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STEEL COMPANY COLLOQUIUM

Steel Company v. Citizens for a Better Environment: Citizens Can't Get No Psychic Satisfaction

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I. INTRODUCTION

In *Steel Company v. Citizens for a Better Environment* the United States Supreme Court held that “psychic satisfaction” is an insufficient basis for standing to sue under Article III of the United States Constitution.¹ The Court’s opinion, authored by Justice Scalia, ruled that Citizens for a Better Environment (CBE) lacked standing to sue the Steel Company for its seven year failure to file reports required by the Emergency Planning and Community Right to Know Act (EPCRA or Act).² The Court found that none of the relief CBE requested would redress the injuries alleged in its complaint.³ The Court was influenced by the following factors: the Steel Company had cured its violation by the time CBE filed its complaint; the civil penalties authorized by EPCRA are paid to the United States Treasury, not to plaintiffs; and CBE alleged no ongoing violations that would support injunctive orders.⁴ Therefore, CBE would gain nothing but the “psychic satisfaction” of knowing that the company had finally complied with the law.⁵ “[P]sychic satisfaction is not an acceptable

1. 118 S. Ct. 1003, 1019 (1998).
 2. *See id.* at 1009, 1018.
 3. *See id.* at 1018.
 4. *See id.* at 1018-19.
 5. *See id.* at 1019.

Article III remedy,” said the Court, “because it does not redress a cognizable Article III injury.”⁶

Although the merits of CBE’s efforts to compel the Steel Company to comply with EPCRA were trivialized by Justice Scalia’s stinging prose, *Steel Company* is an important case, principally because of what it reveals about the Supreme Court’s views on the standing of environmental groups under congressionally authorized citizen suit provisions. To make sense of the *Steel Company* opinion, it must be seen in the context of other recent Supreme Court decisions on environmental standing. Since 1990, all but one of these opinions have been authored by Justice Scalia, and have served as a vehicle for his efforts to “maneuver”⁷ the law of standing back to what he conceives as its “original understanding”⁸ under the Constitution. Justice Scalia’s decisions apply the “injury in fact” test required by Supreme Court standing jurisprudence so as to restrict, and possibly preclude citizen group standing based upon statutory grants.

This Article examines the Supreme Court’s ruling in *Steel Company* as an illustration of Justice Scalia’s standing theories and the conflict between the private rights and public law models of litigation. It reviews the decision in the context of the Supreme Court’s jurisprudence on standing, particularly in environmental cases, and offers a critique of the Court’s reliance on the injury in fact test for standing in public law cases.

The Article begins with a brief synopsis of the citizen suit provision of EPCRA (Part II), and a summary of the *Steel Company* standing decision (Part III). The summary discusses Justice Stevens’ lengthy concurrence, in which he argued that the Court should not reach the standing question at all, but should resolve the matter on the issue of whether EPCRA authorizes citizen suits for wholly past statutory violations. This discussion is followed by an examination of the Court’s rejection of Justice Stevens’ position and a consideration of Justice Scalia’s rulings on standing. As noted above, Justice Scalia held that CBE did not meet the redressability requirement of the injury in fact test for standing.

Part IV of this Article provides a short discussion of how the lower courts have addressed the standing issue raised by the citizen

6. *Id.*

7. Antonin Scalia, *Oversight and Review of Agency Decisionmaking*, 28 ADMIN. L. REV. 659, 686 (1976) [hereinafter Scalia, *Oversight and Review*]; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 899 (1983) [hereinafter Scalia, *Doctrine of Standing*].

8. Scalia, *Doctrine of Standing*, *supra* note 7, at 881.

suit provision of EPCRA. These court decisions illustrate the merits of the issues better than the Supreme Court's *Steel Company* opinion, and may be helpful to lawyers and others wrestling with this question.

Parts V and VI of the Article are devoted to understanding the implications of the *Steel Company* decision for the Supreme Court's standing jurisprudence, particularly the standing of public interest and environmental organizations. Part V traces the development of injury in fact as a constitutional requirement for standing, and its link by the Supreme Court to the doctrine of separation of powers.

Part V also focuses on Justice Scalia's theory that standing to sue is "a crucial and inseparable element" of the separation of powers.⁹ In *Steel Company* and other decisions on environmental standing, Justice Scalia has construed the injury in fact standard to significantly constrain Congress's authority to grant standing by statute, as it did in EPCRA. According to Justice Scalia, the courts play no part in the vindication of public rights and majoritarian values, particularly the protection of the environment.¹⁰ Justice Scalia manipulated the standing inquiry in *Steel Company* to deny a citizen group the right to redress clear violations of EPCRA and to further develop his views on the limited role of the courts in our system of government.

Part VI critiques the Supreme Court's reliance on the injury in fact test for standing, particularly in public law cases such as *Steel Company*. "Injury" is a notoriously manipulable concept, and one for which there may be no constitutional foundation. This part reviews significant historical scholarship establishing that standing is a recent judicial creation, not a constitutionally based doctrine.

Parts VII and VIII offer suggestions for alternative approaches to the injury in fact test for standing, and concluding thoughts on lessons to be learned from *Steel Company*. In the wake of Justice Scalia's decision, lawyers must consider standing as a strategic element of a case. Together with concerned members of the judiciary, they must work to assure that the doors of the courthouse will remain open to public law cases.

II. THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT

In 1984, more than 2,000 people were killed and countless others injured when the Union Carbide facility in Bhopal, India

9. *Id.*

10. *See id.* at 894.

unexpectedly released toxic chemicals into the environment.¹¹ This tragedy, combined with similar, smaller incidents closer to home, focused attention on the presence of hazardous and toxic chemicals in our communities, and the need to provide the public with information on their location and use.¹² Congress responded to these concerns by enacting EPCRA.¹³ As described in detail elsewhere in this colloquium, EPCRA has two central objectives: to assure public access to information about hazardous chemicals used, produced or stored in local communities; and to provide assistance to these communities in formulating and administering response plans for emergencies involving accidental releases of toxic chemicals.¹⁴ In his Memorandum to the Administrator of EPA, President Clinton described EPCRA as “an innovative approach to protecting public health and the environment by ensuring that communities are informed about the toxic chemicals being released into the air, land, and water by manufacturing facilities.”¹⁵ The “Right-to-Know” provisions of the statute offer “a basic informational tool to encourage informed community-based environmental decision making and provide a strong incentive for businesses to find their own ways of preventing pollution.”¹⁶

To fulfill its informational objectives, sections 311 through 313 of EPCRA require owners or operators of facilities producing, using or storing specified toxic and hazardous chemicals to submit two types of annual reports.¹⁷ The first, called a hazardous chemical inventory, describes the amounts, location, and manner of storage of specified chemicals at each facility.¹⁸ The second, known as a toxic chemical release report, details the amounts of toxic chemicals released into the environment during normal business operations.¹⁹ These reports are intended to provide information to the state and local emergency planning and response entities established by the Act,

11. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1238 (7th Cir. 1996), *vacated*, 118 S. Ct. 1005 (1998).

12. See *id.*

13. Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. §§ 11001-11050 (1997).

14. See *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 746 (W.D.N.Y. 1991).

15. Expediting Community Right-to-Know Initiatives, Memorandum of August 8, 1995, 60 Fed. Reg. 41,791 (1995).

16. *Id.*

17. See EPCRA, 42 U.S.C. §§ 11021-11023.

18. See *id.* § 11022.

19. See *id.* § 11023(a). Abnormal emergency releases are covered by 42 U.S.C. § 11004.

and to local fire departments²⁰ and the public, especially the citizens of communities surrounding facilities subject to the Act.²¹ The hazardous-chemical inventories are due March 1st,²² and the toxic-chemical release forms are due July 1st.²³ Failure to file these reports in a timely manner may result in the imposition of civil penalties, which are paid to the United States Treasury.²⁴

EPCRA includes an expansive citizen suit provision²⁵ which authorizes “any person” to

commence a civil action on his own behalf against . . . [a]n owner or operator of a facility for failure to do any of the following:

(i) Submit a follow-up emergency notice under section 11004(c) of this title. (ii) Submit a material safety data sheet or a list under section 11021(a) of this title. (iii) Complete and submit an inventory form under section 11022(a) of this title (iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.²⁶

Additionally, any person may file suit against the Administrator of the EPA and state and local governments for failure to carry out a number of compliance activities.²⁷ These include failing to provide a mechanism for making information publicly available and failing to respond to requests for information in a timely way.²⁸ Finally, EPCRA’s citizen suit provision authorizes intervention of right for persons who have “a direct interest which is or may be adversely affected by the action.”²⁹

Prior to filing an action, a potential citizen plaintiff must give sixty days notice to the alleged violator, the Administrator of the EPA, and the state in which the alleged violation occurred.³⁰ A citizen suit may not go forward, however, if the Administrator of the EPA “has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty.”³¹

20. *See id.* § 11022(a)-(e).

21. *See id.* § 11023(h).

22. *See id.* § 11022(a)(2).

23. *See id.* § 11023(a).

24. *See id.* § 11045(c).

25. *See id.* § 11046(a)(1).

26. *Id.* § 11046(a)(1)(A).

27. *See id.* § 11046(a)(1)(B)-(D).

28. *See id.*

29. *Id.* § 11046(h)(2).

30. *See id.* § 11046(d).

31. *Id.* § 11046(e).

III. SUMMARY OF THE *STEEL COMPANY* DECISION

Over a seven-year period, from 1988 to 1995, the Steel Company failed to submit the hazardous chemical-inventory and toxic-chemical release forms required by sections 11022 and 11023 of EPCRA.³² In 1995, Citizens for a Better Environment, a nonprofit environmental organization, sent notice to the Steel Company, the EPA Administrator, and the relevant Illinois authorities of its intent to sue the Steel Company for violation of EPCRA's reporting requirements.³³ Upon receiving this notice, the Steel Company filed all of the overdue forms.³⁴

The EPA chose not to bring an action against the Steel Company, and when the sixty day notice period expired, CBE filed suit.³⁵ The Steel Company moved to dismiss the action on the grounds that, because its EPCRA submissions were current when the complaint was filed, the court lacked jurisdiction to hear the suit.³⁶ The Steel Company argued that because EPCRA does not permit suits for wholly past violations, CBE's claim of untimely filings was not one for which relief could be granted.³⁷

The district court agreed with the Steel Company, ruling that citizens may not sue for historical violations of the Act if the violations were remedied prior to the suit.³⁸ The Seventh Circuit reversed, holding that EPCRA authorizes citizen suits for wholly past violations.³⁹ The court found that EPCRA requires companies to complete and submit forms in compliance with the requirements of several statutory sections, including mandatory timetables.⁴⁰ The court held further that the enforcement provisions of EPCRA are not cast in the present tense.⁴¹ Failure to do something can indicate a failure, past or present.⁴² To give meaning to the statute as a whole, the citizen suit provision must be interpreted to permit suits for past

32. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1241 (7th Cir. 1996), *vacated*, 118 S. Ct. 1005 (1998).

