, or else the court could make the same interpretations it has regarding the scope of the right. An environmental right, in order to meet the court's standing requirements, should recognize a broad category of interests. If, like in Illinois and Hawaii, the constitution granted standing, the federal courts would have to defer.

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[161] Richard A. Posner, "What Am I? A Potted Plant?" in *American Politics: Classic and Contemporary Readings* ed. Allan J. Cigler and Burdett A. Loomis (Boston: Houghton Mifflin Company, 2008) 471.
[162] Matt Handley "Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts" 116.
[163] Matt Handley Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue *The Review of Litigation* 21:1 (Winter 2002) 116.

5.2 A DIFFERENT INJURED "PERSON"

This paper considers the difficulties in citizens bringing suit to protect public goods because the citizens are unable to demonstrate an "injury in fact" that the Court considers legitimate. This final section proposes a way in which to solve this that, instead of reconsidering the injury, reconsiders the injured. Citizens claiming injury from the failed provision of a public good need demonstrate that the injury to the good is an injury to the citizen. In these standing cases, the citizens are third parties, suing the government for its failure to regulate *someone else*, and indeed these citizens often have a difficult time meeting the three-prong requirements for standing.[164]

Consider the Endangered Species Act as it exemplifies this problem. The Endangered Species Act protects endangered species. The injured party under the statute is the public good, and the harmful agency action is that which threatens the provision of the public good. Despite this purpose, a citizen wishing to bring suit against a party harming an endangered species must prove that she is directly injured by actions taken against the species. To demonstrate "injury in fact" under the Endangered Species Act, a citizen must prove that actions harming a species threaten her own legally protected interest. A citizen must demonstrate that they are injured by injury to the public good.

[164] Consider Defenders of Wildlife's difficulty in demonstrating redressability for two reasons, first, because the American funding for the project was only a tenth of the funding so the project might continue and second, because there was no guarantee that the agency, not a party in the litigation, would actually consult with the secretary. Consider the difficulty Massachusetts had in demonstrating redressability – the court ruled in favor of Massachusetts, arguing that the whole injury need not be redressed, and any action by the EPA would redress a bit of the state's injury.

One proposed solution to the problems that third-party citizens encounter in attempts to establish standing has been to provide the natural entities themselves standing in court.[165] As established, private citizens have difficulty standing in court because they are third parties in environmental protection. Changing what the *injury* is, as suggested above, would make these private citizens second parties because they would be defending a legal interest in the public good. This second proposition, to change who the *injured* is, would grant second-party status to the natural entities protected by public-goods legislation. This standing is legally possible and satisfies the three-prong Constitutional requirements.

First, standing for natural entities is legally and constitutionally possible. As *Defenders of Wildlife* affirmed, Congress could grant standing in a statute, as long as Congress articulates how that upon which it is conferring standing suffers an injury the statute has been written to protect. The other, more controversial and far-reaching provision could be for a constitutional amendment that articulates the rights of natural entities, therefore establishing legal rights they could defend in court. Corporations, estates, states, infants, incompetents, municipalities, universities, and even ships are all non-speaking entities that have been granted standing.[166] Particularly in regards to specific statutory provisions, legal standing for natural entities is possible.

Standing for natural entities would help to solve the third-party problems that citizens encounter. If the statutes protect the goods and not the citizens' rights to those goods, the citizens are often denied standing. However, an endangered species or the Mineral King Valley

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[165] See Cass R. Sunstein in "Standing for Animals (with notes on animal rights)" *UCLA Law Review* 47 (2000), Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Nature* (Los Altos, Cal.: William Kaufman, Inc. I974) and Katherine A. Burke, *Can We Stand For it? Amending the Endangered Species Act With an Animal-Suit Provision*, University of Colorado Law Review 75 (2004).