33. See *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1009 (1998).

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

38. See *Citizens for a Better Env't v. Steel Co.*, No. 95-C-4534, 1995 WL 758122 at *1, *4 (N.D. Ill. Dec. 21, 1995), *rev'd*, 90 F.3d 1237 (7th Cir. 1996), *vacated*, 118 S. Ct. 1003 (1998).

39. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1243 (7th Cir. 1996), *vacated*, 118 S. Ct. 1003 (1998).

40. See *id.*

41. See *id.* at 1244.

42. See *id.* at 1243.

violations.⁴³ Otherwise the citizen enforcement provision would be rendered “virtually meaningless.”⁴⁴

The Supreme Court granted *certiorari* ostensibly to resolve the conflict between the Seventh Circuit’s interpretation of EPCRA and that of the Sixth Circuit in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*,⁴⁵ a case acknowledged by the Seventh Circuit to be “factually indistinguishable” from *Steel Company*.⁴⁶

However, the Supreme Court did not decide whether EPCRA applies to past violations. Instead, the Court held that CBE lacked standing to maintain its action and, therefore, the courts had no jurisdiction to hear the case.⁴⁷ The judgment of the Seventh Circuit was vacated and the case remanded with instructions that the complaint be dismissed.⁴⁸

A. *The “Long Front Walk”*

The *Steel Company* decision is one of the more confusing of recent Supreme Court history. With its multiplicity of concurrences,⁴⁹ the opinion reads like an extended debate among the members of the Court, the kind of debate that might be expected in preparation of the actual decision. Much of the confusion in the opinion stems from the fact that Justice Scalia opens with what he calls a “long front walk,” before he explains the Court’s rulings and its analysis.⁵⁰ The “walk” is an extensive response to Justice Stevens’ concurring opinion on the question of which issue the Court should address first: the scope of EPCRA’s citizen suit provision or the standing of the respondent CBE.⁵¹ To understand Justice Scalia’s excursion, it is first necessary to consider Justice Stevens’ concurrence.

43. *See id.* at 1244.

44. *Id.*

45. 61 F.3d 473 (6th Cir. 1995).

46. *Citizens for a Better Env’t v. Steel Co.*, 90 F.3d at 1242; *Steel Co. v. Citizens for a Better Env’t*, 118 S. Ct. 1003, 1009 (1998).

47. *See Steel Co.*, 118 S. Ct. at 1019-20.

48. *See id.* at 1020.

49. Chief Justice Rehnquist and Justices O’Connor, Kennedy and Thomas, *see id.* at 1020, joined Justice Scalia’s opinion, *see id.* at 1008. Justice Breyer concurred in parts of Justice Scalia’s opinion, as did Justices O’Connor and Kennedy, *see id.* at 1020 (Breyer, O’Connor, Kennedy, J.J., concurring). Justice Stevens filed an extensive concurrence, in which Justices Souter and Ginsberg joined, in part, *see id.* at 1021 (Stevens, J., concurring; Souter, Ginsberg, J.J., concurring in part). Justice Ginsberg also filed a separate concurrence, *see id.* at 1032 (Ginsberg, J., concurring); *see also id.* at 1008.

50. *Steel Co.*, 118 S. Ct. at 1016.

51. Justice Stevens claimed that the Court should first consider whether EPCRA authorizes suits for past violations, before addressing CBE’s standing. *See id.* at 1021-23

1. Justice Stevens' Concurrence

Although he concurred in the judgment, Justice Stevens argued that the Supreme Court need not, and indeed should not, consider the issue of CBE's standing.⁵² According to Justice Stevens, the case presented two interrelated threshold issues: "(1) whether [EPCRA] confers federal jurisdiction over citizen suits for wholly past violations; and (2) if so, whether respondent has standing under Article III of the Constitution."⁵³ Because both issues are jurisdictional, Justice Stevens reasoned that the Court has the power to decide which to resolve first.⁵⁴ For him, the choice was clear. Rather than take up the issue of standing, and "unnecessarily pass[] on an undecided constitutional question," the case should be resolved on the statutory jurisdictional question, *i.e.*, whether EPCRA authorizes suits for wholly past violations.⁵⁵ If the citizen suit provision of EPCRA authorizes suits for past violations, then the standing of the respondent is an issue.⁵⁶ If the statute does not permit such actions, the standing issue need not be considered at all.⁵⁷

Justice Stevens argued that the threshold issue of statutory jurisdiction in *Steel Company* is "virtually identical"⁵⁸ to the question decided in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*⁵⁹ In *Gwaltney*, the Court concluded that the Clean Water Act does not allow citizen suits for wholly past violations.⁶⁰ According to Justice Stevens, the Court framed the issue in *Gwaltney* as a matter of jurisdiction.⁶¹ It stated: "In this case, we must decide

(Stevens, J., concurring). He labeled both issues "jurisdictional." *Id.* Justice Scalia responded, "[Standing] would normally be considered a threshold question that must be resolved in respondent's favor before proceeding to the merits. Justice Stevens . . . claims that the question of whether [EPCRA] permits this cause of action is *also* 'jurisdictional,' and so has equivalent claim to being resolved first." *Id.* at 1009. The initial part of Justice Scalia's opinion is the discussion of this dispute.

52. *See id.* at 1021 (Stevens, J., concurring).

53. *Id.* (Stevens, J., concurring).

54. *See id.* (Stevens, J., concurring). Justice Stevens stated that "this is not a case in which the choice between resolving the statutory question or the standing question first is a choice between a merits issue and a jurisdictional issue; rather, it is a choice between two jurisdictional issues." *Id.* at 1022 (Stevens, J., concurring).

55. *Id.* at 1027 (Stevens, J., concurring).

56. *See id.* at 1024-25 (Stevens, J., concurring).

57. *See id.* at 1025 (Stevens, J., concurring).

58. *Id.* at 1022 (Stevens, J., concurring).

59. 484 U.S. 49 (1987).

60. *See id.* at 64.

61. *See Steel Co.*, 118 S. Ct. at 1022 (Stevens, J., concurring).

whether § 505(a) of the Clean Water Act . . . confers federal jurisdiction over citizen suits for wholly past violations.”⁶²

To further support his conclusion that the statutory issue is jurisdictional and should be decided first, Justice Stevens offered an alternative rationale.⁶³ He argued that a court must evaluate whether a plaintiff has standing only if a cause of action is stated in its complaint.⁶⁴ Without a cause of action, either under a statute or the common law, a potential plaintiff lacks standing to sue, and the matter may be dismissed.⁶⁵ If the issue in *Steel Company* was approached in this manner, said Justice Stevens, it would be evident that the Court had the power to decide the statutory question first.⁶⁶

2. Justice Scalia’s Response to Justice Stevens’ Concurrence

Justice Scalia rejected both of Justice Stevens’ approaches and proceeded to decide the standing issue.⁶⁷ He concluded that the question of whether the scope of EPCRA’s citizen suit provision includes wholly past violations goes to the merits of the case and could not be considered before the threshold jurisdictional question, *i.e.*, standing.⁶⁸ Justice Scalia chided Justice Stevens for “attempt[ing] to convert the merits issue in this case into a jurisdictional one.”⁶⁹ He strongly criticized the appellate practice of moving immediately to the merits of a case, despite jurisdictional objections, even when the merits question is more readily resolved, and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied.⁷⁰ Justice Scalia stated that this practice, referred to as the “doctrine of hypothetical jurisdiction” by the Ninth Circuit,⁷¹ “carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.”⁷² Justice Scalia emphasized that, without jurisdiction, a court cannot proceed at all.⁷³ “For a court to pronounce upon the meaning or the

62. *Id.* (Stevens, J., concurring) (quoting *Gwaltney*, 484 U.S. at 52).

63. *See id.* at 1024 (Stevens, J., concurring).

64. *See id.* (Stevens, J., concurring).

65. *See id.* (Stevens, J., concurring).

66. *See id.* at 1022 (Stevens, J., concurring).

67. *See id.* at 1016.

68. *See id.* at 1018.

69. *Id.* at 1012.

70. *See id.*

71. *Id.*

72. *Id.*

73. *See id.*

constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.⁷⁴

Justice Scalia disagreed with Justice Stevens on the Supreme Court's treatment of the past violation issue in *Gwaltney*, calling it a "drive-by jurisdictional ruling[]" with "no precedential effect."⁷⁵ According to Justice Scalia, the ruling on the past violations issue was a decision on the merits.⁷⁶ He distinguished the provision of the Clean Water Act under review in *Gwaltney* from the language of EPCRA and concluded that "the jurisdictional character of the elements of the cause of action in *Gwaltney* made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court."⁷⁷

Justice Scalia also disputed Justice Stevens' contention that jurisdiction need not be considered until the Court determined that respondent had stated a cause of action in its complaint.⁷⁸ He stated, "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."⁷⁹ A court's jurisdiction over a subject matter does not fail simply because a plaintiff does not state a cause of action in its complaint.⁸⁰ Jurisdiction fails when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy."⁸¹ Courts have jurisdiction if "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another."⁸² In *Steel Company*, Justice Scalia declared that the respondent would win under one construction of EPCRA and lose under another.⁸³ Therefore, the courts clearly have jurisdiction to hear the case.⁸⁴ "Jurisdiction is power to declare the

74. *Id.* at 1016.

75. *Id.* at 1011.

76. *See id.*

77. *Id.*

78. *See id.* at 1010.

79. *Id.*

80. *See id.* at 1011.

81. *Id.* at 1010 (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)).

82. *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)).

83. *See id.*

84. *See id.*

law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”⁸⁵

3. Concurrences on Jurisdiction

As is often the case, Justice Scalia’s colleagues did not fully agree with his hard line approach.⁸⁶ Justices O’Connor, Kennedy, and Breyer filed concurrences on the jurisdictional issue.⁸⁷ Justice O’Connor acknowledged that several Supreme Court decisions “have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question” and urged that the *Steel Company* opinion not be read as an exhaustive catalogue of the circumstances in which federal courts may resolve cases on the merits rather than deal with questions of jurisdiction.⁸⁸ While federal courts “typically should decide standing questions at the outset of a case,” Justice Breyer said, “[t]he Constitution does not impose a rigid judicial ‘order of operations,’ when doing so would cause serious practical problems.”⁸⁹

85. *Id.* at 1012 (quoting *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

86. In previous opinions, members of the Supreme Court have taken issue with Justice Scalia’s hard line approach to various issues. For example, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992), Justice Scalia concluded that Defenders of Wildlife lacked standing to sue the Department of the Interior because it had failed to show concrete injury in fact or a likelihood of redressability. Defenders’ procedural injuries, which were based on the citizen suit provision of the Endangered Species Act, were insufficient to support standing. *See id.* Justice Scalia stated that Congress may not, through a citizen suit provision, grant standing to persons who do not meet the “injury in fact” requirements of Article III, as he defines those requirements. *See id.* at 573. “[A] generally available grievance about government . . . does not state an Article III case or controversy.” *Id.* at 573-74. Congress cannot “convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts.” *Id.* at 577. Although they concurred in the judgment of the court, Justices Kennedy and Souter responded that “[m]odern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission” and that “we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.” *Id.* at 580 (Kennedy, J., concurring). Moreover, “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.” *Id.* (Kennedy, J., concurring). In his dissent to *Defenders*, Justice Blackmun strongly rebuked Justice Scalia for his “anachronistically formal view of the separation of powers,” *id.* at 602 (Blackmun, J., dissenting), and for allowing the government to “play ‘Three-Card Monte’” with the redressability requirement in order to defeat plaintiff’s standing, *id.* at 596 (Blackmun, J., dissenting).

87. *See Steel Co.*, 118 S. Ct. at 1020-21 (Breyer, O’Connor, Kennedy J.J., concurring).

88. *Id.* (O’Connor, J., concurring) (quoting the majority opinion at 1016).

89. *Id.* at 1020-21 (Breyer, J., concurring). Justice Breyer cites the Court’s opinion in *Norton v. Mathews*, 427 U.S. 524, 532 (1976) for the proposition that courts may “reserve[] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.” *Steel Co.*, 118 S. Ct. at 1020-21 (Breyer, J., concurring). Such an approach, according to Justice Breyer, “makes enormous practical sense. Whom does it help to have appellate judges spend their time and energy puzzling over the correct answer to an

B. *The Standing Issue*

1. Introduction to Justice Scalia's Opinion

After clearing the hurdle of Justice Stevens' concurrence, the Court reached the threshold standing issue.⁹⁰ As a foundation for its ruling, Justice Scalia provided a brief reprise of the law of standing, the "numbingly familiar"⁹¹ litany of requirements intended to assure that only those persons with a direct stake in the outcome of a dispute are permitted to invoke the jurisdiction of a court to resolve it.⁹²

Article III of the Constitution limits the federal courts' judicial authority to "cases" and "controversies."⁹³ Current Supreme Court jurisprudence on Article III standing requires a potential plaintiff to demonstrate that he has suffered an injury in fact, a "distinct and palpable" harm that can be fairly traced to the conduct of the defendant and redressed by a favorable court decision.⁹⁴ The three requirements of injury, causation, and redressability constitute what the Supreme Court, with "dreary regularity,"⁹⁵ calls "the irreducible constitutional minimum of standing."⁹⁶

The Supreme Court did not decide whether "being deprived of information that is supposed to be disclosed under EPCRA—or at least being deprived of it when one has a particular plan for its use—is a concrete injury in fact that satisfies Article III" of the Constitution.⁹⁷ Rather, the Court focused on the element of redressability and concluded that, even assuming injury, none of the

intractable jurisdictional matter, when . . . the same party would win or lose regardless?" *Id.* at 1021 (Breyer, J., concurring).

90. See *Steel Co.*, 118 S. Ct. at 1016.

91. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

92. See *Steel Co.*, 118 S. Ct. at 1016-17 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

93. U.S. CONST. art. III, § 2, cl. 1.

94. *Valley Forge Christian College v. Americans United for the Separation of Church & State, Inc.*, 454 U.S. 464, 472, 474-75 (1982).

95. Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22 (1982).

96. *Defenders of Wildlife*, 504 U.S. at 560. In addition to the constitutional requirements, there are three prudential limitations on standing: (1) a plaintiff must assert his own legal rights and interests, not those of a third party; (2) the interests must be specific, not "abstract questions of wide public significance;" and (3) the plaintiff's complaint must fall within the "zone of interests" to be protected by the statute in question. *Valley Forge*, 454 U.S. at 474-75; see also *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 805 (11th Cir. 1993). To be within the zone of interests of a statute, a plaintiff must demonstrate a plausible relationship between his interest and the overall policies of the statute. See *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 60-61 (D.C. Cir. 1988). For an overview of the prudential limits on standing, see Fletcher, *supra* note 91, at 251-53.

97. *Steel Co.*, 118 S. Ct. at 1018.

relief sought by CBE would provide a remedy for its claims.⁹⁸ In the absence of the complete triad of standing, the Court would not consider the merits of CBE's complaint.⁹⁹

2. Preview of Justice Scalia's Theories of Standing

As discussed in greater detail in Parts V and VI of this Article, the key to the *Steel Company* decision is Justice Scalia's interpretation and application of the injury in fact test for standing and the relationship of standing to the separation of powers doctrine.¹⁰⁰ Since its decision in *Association of Data Processing Service Organizations, Inc. v. Camp*,¹⁰¹ the Supreme Court has treated the injury in fact test as "received wisdom," and part of the "basic conceptual scheme of Article III."¹⁰² In Justice Scalia's hands, the injury in fact test severely limits both the category of persons who may invoke the jurisdiction of the courts and the matters for which they make seek review.¹⁰³ This test even constrains Congress's power to grant standing by statute.¹⁰⁴ A short preview of Justice Scalia's theory of standing is included here to set the stage for the longer discussion in Parts V and VI.

98. See *id.*

99. See *id.* at 1017.

100. Justice Scalia explained his views on this subject in *The Doctrine of Standing as an Essential Element of the Separation of Powers*, *supra* note 7. For other discussions of his views see, for example, Karin P. Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10557 (Dec. 1990) [hereinafter Sheldon, *Scalia Restricts Standing*]; Karin P. Sheldon, *Lujan v. Defenders of Wildlife: The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10031 (Jan. 1993) [hereinafter Sheldon, *Slash and Burn*]; Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); David Sive, *Environmental Standing*, 10 NAT. RESOURCES & ENV'T, Fall 1995 at 49; Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93 (1996); Jonathan Poisner, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991).

101. 397 U.S. 150 (1970). In *Data Processing*, the Supreme Court replaced the previous test for standing, which called for the plaintiff to show that it had a legally protected interest in the matter, with a factual inquiry into the existence of harm. See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1445 (1988). Professor Fletcher notes that, although the idea that a plaintiff must suffer some kind of injury before a federal courts can provide relief was "already at large in the Supreme Court's cases," *Data Processing* was the first case to state that "injury in fact" was required, and to formulate the issue of plaintiff's standing as a factual inquiry. Fletcher, *supra* note 91, at 230. See discussion of *Data Processing* in text accompanying notes 266-273 *infra*.

102. Fletcher, *supra* note 91, at 230.

103. See text *infra* accompanying notes 332-347.

104. See text *infra* accompanying notes 365-377.

For Justice Scalia, separation of powers is the fundamental feature of our system of government, its “central mechanism”.¹⁰⁵ Standing is a “crucial and inseparable element” of the separation of powers.¹⁰⁶ It restricts the courts to their constitutionally defined role of protecting individual rights.¹⁰⁷ The injury in fact requirement, in turn, limits standing to those persons who can demonstrate they have suffered an individualized injury.¹⁰⁸ Justice Scalia has said:

[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.¹⁰⁹

According to Justice Scalia, there are constitutionally imposed bright line controls on the roles of Congress, the courts, and the executive, and thus there are rigid limits on Congress’s authority to use the courts to check executive compliance with federal law.¹¹⁰ Congress cannot, through grants of statutory standing, “convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts.”¹¹¹ A citizen suit cannot create a procedural right in “all persons” so that anyone may file suit to challenge an agency’s alleged failure to follow statutory procedures.¹¹² A plaintiff must still show that the agency’s action impairs a separate, concrete interest, other than the interest in compliance with the law.¹¹³

For Justice Scalia, the judicial power of the courts does not extend to any and all disputes, but only to constitutional “cases” and “controversies.”¹¹⁴ Although these terms are not defined in the Constitution, Justice Scalia has said that “[w]e have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process.”¹¹⁵

105. Scalia, *Doctrine of Standing*, *supra* note 7, at 881.

106. *Id.*

107. *See id.* at 894.

108. *Id.*

109. *Id.*

110. *See id.* at 881, 890-93; *Morrison v. Olson*, 487, U.S. 703-705, 709-10 (Scalia, J., dissenting); *see also* text *infra* accompanying notes 337-347, 365-377.

111. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

112. *See id.* at 573.

113. *See id.* at 573-74.

114. U.S. CONST. art. III, § 2, cl. 1.

115. *Steel Co. v. Citizens for a Better Env’t*, 118 S. Ct. 1003, 1016 (1998) (citing *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911)).

Such a meaning is fairly implied by the text [of the Constitution], since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all. Every criminal investigation conducted by the Executive is a “case,” and every policy issue resolved by congressional legislation involves a “controversy.” These are not, however, the sort of cases and controversies that Article III, § 2, refers to, since “the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.”¹¹⁶

In sum, Justice Scalia’s model for litigation is one of private rights. Only certain persons may invoke the jurisdiction of the courts, and they may do so only to complain about certain kinds of harm. Subjects which do not fall within the categories of matters traditionally heard by the courts are not appropriate for judicial review. These categories include much of modern public law, particularly environmental law. Justice Scalia believes that vindicating the public interest and protecting the environment is the function of Congress and the Executive.