[166] Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Nature* (Los Altos, Cal.: William Kaufman, Inc. I974) 17.

could demonstrate that a violation of the particular statute would harm them in fact. The statute is created to prevent these environmental injuries. It would be fairly easy for Congress to then connect the injury the statute intends to prevent with those entities upon which it confers standing.

Lawyer Katherine Burke has applied this idea to the Endangered Species Act.[167] An animal-suit provision would meet the requirements Congress must fulfill. Congress could clearly relate the injury that it is trying to prevent (the endangerment of species) to the bearer of standing (the animal) and a ruling in the plaintiff's favor would redress the injury (halt harm to that species).[168] Several problems result from Burke's use of "animal" in her provision instead of "species." These problems are psychological and practical, and suggest further dilemmas under other statutes, but these could be resolved. First, there is a significant difference in what type of plaintiff these two would be. Granting "personhood" to an animal would incite tremendous controversy, much of which I will not address in this paper. Granting standing to a species actually seems more benign. Although a species might be comprised of individuals that can feel pain, but a *species* cannot feel pain. In this respect, a species is more similar to a mountain or a river than to an individual animal. Granting legal personhood under a specific statute to a mountain need not confer moral equality upon the mountain.[169] The psychological issue of recognizing moral equality in mice or skunks no longer applies. Granting a species "personhood" is not a moral issue, but a practical one.[170] Furthermore, a specific individual of a

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[167] Katherine A. Burke, *Can We Stand For it? Amending the Endangered Species Act With an Animal-Suit Provision*, University of Colorado Law Review 75 (2004) 651.
[168] Burke, 651.
[169] Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Nature* (Los Altos, Cal.: William Kaufman, Inc. I974).
[170] Cass Sunstein in "*Standing for Animals,"* (2000) argues that standing for animals is also not an issue of moral rights, but of legal rights. Furthermore, Sunstein argues that an animal's capacity to suffer should grant it standing and legal protection under the law. 1364.

species might not be harmed by actions that threaten the species. For instance, an individual animal might not be hurt or killed by habitat modification or destruction. These same modifications or destruction could affect that individual's ability to reproduce, thus affecting the future population of the species. Indeed, the intent of the Endangered Species Act is to protect *species* and *populations*, not individuals. There is a great difference in wildlife management when the goal changes from protection of the individual to protection of the species. The species-suit provision has a similar effect as the animal-suit provision. If a species had standing, then regardless of injury to human citizens, a guardian for the species could speak on behalf of "its interests." Ultimately, this standing would prevent practices that are already illegal, as denoted in environmental protection statutes.

This concept is not foreign to the courts. In 1972, Justice William O. Douglas wrote a dissent in *Sierra Club* in which he proposed this very structure:

> The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.[171]

Thus far this concept of extending standing to natural entities has been addressed inconsistently in appellate courts, and only in consideration of species. Still, these cases do not deny that Congress could grant standing if it chose. In 2004, the 9th Circuit Court ruled in *Cetacean Community v. Bush* (2004) that the plaintiff did not have standing to sue under the Endangered Species Act, the Marine Mammal Protection Act (MMPA), the National Environmental

[171] *Sierra Club v. Morton* 405 U. S. 741, 742 (1972).

Protection Act (NEPA), and the Administrative Procedure Act. [172] The Cetacean Community was the name given to the world's whales, porpoises, and dolphins, and was the only plaintiff in the case. The court then reconciled its decision with a decision it had made 15 years previous in *Palila v. Hawaii Department of Natural Resources* (1989) in which the court held that the actions of the defendant were indeed a taking of the Palila.[173] The Palila, an endangered bird located only in a small area in Hawaii, was listed as the first plaintiff and was followed by the Sierra Club and others. The 9th Circuit wrote that the Palila "has legal status and wings its way into federal court as a plaintiff of its own right."[174] The court in *Cetacean Community* called their previous statements "little more than rhetorical flourishes."[175] Furthermore, the court noted, immediately after they named the Palila as a "plaintiff in its own right," the 1989 court wrote that "the Sierra Club and others brought action under the [ESA] on behalf of the Palila."[176] Had the 9th circuit employed the Supreme Court's *Lujan* criteria, it is doubtful that the court would have found that the Sierra Club had standing, for the club never testified as to how *it* was injured. In this instance, standing for the species would have been more successful in bringing the case before the court. It is presumable that the Supreme Court would not recognize a species or valley as a plaintiff in its own right. Although the 9th Circuit Court held that a species did not have standing under the statutes it examined, it articulated that Congress had the authority to confer standing upon species if it so decided. The Court wrote, "We see no reason why Article