3. The *Steel Company* Standing Decision

The Supreme Court has articulated a test to determine whether the party seeking to invoke the court’s jurisdiction presents a constitutionally recognized case or controversy. Justice Scalia began the Court’s review of the standing issue in *Steel Company* with a reiteration of the test:

The “irreducible constitutional minimum of standing” contains three requirements. First and foremost, there must be alleged (and ultimately proven) an “injury in fact”—a harm suffered by the plaintiff that is “concrete” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be causation—a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant. And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. This triad of injury in fact, causation, and redressability comprises the core of Article III’s case-or-controversy

116. *Id.* at 1016 (quoting *Defenders of Wildlife*, 504 U.S. at 559-60). Because the Constitution does not define “case” or “controversy,” there is considerable debate about what the Framers contemplated. Many legal scholars and judges disagree with Justice Scalia’s assertion of a “common understanding” of what cases are “traditionally amenable to and resolved by the judicial process.” In particular, they disagree with Justice Scalia’s theory that the Constitution restricts the courts only to cases involving harm to individual rights. See discussion *infra* in Part V.

requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.¹¹⁷

The Court measured CBE's complaint against these "core component[s]"¹¹⁸ of standing, and found it wanting.¹¹⁹ The organization described itself as a citizen group that "seeks, uses and acquires data reported under EPCRA."¹²⁰

[CBE] reports to its members and the public about storage and releases of toxic chemicals into the environment, advocates changes in environmental regulations and statutes, prepares reports for its members and the public, seeks the reduction of toxic chemicals and further seeks to promote the effective enforcement of environmental laws.¹²¹

CBE's complaint asserted that the organization's "right to know about [toxic chemical] releases and its interests in protecting and improving the environment and the health of its members" were "adversely affected" by the Steel Company's failure to submit information required by EPCRA in a timely way.¹²² The complaint also alleged that the organization's members lived or worked near the Steel Company's facility and used the information reported under EPCRA "to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit."¹²³

As described by Justice Scalia, "respondent assert[ed] petitioner's failure to provide EPCRA information in a timely fashion, and the lingering effects of that failure, as the injury in fact to itself and its members."¹²⁴

In its complaint, CBE asked for a declaratory judgment that Steel Company had violated the law.¹²⁵ Justice Scalia stated that the Court had not had occasion to decide whether deprivation of information that must be disclosed under EPCRA constitutes injury in fact for

117. *Id.* The three-pronged test was summarized in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). It requires a plaintiff to show that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," that the injury "'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision.'" *Id.* (citations omitted).

118. *Defenders of Wildlife*, 504 U.S. at 560.

119. *See Steel Co.*, 118 S. Ct. at 1018.

120. *Id.* at 1017.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1018.

125. *See id.*

standing purposes under Article III,¹²⁶ and declined the opportunity for “another day.”¹²⁷ Instead, he ruled that, even assuming that injury in fact existed, CBE failed to prove that it met the redressability prong of the standing test.¹²⁸ Because CBE did not allege any ongoing violations, “[n]one of the specific items of relief sought, and none that we can envision as ‘appropriate’ under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent.”¹²⁹

CBE’s request for declaratory judgment was pronounced “worthless” in light of the Steel Company’s filings.¹³⁰ Its request that civil penalties be assessed against the Steel Company was similarly ineffective for standing purposes, because the penalties would be paid to the United States Treasury, not to the plaintiffs.¹³¹ Therefore, Justice Scalia concluded, CBE “seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the ‘undifferentiated public interest’ in faithful execution of EPCRA. This does not suffice” for standing purposes.¹³²

[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just desserts, or that the nation’s laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.¹³³

The other items of relief CBE requested were similarly insufficient to support standing. Although the payment of

126. *See id.* The Court’s resolution of this matter is, of course, speculative. It might have characterized the injury as “informational.” Although some early cases, such as *Scientists’ Inst. for Public Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079 (D.C. Cir. 1973), held that deprivation of information that is required by statute to be released is a sufficient injury for purposes of standing, most recent decisions conclude that informational injury alone will not support standing. *See Foundation on Econ. Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991) (holding that failure to file an environmental impact statement under NEPA does not, in and of itself, give standing). For a discussion of informational standing, see Bruce Teicher, Note, *Informational Injuries as a Basis for Standing*, 79 COLUM. L. REV. 366 (1979); Lawrence Gerschwer, Note, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996 (1993).

127. *Steel Co.*, 118 S. Ct. at 1020.

128. *See id.* at 1018.

129. *Id.*

130. *Id.*

131. *See id.*

132. *Id.*

133. *Id.* at 1019.

investigation and prosecution costs would benefit CBE, the Court held that “a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.”¹³⁴ Furthermore, because EPCRA limits cost recovery to the costs of litigation,¹³⁵ a plaintiff may not use reimbursement of other costs associated with efforts to secure standing to enforce the statute.¹³⁶

Finally, the Court held that CBE’s request to inspect Steel Company records and for copies of compliance reports submitted to the EPA was injunctive in nature, aimed at deterring the Company from violating EPCRA in the future.¹³⁷ Consequently, this request would not remedy a past wrong.¹³⁸ In the absence of an allegation in the complaint of a continuing or an imminent future violation, there was no support for injunctive relief, other than CBE’s interest in deterrence which was insufficient for Article III standing purposes.¹³⁹

4. Justice Stevens’ Concurrence on Standing

Justice Stevens agreed with the Court that CBE could not sue the Steel Company, but disagreed as to the reason. According to Justice Stevens, CBE could not sue because it failed to state a cause of action upon which relief could be granted.¹⁴⁰ The group had not alleged any present or future violations of EPCRA, and since the Steel Company had filed all of its overdue reports before the lawsuit was commenced, there was no violation to correct.¹⁴¹ “EPCRA, properly construed, does not confer jurisdiction over citizen suits for wholly past violations”¹⁴²

Justice Stevens accused the Court of a “mechanistic application of the ‘redressability’ aspect of our standing doctrine” in its ruling that CBE lacked standing.¹⁴³ He pointed out that “redressability” does not appear anywhere in the text of the Constitution, but is “a judicial creation of the past twenty-five years—a judicial interpretation of the ‘Case’ requirement of Article III.”¹⁴⁴ Other cases in which the Supreme Court denied standing on redressability grounds, asserted

134. *Id.*

135. EPCRA, 42 U.S.C. § 11046(f) (1997).

136. *See Steel Co.*, 118 S. Ct. at 1018-19.

137. *See id.* at 1019.

138. *See id.*

139. *See id.* at 1019-20.

140. *See id.* at 1021-22 (Stevens, J., concurring).

141. *See id.* at 1030-31 (Stevens, J., concurring).

142. *Id.* at 1021 (Stevens, J., concurring).

143. *Id.* at 1027 (Stevens, J., concurring).

144. *Id.* (Stevens, J., concurring) (citations omitted).

Justice Stevens, involved challenges to governmental action or inaction or an indirect injury.¹⁴⁵ “[A]s far as I am aware,” he said, “the Court has never held—until today—that a plaintiff who is *directly injured* by a defendant lacks standing to sue because of a lack of redressability.”¹⁴⁶

Justice Stevens was particularly troubled by the Court’s acknowledgment that CBE would have met the redressability element of standing if Congress had authorized some payment to the group, but did not meet it because the civil penalties approved by EPCRA are paid to the Treasury.¹⁴⁷ He noted that CBE believed that punishing the Steel Company, along with future deterrence, would redress its injury.¹⁴⁸ As long as the relief is an appropriate legal decree, Justice Stevens concluded, the plaintiff, and not the court, determines what relief is satisfactory.¹⁴⁹

Justice Stevens observed that punishment or deterrence does in fact redress injuries and cited the prosecution of criminal cases by private persons in England and the American colonies.¹⁵⁰ The interest of these persons in punishing the defendant and deterring future violations of law was sufficient to support standing, even in the absence of monetary compensation.¹⁵¹ “[E]ven when such damages are payable to the sovereign, they provide a form of redress for the individual as well.”¹⁵²

Similarly, Justice Stevens was not convinced that the separation of powers doctrine foreclosed CBE’s standing.¹⁵³ If the separation of powers permits standing for a congressionally created legal right that provides compensation to the plaintiff, it should not preclude standing when Congress creates a legal right but directs that compensation be paid to the federal Treasury.¹⁵⁴ EPCRA’s citizen suit provision does not interfere with the Executive’s power to “take Care that the Laws

145. *See id.* at 1027-28 (Stevens, J., concurring). The Supreme Court explained indirect injury in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1979). “[T]he ‘case or controversy’ limitation of Article III . . . requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.” *Steel Co.*, 118 S. Ct. at 1028 (citing *Simon*, 426 U.S. at 40-46).

146. *Steel Co.*, 118 S. Ct. at 1028 (Stevens, J., concurring).

147. *See id.* at 1028-29 (Stevens, J., concurring).

148. *See id.* at 1029 (Stevens, J., concurring).

149. *See id.* (Stevens, J., concurring).

150. *See id.* (Stevens, J., concurring).

151. *See id.* (Stevens, J., concurring).

152. *Id.* (Stevens, J., concurring).

153. *See id.* (Stevens, J., concurring).

154. *See id.* at 1030 (Stevens, J., concurring).

be faithfully executed.”¹⁵⁵ CBE has more than an “undifferentiated public interest’ in seeing EPCRA enforced.”¹⁵⁶ Its members live, work, and breathe in areas near the Steel Company’s facility.¹⁵⁷ Justice Stevens found that it was the Court’s decision denying CBE standing, “not anything that Congress or the Executive has done, that encroaches on the domain of other branches of the Federal Government.”¹⁵⁸

IV. EPCRA IN THE LOWER COURTS

In the twelve years between the enactment of EPCRA and the Supreme Court’s decision in *Steel Company*, citizen groups brought eight reported cases under the statute.¹⁵⁹ In each of these cases, the defendant company had failed over some period of time to submit the required reports. In each case, as soon as the company received the plaintiff’s sixty day notice, it provided the information and cured the defect. The issues presented in court in each case were the same as those before the Supreme Court in *Steel Company*: EPCRA’s jurisdiction over past violations and the standing of the plaintiffs. Only the Seventh Circuit decision in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments* concluded that EPCRA does not authorize citizen suits for past violations.¹⁶⁰ The standing of the plaintiff citizen group was not at issue in *United Musical Instruments*.¹⁶¹ Thus, prior to the Supreme Court’s decision in *Steel Company*, no court had found that citizens lack standing to sue under EPCRA.

Given Justice Scalia’s peremptory dismissal of CBE’s standing and the fractured nature of the Supreme Court’s decision, *Steel Company* is not a weighty precedent for either the scope of the citizen

155. U.S. CONST. art. II, § 3.

156. *Steel Co.*, 118 S. Ct. at 1029 (Stevens, J., concurring).

157. *See id.* at 1030 (Stevens, J., concurring).

158. *Id.* (Stevens, J., concurring).

159. *See* *Atlantic States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995); *Don’t Waste Ariz., Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972 (D. Ariz. 1997); *Neighbors for a Toxic Free Community v. Vulcan Materials Co.*, 964 F. Supp. 1448 (D. Colo. 1997); *Idaho Sporting Congress v. Computrol, Inc.*, 952 F. Supp. 690 (D. Idaho 1996); *Atlantic States Legal Found., Inc. v. Buffalo Envelope*, 823 F. Supp. 1065 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132 (E.D. Pa. 1993); *Williams v. Leybold Tech., Inc.*, 784 F. Supp. 765 (N.D. Cal. 1992); *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745 (W.D.N.Y. 1991). Three other reported EPCRA cases were not citizen enforcement actions. *See* *Troy Corp. v. Browner*, 129 F.3d 1290 (D.C. Cir. 1997); *Kaw Valley, Inc. v. EPA*, 844 F. Supp. 705 (D. Kan. 1994); *Gossner Foods, Inc. v. EPA*, 918 F. Supp. 359 (D. Utah 1996).

160. *See* *United Musical Instruments*, 61 F.3d at 477.

161. *See id.*

suit provision under EPCRA or the standing issue. Most lawyers contemplating the opinion will probably wonder why the case reached the Supreme Court at all. A review of the EPCRA decisions of the lower courts shows how the Supreme Court could have addressed the issues presented in a much more satisfying manner from both a legal and policy standpoint, regardless of the ultimate decision reached. The district and appellate courts interpreting EPCRA have grappled with the issues in a detailed and principled way. Their jurisprudence on EPCRA will be useful to courts hearing EPCRA cases and lawyers representing citizen groups under the statute in the future. This Article will briefly consider their standing decisions, but their statutory interpretation of EPCRA is equally important.

In each case where standing was an issue,¹⁶² the plaintiff was found to have suffered an injury in fact that supported standing, even for past violations. In each decision that explicitly considered the matter, payment of civil penalties to the United States Treasury was held to redress the injury because it would punish the wrongdoers and deter them from similar conduct in the future.¹⁶³

The standing analysis in *Don't Waste Arizona, Inc. v. McLane Foods, Inc.* focused principally on representational standing, *i.e.*, the circumstances in which an organization may sue in its own right or in a representational capacity for injury to its members.¹⁶⁴ The Supreme Court did not mention representational standing in *Steel Company*, although its previous decisions recognize that it is "appropriate where: (1) an organization's members have standing to sue in their own right; (2) the interests sought to be protected are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires that members participate individually in the suit."¹⁶⁵

An examination of the affidavits submitted by the plaintiff to support its standing allegations convinced the *Don't Waste Arizona* court that all the tests for representational standing had been

162. Standing was an issue in *Don't Waste Ariz.* 950 F. Supp. at 979-81; *Buffalo Envelope*, 823 F. Supp. at 1067-72, and *Kurz-Hastings*, 813 F. Supp. at 1138-41. Standing was not an issue in *Steel Company* until it reached the Supreme Court.

163. See *Buffalo Envelope*, 823 F. Supp. at 1072; *Kurz-Hastings*, 813 F. Supp. at 1140-41; *Don't Waste Ariz.*, 950 F. Supp. at 981.

164. See *Don't Waste Ariz.*, 950 F. Supp. at 980 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992)).

165. *Id.* at 980 (citing *Washington State Apple Adver. Comm'n*, 432 U.S. at 343; *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1352 n.10 (9th Cir. 1994)).

satisfied.¹⁶⁶ Members of the organization were injured because they were denied information that EPCRA requires released in accordance with specific time schedules.¹⁶⁷ The injury was caused by the defendant's failure to report, and was redressable by a favorable decision because the court could impose civil penalties or enjoin the defendant from committing further violations, both of which would deter the defendant from causing similar injuries in the future.¹⁶⁸

The fact that civil penalties were not paid to the plaintiff, but to the United States Treasury, supported the court's conclusion that the redressability element of standing was satisfied.¹⁶⁹ The injury caused by the defendant's failure to submit the reports required by EPCRA was common to all members of the group.¹⁷⁰ Representational standing would not be appropriate where damages would be paid to individual members for their particular injuries.¹⁷¹

Both *Atlantic States Legal Foundation, Inc. v. Buffalo Envelope* and *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.* include extensive discussion of standing.¹⁷² The defendants in *Buffalo Envelope*, citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, argued that the plaintiff failed to allege a personal injury fairly traceable to the defendant's conduct and redressable by the requested relief.¹⁷³ In the alternative, the defendant claimed that the citizen enforcement provision of EPCRA was unconstitutional because it violated the principle of separation of powers.¹⁷⁴ By permitting a private organization to seek a civil penalty to be paid to the United States Treasury, EPCRA improperly allows a private party to vindicate a public right.¹⁷⁵ The support for this assertion was the Supreme Court's decision in *Lujan v. Defenders of Wildlife*.¹⁷⁶

In *Kurz-Hastings*, the defendants, relying as well on *Defenders of Wildlife*, contended that Congress unconstitutionally delegated Executive power in EPCRA by authorizing "any person" to sue, and

166. See *id.* at 980-81.

167. See *id.* at 980.

168. See *id.*

169. See *id.* at 981.

170. See *id.* at 980-81.

171. See *id.* at 981 (citing *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975)).

172. See *Atlantic State Legal Found., Inc. v. Buffalo Envelope*, 823 F. Supp. 1065, 1067-72 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1138-41 (E.D. Pa. 1993).

173. See *Buffalo Envelope*, 823 F. Supp. at 1067.

174. See *id.* at 1073.

175. See *id.*

176. 504 U.S. 555 (1992).

thus violated the separation of powers doctrine.¹⁷⁷ In addition, the defendants claimed that, even if EPCRA itself is constitutional, the plaintiffs lacked standing to maintain the action because all the alleged violations had been cured and they sought only the payment of civil penalties to the United States Treasury.¹⁷⁸

Both the *Buffalo Envelope* and *Kurz-Hastings* courts began their review of standing with the three pronged test found in *Valley Forge*.¹⁷⁹ They announced that Article III of the Constitution is the fundamental pre-requisite for standing, even when Congress has granted standing by statute.¹⁸⁰ Unlike the Supreme Court, however, both of these courts held that plaintiffs met the Article III requirements and had standing to sue.¹⁸¹

The two courts recognized that Congress has the authority to articulate rights, the invasion of which gives rise to legally cognizable injuries.¹⁸² In *Buffalo Envelope* the court noted that:

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. This is not only consistent with the separation of powers; it is fundamental to the principle. Congress may expand or limit the scope of the statutory rights it creates, and may determine who will vindicate those rights. A constitutional concern arises only where Congress has reserved unto itself the right to control or supervise the enforcement of the rights it created.¹⁸³

EPCRA is intended to protect the right to know.¹⁸⁴ To have standing, plaintiffs must prove more than a “mere interest” in information about hazardous and toxic chemicals in their communities.¹⁸⁵ They are required to show individualized injury of the type that EPCRA was meant to redress.¹⁸⁶

The *Buffalo Envelope* court was satisfied by the plaintiff’s allegations that the injuries to its members were “concrete in nature

177. See *Kurz-Hastings*, 813 F. Supp. at 1137.

178. See *id.* at 1138.

179. See *Buffalo Envelope*, 823 F. Supp. at 1067; *Kurz-Hastings*, 813 F. Supp. at 1139.

180. See *Buffalo Envelope*, 823 F. Supp. at 1075; *Kurz-Hastings*, 813 F. Supp. at 1138-41.

181. See *Buffalo Envelope*, 823 F. Supp. at 1071; *Kurz-Hastings*, 813 F. Supp. at 1139-41.

182. See *Buffalo Envelope*, 823 F. Supp. at 1073; *Kurz-Hastings*, 813 F. Supp. at 1138, 1141.

183. *Buffalo Envelope*, 823 F. Supp. at 1073-74 (citing *Davis v. Passman*, 442 U.S. 228, 241 (1979); *INS v. Chadha*, 462 U.S. 919, 958 (1983)).

184. See *id.* at 1068.

185. *Id.*

186. See *id.* at 1069.

and particularized to them.”¹⁸⁷ Furthermore, the plaintiff’s injuries were precisely those EPCRA was meant to relieve.¹⁸⁸

The court judged the other two elements of standing—causation and redressability—to be satisfied as well.¹⁸⁹ The defendant failed to file reports in a timely way, resulting in a “direct causal relationship between this failure and the injuries alleged by plaintiff’s members.”¹⁹⁰ Most important from the standpoint of comparison with the Supreme Court’s decision in *Steel Company*, the court in *Buffalo Envelope* did not find that the defendant’s failure to file reports prior to the institution of the lawsuit defeated the redressability requirement.¹⁹¹ The court said, “[the] plaintiff may still be entitled to important relief,” including a declaratory judgment, injunctive relief to prevent future violations of EPCRA, and civil penalties which may deter the defendant from failing to file timely reports in the future.¹⁹² The court also held that the judicial relief of civil penalties, even if payable to the United States Treasury, is “causally connected to [plaintiff’s injury].”¹⁹³ Such penalties “can be important deterrence against future violations.”¹⁹⁴

The fact that the monetary penalties sought are payable to the Treasury rather than to the private individual is of no moment. Such penalties redress the injuries of private parties whose interests are met through compliance with EPCRA’s reporting requirements. The civil fine provisions are designed to effect compliance through general and specific deterrence.¹⁹⁵

The *Buffalo Envelope* court also addressed the relationship between standing and the separation of powers.¹⁹⁶ The defendant argued that EPCRA’s citizen suit provision violated the separation of powers doctrine by allowing private parties to redress public rights.¹⁹⁷ The court held that the separation of powers applies to inter-branch

187. *Id.* at 1071 (citing *In re Catholic Conference*, 885 F.2d 1020, 1023 (2d Cir. 1989)).