[172] *Cetacean Community v. Bush* 386 F.3d 1169 (9th Cir. 2004).
[173] *Palila v. Department of Natural Resources*, 852 F.2d 1106, 1107 (9th Cir. 1988)
[174] *Cetacean Community v. Bush* 386 F.3d 1169 (9th Cir. 2004).
[175] *Cetacean Community v. Bush* 386 F.3d 1169 (9th Cir. 2004).
[176] *Cetacean Community v. Bush* 386 F.3d 1169 (9th Cir. 2004).

III prevents Congress from authorizing a suit in the name of an animal."[177] The court simply concludes that Congress had not done so, but that Congress could grant standing if it so chose.

5.3 CONCLUSION

This paper has demonstrated that the very intergenerational and public nature of environmental goods makes EPGs both important and difficult to provide. I have proposed several methods to increase the ability of citizens to hold government agencies accountable to the provision of statutorily protected environmental public goods. This paper has specifically focused on American government as a provider of goods, but some environmental problems are international. Significantly, standing around climate change issues is not as easily solved as around Mineral King.

Alkuin Kölliker has explained that countries are more likely to protect environmental goods for which the benefits are excludable to that country.[178] This type of internationally excludable good, or club good, would include soil stability or non-border rivers and lakes, or the Palila. Consider the protection of the Mississippi River. If the United States does not act to protect the Mississippi, no other nation will. There is therefore no chance for the US to benefit from a clean Mississippi without acting.

This is not true for all international environmental goods, such as a stable climate. Climate protection is an international public good, dependent upon international collective action for its provision. Recall that EPA argued that their regulation of greenhouse gases would

[177] *Cetacean Community v. Bush* 386 F.3d 1169 (9th Cir. 2004).
[178] Alkuin Koelliker, "Globalisation and National Incentives for Protecting Environmental Public Goods" 66.

undermine the president's foreign policy goals because it would remove a bargaining tool to convince other nations to act collectively. The United States government has little incentive to protect a stable climate if other countries can simply free-ride –in other words, if other countries can benefit from US efforts without having to do anything on their part. All countries (especially the United States) must act collectively to prevent climate change. Furthermore, the regulation of greenhouse gases affects trade profits and further undermines US incentive to autonomously regulating greenhouse gases.[179] The combination of the public goods nature of climate protection and the expensive negative effects on trade make the collective action problem surrounding climate protection severe.[180]

This paper has focused on ways in which groups become involved in the policy process to ensure the provision of intergenerational EPGs. This conclusion has presented several ways in which Congress could alter environmental statutes to enable groups to bring suit. Citizen suits are but one method for groups to become involved. It is thus likely that those groups which have been denied standing would focus their efforts on changing Congressional consideration of injury so that they can again seek legal review of agency actions. In this way, groups serve as external mechanisms in all branches of government to ensure that trees remain standing.

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[179] Alkuin Koelliker, "Globalisation and National Incentives for Protecting Environmental Public Goods" 67.
[180] Ibid., 73.
See Robert A. Weinstock, "The Lorax State: Parens Patriae and the Provision of Public Goods" *Columbia Law Review* (2009) 109, in which he argues that the "semi-sovereignty" of a state offers a mechanism to develop standing. This suggestion is however limited by the volume of cases a state could bring.

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