188. *See id.*

189. *See id.* at 1071-72.

190. *Id.* at 1072.

191. *See id.*

192. *See Buffalo Envelope*, 823 F. Supp. at 1072. Contrast this with Justice Scalia’s pronouncement that a declaratory judgment in this situation is “worthless.” *See Steel Co. v. Citizens for a Better Env’t*, 118 S. Ct. 1003, 1018 (1998).

193. *Buffalo Envelope*, 823 F. Supp. at 1072.

194. *Id.*

195. *Id.* at 1075.

196. *See id.* at 1073. The court’s analysis of this relationship is discussed in greater detail in Part V of this Article.

197. *See id.*

relationships, not to private parties exercising rights granted by the legislature.¹⁹⁸

V. UNDERSTANDING THE STEEL COMPANY DECISION

A. *The Steel Company Decision in Context*

As observed earlier, the Supreme Court's ruling that a citizen group failed to satisfy the redressability requirement for standing to sue under EPCRA by itself is not a terribly momentous decision. In the future, counsel for EPCRA plaintiffs will need to include allegations of present and imminent future violations in their complaints and craft their requests for relief more precisely. The Supreme Court may yet have occasion to rule on the question of whether being deprived of the information that is supposed to be disclosed in a timely way under EPCRA is a concrete injury that satisfies Article III. In the meantime, the chief consequence of the *Steel Company* decision is likely to be that other companies will adopt the Steel Company's approach and ignore EPCRA's filing requirements until they receive a sixty day notice.

Steel Company is important principally because of its implications for the Supreme Court's standing jurisprudence, especially the standing of public interest and environmental organizations. The decision shows how the standing inquiry can be manipulated to preclude these groups from asking the courts to help address statutory violations. If Justice Scalia's views prevail, plaintiffs who seek to protect widely shared interests and to compel compliance with procedures required by law may find the courthouse door closed.

Steel Company is the Supreme Court's fourth standing decision in a case involving environmental law since *Lujan v. National Wildlife Federation*, decided in 1990.¹⁹⁹ A fifth case, *Ohio Forestry Ass'n v. Sierra Club*, was decided on standing grounds two months after *Steel Company*.²⁰⁰ Of these five, three involve statutes with citizen suit provisions.²⁰¹ Four of the five decisions limit the standing of

198. *See id.*

199. 497 U.S. 871 (1990). In addition to *National Wildlife Fed'n*, the Court decided *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

200. 118 S. Ct. 1665, 1673 (1998) (holding that Sierra Club's challenge to the Land and Resource Management Plan for the Wayne National Forest was not ripe for review).

201. *Defenders of Wildlife*, 504 U.S. 555, and *Bennett v. Spear*, 117 S. Ct. 1154, involved the Endangered Species Act while *Steel Co.*, 118 S. Ct. 1003, implicated the citizen suit provisions of EPCRA. *National Wildlife Federation*, 497 U.S. 871, was brought under the Federal Land Policy and Management Act, and *Ohio Forestry Ass'n*, 118 S. Ct. 1665, under the

environmental organizations.²⁰² The fifth weakens the citizen suit provision by eliminating the zone of interests test thereby allowing persons with private economic interests to sue.²⁰³

Justice Scalia wrote the Court's opinion in all of these cases except *Ohio Forestry*.²⁰⁴ They bear the mark of his views on the role of the injury in fact test and the relationship between standing and the separation of powers.

1. Prelude to *Steel Company*: Recognition of Environmental Standing

Prior to 1990, the Supreme Court had not decided a major environmental standing case in seventeen years.²⁰⁵ In 1973, it decided *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,²⁰⁶ a decision that has been called “[t]he zenith of the relaxation of the injury-in-fact requirements” for standing.²⁰⁷ In *SCRAP*, a group of creative students at George Washington University Law School challenged an Interstate Commerce Commission order approving a 2.5 percent surcharge on shipments of freight.²⁰⁸ *SCRAP* claimed that the surcharge discriminated between recycled and nonrecycled products, and would lead to a decrease in the use of recycled materials.²⁰⁹ The decrease, in turn, would lead to environmental harm, primarily from increased litter from disposing of recyclables and air pollution from manufacturing new materials.²¹⁰ To establish standing, *SCRAP* alleged that “each of its members ‘[u]ses

National Forest Management Act, neither of which includes a citizen suit provision. For these suits, plaintiffs must demonstrate they are adversely affected or aggrieved within the meaning of a relevant statute, pursuant to the Administrative Procedure Act, 5. U.S.C. §§ 551-706 (1997).

202. Environmental group standing was limited in *National Wildlife Federation*, 497 U.S. 871, *Defenders of Wildlife*, 504 U.S. 555, *Ohio Forestry Ass'n*, 118 S. Ct. 1665 and *Steel Co.*, 118 S. Ct. 1003.

203. In *Bennett v. Spear*, 117 S. Ct. at 1162, the Supreme Court held that persons with economic interests had standing under the ESA citizen suit provision, contrary to lower court decisions that such interests are not within “the zone of interests protected by” the ESA.

204. See *Defenders of Wildlife*, 497 U.S. 871; *Bennett v. Spear*, 117 S. Ct. 1154; *National Wildlife Fed'n*, 497 U.S. 871; *Steel Co.*, 118 S. Ct. 1003; *Ohio Forestry*, 118 S. Ct. 1665.

205. The standing of the American Cetacean Society and other conservation groups was considered in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986), but the discussion was limited to a footnote. Although the Court issued no environmental standing decisions during this seventeen year period, it did render a number of significant standing rulings that would later affect environmental standing. The decisions are discussed in Part IV of this Article.

206. 412 U.S. 669 (1973).

207. WILLIAM H. RODGERS, ENVIRONMENTAL LAW 104 (2d ed. 1994).

208. See *SCRAP*, 412 U.S. at 678.

209. See *id.* at 676.

210. See *id.*

the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area . . . for camping, hiking, fishing, sightseeing, . . . and that these uses have been adversely affected by the increased freight rates.”²¹¹ The Supreme Court sustained SCRAP’s standing, although Justice Stewart did observe: “Of course, pleadings must be something more than an ingenious academic exercise in the conceivable.”²¹²

The acme, or nadir depending on your viewpoint, of *SCRAP* followed by a year the decision in *Sierra Club v. Morton*, the first Supreme Court case to conclude that injury to noneconomic, widely shared environmental interests is sufficient to support standing.²¹³ In *Morton*, the Court stated that “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the 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.”²¹⁴

Morton provided the general formula for pleading standing in all environmental cases in which no citizen suit provision or other explicit grant of standing is available.²¹⁵ The Supreme Court held that an organizational interest in an issue is insufficient to support standing.²¹⁶ To demonstrate the necessary particularized harm required by Article III, a plaintiff environmental group must establish that individual members have suffered, or will suffer, injury to their personal interests in the environmental, aesthetic, or recreational resources of a particular place or area.²¹⁷ This injury is shown by

211. *Id.* at 678.

212. *Id.* at 688.

213. 405 U.S. 727, 734, 738 (1972). Prior to *Morton*, several lower courts held that injury to aesthetic, recreational, and conservation interests could support standing. *See, e.g.*, *Namekagon Hydro Co. v. Federal Power Comm’n*, 216 F.2d 509, 615 (7th Cir. 1954) (stating that an economic interest is “not required by the ‘case’ or ‘controversy’ requirement of Article III, § 2 of the Constitution . . .”); *Scenic Hudson Preservation Conf. v. Federal Power Comm’n*, 354 F.2d 608 (2d Cir. 1965). Both *Namekagon* and *Scenic Hudson* were brought under the Federal Power Act, 16 U.S.C. §§ 791a–828c (1997), which includes “recreational purposes” among the beneficial public uses of power projects. *See* 16 U.S.C. § 803(a). In *Scenic Hudson*, the court stated that “[t]he phrase [recreational purposes] undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites.” 354 F.2d at 614. Therefore, a citizen group with interests in the preservation of these values and resources had standing to challenge a decision by the Federal Power Commission that would adversely affect them. For a discussion of the contribution of *Scenic Hudson* to the development of environmental standing, see Sive, *supra* note 100.

214. *Morton*, 405 U.S. at 734.

215. *See id.* at 735.

216. *See id.* at 739.

217. *See id.* at 735.

alleging that individual members use the area to be affected by a proposed agency action, or that the interest of particular members in endangered species, wildlife, or other environmental resource would be adversely affected.²¹⁸

For many years, pleading standing in environmental cases amounted to a *pro forma* recitation of the *Morton* formula.²¹⁹ Professor William Rodgers commented that proof of standing had been “shifted from a significant doctrinal barrier to a nettlesome technicality.”²²⁰

Cases involving citizen suits and other statutory grants of standing were brought with equal ease. The Administrative Procedure Act (APA) includes an extremely broad grant of standing.²²¹ Under section 10 of that statute, “[a] person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is *entitled* to judicial review thereof.”²²² The APA has allowed citizen standing in a wide variety of cases, especially under the National Environmental Policy Act (NEPA).²²³

During the 1960s and 1970s, Congress included citizen enforcement provisions in many environmental statutes.²²⁴ For example, the Clean Water Act authorizes “any person” or “any citizen” to “commence a civil action . . . against any person [including the United States] . . . who is alleged to be in violation” of the statute.²²⁵ Although some courts referred to Article III as the foundation for standing, they generally did not require plaintiffs to

218. *See id.*

219. *See* Sheldon, *Slash and Burn*, *supra* note 100, at 10,039.

220. WILLIAM H. RODGERS, *ENVIRONMENTAL LAW* 23 (1977).

221. Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1997).

222. *Id.* § 702 (emphasis added).

223. *See* Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289 (1975); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *see also* NEPA, 42 U.S.C. §§ 4321-4370 (1997).

224. *See, e.g.*, Toxic Substances Control Act 15 U.S.C. § 2619 (1997); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1997); Clean Water Act, 33 U.S.C. § 1365 (1988); Endangered Species Act, 16 U.S.C. § 1540(g) (1997); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (1997), and Clean Air Act, 42 U.S.C. § 7604 (1997). For a comprehensive overview of citizen suit provisions, *see* MICHAEL AXLINE, *ENVIRONMENTAL CITIZEN SUITS* (1991); JEFFREY MILLER, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* (1978).

225. Federal Water Pollution Control Act (Clean Water Act) § 505, 33 U.S.C. § 1365 (1997).

show any injury other than a statutory violation. Prior to the 1991-92 term, neither did the Supreme Court.²²⁶

2. Justice Scalia Takes Over

In 1990, the Supreme Court shocked the environmental community with its decision in *National Wildlife Federation v. Lujan*.²²⁷ The Court held that the National Wildlife Federation (NWF) lacked standing to challenge the “land withdrawal review program” of the United States Department of the Interior’s Bureau of Land Management (BLM).²²⁸ Under the program, BLM terminated the protective withdrawals and classifications of nearly 180 million acres of public land, making this acreage legally available for mineral development or disposal.²²⁹

In support of its standing, NWF submitted two affidavits from members who averred that they used public lands “in the vicinity” of two of the areas subject to the lawsuit for recreation and aesthetic enjoyment.²³⁰

The Supreme Court ruled that NWF had not demonstrated that its members were “adversely affected or aggrieved” by BLM’s actions within the meaning of section 10 of the APA.²³¹ The affidavits submitted failed to include facts showing that the members used specific parcels of land subject to BLM’s challenged action, and, therefore, that they were “actually affected” by it.²³²

The Court also ruled that BLM’s land withdrawal review program was not a discrete, final agency action for purposes of judicial review, but rather the Agency’s ongoing operations on the public lands.²³³ The Agency’s withdrawal and classification decisions had future effect only, and, therefore, were not ripe for judicial review.²³⁴

The most significant ruling in the case was that, even if the members of NWF had standing to challenge individual agency decisions that were ripe for review, the standing of those members would not support NWF’s lawsuit seeking “*wholesale* improvement”

226. See *Havens Realty Corp. v. Coleman*, 453 U.S. 363 (1982); *United States Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980); *Fletcher*, *supra* note 91, at 252.

227. 497 U.S. 871, 898-899 (1990).

228. *Id.*

229. See *id.* at 875-79.

230. See *id.* at 880, 886.

231. See *id.* at 889.

232. See *id.* at 886.

233. See *id.* at 890.

234. See *id.* at 891.

of the land withdrawal review program.²³⁵ Such programmatic improvement could only be made by BLM or by Congress.²³⁶

Justice Scalia's views on standing and the separation of powers shaped the *National Wildlife Federation* opinion. He ruled that it was "impossible" for NWF to have standing to challenge the entirety of the land withdrawal review program.²³⁷ Regardless of the number of affidavits NWF submitted, it could not achieve improvements in the program because it was asking the wrong branch of government for help.²³⁸

In *National Wildlife Federation*, the Court did not overhaul environmental standing or foreclose judicial review in environmental cases. It affirmed that recreational use and aesthetic enjoyment are among the sorts of interests the applicable statutes were designed to protect.²³⁹ Moreover, the decision did not change the traditional *Morton* formula for demonstrating environmental standing in the absence of a citizen suit provision, it just made the demonstration of injury more stringent. The environmental community's chief concerns were that the decision would introduce new formalism into environmental pleading, and would preclude environmental organizations from challenging federal programs, resulting in fragmented review of environmental issues and a proliferation of lawsuits.²⁴⁰

Justice Scalia's second environmental standing decision, *Lujan v Defenders of Wildlife*,²⁴¹ however, did "mark a transformation in the law of standing"²⁴² that continues to be played out, and is highly visible in *Steel Company*.

Defenders of Wildlife, an environmental organization devoted to the protection of wildlife, sued the United States Department of the Interior for rescinding a regulation that required federal agencies to consult with the Fish and Wildlife Service to determine the potential impact of federal projects being constructed overseas on species

235. *Id.*

236. *See id.*

237. *See id.* at 890.

238. *See id.* at 890-91.

239. *See id.* at 891.

240. *See Sheldon, Scalia Restricts Standing, supra* note 100, at 10,565.

241. 504 U.S. 555 (1992).

242. Nichol, *supra* note 100, at 1142. A number of excellent articles have been written about the *Defenders of Wildlife* opinion. In addition to Professor Nichol's piece, see Sunstein, *supra* note 100; Stanley E. Rice, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in Lujan v. Defenders of Wildlife*, 38 ST. LOUIS U. L.J. 199 (1993); Poisner, *supra* note 100.

protected by the Endangered Species Act (ESA).²⁴³ Defenders brought the action under the citizen suit provision of the ESA.²⁴⁴ The Supreme Court ruled that Defenders lacked standing because the group could show no distinct injury to its members, other than to their interests in endangered species and in seeing the ESA enforced, which was not sufficient for Article III purposes.²⁴⁵

Justice Scalia's opinion acknowledged that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."²⁴⁶ However, an injury in fact requires more than an injury to a cognizable interest.²⁴⁷ It requires a showing by the plaintiff that he is among the injured.²⁴⁸ Defenders' members did not demonstrate "imminent" injury because they had no immediate plans to return to the sites of the proposed projects that would allegedly cause harm to endangered species.²⁴⁹ Visits that occurred before the law suit was filed were not enough to fulfill the requirement. Justice Scalia stated that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief."²⁵⁰

Defenders of Wildlife also lacked standing because it could not establish that the relief sought would redress its injury.²⁵¹ The organization did not attack the actions of the individual agencies funding the overseas projects; rather it challenged the Department of the Interior's decision to rescind the regulation requiring those agencies to consult with Fish and Wildlife Service regarding the impacts of the projects on endangered species.²⁵² Justice Scalia opined that this made both the injury and its redressability indirect.²⁵³ Because the agencies funding the projects were not before the court, he was unconvinced that an order issued against the Secretary of the Interior would provide the result sought by the Defenders of Wildlife lawsuit.²⁵⁴

243. See Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1997); *Defenders of Wildlife*, 504 U.S. at 558-59.

244. Endangered Species Act § 11, 16 U.S.C. § 1540.

245. See *Defenders of Wildlife*, 504 U.S. at 563.

246. *Id.* at 562-63.

247. *Id.* at 563.

248. See *id.*

249. See *id.* at 564.

250. *Id.*

251. See *id.* at 568.

252. See *id.*

253. See *id.* at 568-71.

254. See *id.*

The most important ruling in the case concerned the procedural injuries alleged by Defenders of Wildlife pursuant to the ESA's citizen suit provision. Justice Scalia held that the citizen suit provision did not, and could not provide the basis for standing to sue for violations of the statute.²⁵⁵ He rejected the lower court's view that "the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."²⁵⁶ Vindication of the public interest, including the public interest in government compliance with law, is a function of the Congress and the Chief Executive.²⁵⁷ Justice Scalia did acknowledge that Congress may broaden the categories of "de facto" injuries that are judicially cognizable, but may not abandon the injury requirement.²⁵⁸ A plaintiff must still show that the violation of the statute endangers a concrete interest apart from having the procedures observed.²⁵⁹ In Justice Scalia's view, if the courts ignore the concrete injury requirement, "at the invitation of Congress," they would "discard[] a principal fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' or 'Controversies' that are the business of the courts rather than of the political branches."²⁶⁰

The *Steel Company* opinion takes both *National Wildlife Federation* and *Defenders of Wildlife* one step further. In *Steel Company* Justice Scalia bypassed the question of whether CBE had suffered an Article III harm and concluded that, even if it had, it was not an injury that was redressable by a court through the relief sought.²⁶¹ His analysis makes explicit his view that the injury in fact test has three distinct hurdles.²⁶² If all three are not surmounted, standing does not exist. Congress may create procedural rights through a citizen suit provision, the abrogation of which is a legal injury, but this alone will not support standing. A plaintiff must still show that he has suffered a distinct harm, separate from both the harm suffered by the general public and his special interest in the subject matter of the procedures at issue. This harm must be traceable to the conduct of the defendant. Furthermore, the plaintiff must ask for

255. *See id.* at 573.

256. *Id.*

257. *See id.* at 576.

258. *See id.* at 578.

259. *See id.* at 572-75.

260. *Id.* at 576.

261. *See Steel Co. v. Citizens for a Better Env't.*, 118 S. Ct. 1003, 1018 (1998).

262. *See id.* at 1016-17.

relief that gives him something distinct and concrete. Just as a generalized interest in compliance with law is not an Article III injury, relief that simply requires compliance with law is not Article III redressability. It is “just desserts,” “comfort and joy,” and “psychic satisfaction” and will not “suffice.”²⁶³

B. *Evolution of Injury in Fact as a Constitutional Requirement*

1. The Change from a Legal Interest to Injury in Fact

Justice Scalia’s environmental standing decisions, including *Steel Company*, illustrate the conflict between the private rights model of litigation, which relies upon a showing of concrete injury in fact, and the public law model typified by the citizen suit provisions in environmental statutes. Although they shocked the environmental community when issued, Justice Scalia’s environmental standing decisions did not spring forth from his pen without legal precedent. Under Chief Justice Burger, the Supreme Court cut back on the liberal standing doctrine of the Court under Chief Justice Warren.²⁶⁴ It tightened the injury in fact requirement of Article III and linked standing to the separation of powers doctrine.²⁶⁵ This part of this Article will trace the evolution of the injury in fact standard and its connection with separation of powers to provide background for understanding Justice Scalia’s brand of standing jurisprudence. It will also look briefly at the rise of public law litigation, of which environmental law is a significant part.

The beginning of the Supreme Court’s focus on injury in fact is usually pinpointed with Justice William O. Douglas’ 1970 opinion in *Association of Data Processing Service Organizations v. Camp*.²⁶⁶ In *Data Processing*, an association of data processors (collectively, the Association) sued to invalidate a rule promulgated by the Comptroller of the Currency permitting national banks to provide data processing

263. *Id.* at 1019.

264. See Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 COL. L. REV. 1915, 1923 (1986); see also discussion in text accompanying notes 274-280.

265. See Poisner, *supra* note 100, at 344-45; see also discussion in text accompanying notes 281-299.

266. 397 U.S. 150 (1970). For a complete review of the history of the development of the standing doctrine, particularly the injury in fact test, see Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Fletcher, *supra* note 91, at 224-27 (injury in fact discussion at 229-33); Sunstein, *supra* note 100, at 163-96 (injury in fact discussion at 184-92); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 73-79 (1984).

services to bank customers and other banks.²⁶⁷ The Association claimed that its members had suffered an Article III injury as a result of the increased competition.²⁶⁸ The issue before the Court was whether the Association was “aggrieved by agency action within the meaning of a relevant statute” pursuant to the APA.²⁶⁹ In an apparent effort to liberalize access to the federal courts, to give content to the APA’s grant of standing, and to articulate an overarching principle for the threshold standing inquiry,²⁷⁰ the Supreme Court replaced the previous test for standing, which called for determining whether plaintiff had a legally protected interest in the matter, with a factual inquiry into the existence of harm.²⁷¹ The Court rejected the legal interest test as “go[ing] to the merits,” whereas the “question of standing is different.”²⁷²

It concerns, apart from the “case” or “controversy” test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest, at times, may reflect “aesthetic, conservational, and recreational” as well as economic values.²⁷³

In the years following the *Data Processing* decision, there was a pronounced shift away from liberalized standing.²⁷⁴ The Burger Court did not abandon the injury in fact standard, but tightened it considerably with a renewed emphasis on concepts reminiscent of the traditional lawsuit.²⁷⁵ In *Warth v. Seldin*, the Court cautioned that

267. See *Data Processing*, 397 U.S. at 151.

268. See *id.* at 152.

269. *Id.* at 153.

270. See Nichol, *supra* note 266, at 73-74.

271. See Sunstein, *supra* note 101, at 1445, 1475-76. Both Professors Fletcher and Sunstein are critical of the *Data Processing* case, not because they oppose liberal access to the courts, but because of its effect on subsequent standing jurisprudence in the Supreme Court. Professor Fletcher remarked that “[m]ore damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision.” Fletcher, *supra* note 91, at 229. Professor Sunstein called the *Data Processing* opinion “remarkably sloppy.” Sunstein, *supra* note 100, at 185. In it, the Court concluded that a plaintiff no longer needed to show a “legal interest” or “legal injury” to establish standing. “Instead of a careful examination of the governing law to see if Congress had created a legal interest, the standing inquiry would be a simple one barely related to the underlying law. Henceforth the issue would turn on facts, not on law.” *Id.* The malleability of the allegedly factual inquiry is discussed in Part VI *infra*.

272. *Data Processing*, 397 U.S. at 153. This conclusion is echoed in Justice Scalia’s response to Justice Stevens’ concurrence in *Steel Company*, when he pronounced that the issue of whether citizens have a right to bring actions under EPCRA for past violation goes to the “merits,” whereas the standing inquiry is “jurisdictional.” See *Steel Co. v. Citizens for a Better Env’t.*, 118 S. Ct. 1003, 1012 (1998).

273. *Data Processing*, 397 U.S. at 153-54.

274. See Nichol, *supra* note 264, at 1923.

275. See *id.*

courts should not recognize “generalized grievances” as a basis for standing, but require a showing of “distinct and palpable injury.”²⁷⁶ In *Simon v. Eastern Kentucky Welfare Rights Organization*, the Court adopted two corollary requirements: a plaintiff must show that his injury was caused or would likely be caused by the conduct of the defendant, and that the injury would be redressed by the relief sought.²⁷⁷ Finally, in *Valley Forge*, the Court summarized its standing jurisprudence in the familiar “three pronged test” of injury, causation and redressability.²⁷⁸ In short, the Supreme Court insisted that the litigant prove that he was in a position analogous to the plaintiff in a traditional lawsuit, even if he was challenging government action.²⁷⁹

The Burger Court also described the injury requirement as independent of any statutory standing rights created by Congress. In *Warth v. Seldin*, for example, the Court stated that “Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Article III’s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself.”²⁸⁰

2. Link to Separation of Powers

Until the mid-1970s, courts considered the doctrines of the separation of powers and standing to be discrete areas of the law.²⁸¹ In 1968, in *Flast v. Cohen*, Chief Justice Warren rejected the government’s argument that, as a matter of the separation of powers, federal taxpayers had no standing to raise an Establishment Clause challenge to a government spending program that reached some parochial schools.²⁸² Writing for an eight to one majority, the Chief Justice stated, “The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal

276. 422 U.S. 490, 499-501 (1975); see also *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979) (finding that questions of “broad social import where no individual rights would be vindicated” do not satisfy standing requirement).

277. 426 U.S. 26, 38 (1976).

278. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 404, 472 (1982).

279. See *Chayes*, *supra* note 95, at 10.

280. *Warth*, 422 U.S. at 501. See also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Allen v. Wright*, 468 U.S. 737, 754 (1984) (stating that “an asserted right to have the Government act in accordance with law” is by itself insufficient to confer jurisdiction in federal court).

281. See *Poisner*, *supra* note 100, at 343-45.

282. 392 U.S. 83, 92 (1968).

Government.”²⁸³ Chief Justice Warren contended that the central constitutional core and the rule that “implements the separation of powers prescribed by the Constitution,” are merely that the Court will not give advisory opinions.²⁸⁴ To establish standing for judicial review, a plaintiff is required to demonstrate “a sufficient *stake* in an otherwise justiciable controversy to obtain judicial resolution of that controversy”²⁸⁵ and “a logical nexus between the status asserted and the claim sought to be adjudicated.”²⁸⁶

In three cases decided in the mid-1970s the Supreme Court cut back on the implications of *Flast* and began to stress the constitutional nature of standing doctrine and its roots in the separation of powers. In *Schlesinger v. Reservists Committee to Stop the War*²⁸⁷ and *United States v. Richardson*,²⁸⁸ decided the same day, the Court connected the injury in fact test to the separation of powers doctrine for the first time. Standing was denied to citizens who alleged that certain government actions violated the Constitution, on the grounds that they had failed to establish the requisite injury in fact.²⁸⁹ In *Schlesinger*, Chief Justice Burger noted that concrete injury was essential for standing because only Congress is competent to deal with abstract questions.²⁹⁰ In *Richardson*, the Chief Justice stated that if no individual suffers harm, the dispute is properly “committed to the surveillance of Congress, and ultimately to the political process,” not to the judiciary.²⁹¹ In the third case, *Warth v. Seldin*, the Court concluded that the injury in fact test was essential to restrict judicial power to its proper role in a democratic form of government.²⁹² Thus, under the principle of separation of powers, “[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party.”²⁹³

283. *Id.* at 100.

284. *Id.* at 96.

285. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 102, 107 (2d ed. 1988).

286. *Flast*, 392 U.S. at 102.

287. 418 U.S. 208 (1974).

288. 418 U.S. 166 (1974).

289. *See Schlesinger*, 418 U.S. 208, 209, 226-27; *Richardson*, 418 U.S. 166, 175-80.

290. *See Schlesinger*, 418 U.S. at 221 n.10 (“The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves.”)

291. *Richardson*, 418 U.S. at 179.

292. 422 U.S. 490, 499-500 (1975).

293. *Id.* at 499.

By the mid-1980s, standing doctrine rested solidly on the separation of powers theory.²⁹⁴ In *Valley Forge*, the Court denied standing to an organization challenging the transfer of surplus federal property to a religious college as a violation of the Establishment Clause.²⁹⁵ The Court held that the injury in fact requirement prevented the courts from ruling on “abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches.”²⁹⁶ Finally, in *Allen v. Wright*, the Supreme Court explicitly linked standing and the separation of powers.²⁹⁷ The Court denied standing to black public school students challenging the IRS’s grant of tax-exempt status to segregated private schools on the grounds that, if standing were allowed for such a speculative claim, it would open the courts to suits that did not allege “specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations.”²⁹⁸ The Court emphasized that the standing doctrine is “built on a single basic idea—the idea of the separation of powers.”²⁹⁹

C. *The Contrast Between Supreme Court Standing Decisions and Public Law Litigation*

During the same period the Supreme Court was moving away from a liberal construction of standing, Congress was advancing in the other direction, defining injuries and articulating chains of causation that gave rise to cases and controversies unknown to the common law.³⁰⁰ Environmental statutes in the late 1960s and 1970s frequently included citizen suit provisions to recognize the interest of the public in protection of the environment, and permit “private attorneys general” to assist in implementation and enforcement.³⁰¹ These provisions represented Congress’s response to the widespread public “skepticism, if not despair,” of the 1970s about federal agency

294. See Poisner, *supra* note 100, at 345.

295. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 404, 470 (1982).

296. *Id.* at 475.

297. 468 U.S. 737, 759 (1984).

298. *Id.*

299. *Id.* at 752. See Sunstein, *supra* note 100, at 193-97; Rice, *supra* note 242, at 210-11.

300. See *Lujan v. Defenders of Wildlife*, 504 U.S. 580 (1992) (Kennedy, J., concurring).

301. 116 CONG. REC. 32,903 (1970), reprinted in 1 *Env'tl. Pol'y Div., Cong. Res. Serv., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970*, at 226, 230 (1974). For a list of the statutes that include citizen suit provisions, see *supra* note 224.

enforcement of environmental laws.³⁰² Congress sought to “motivate” government agencies to bring enforcement proceedings by allowing concerned citizens to participate in the process.³⁰³ Congress also intended to “open wide the opportunities for the public to participate in a meaningful way in the decisions of government.”³⁰⁴ Until *Defenders of Wildlife*, the courts approved of the private attorney general role fostered by citizen suit provisions and generally upheld standing to sue for statutory violations.³⁰⁵ To establish this procedural standing, a plaintiff had to allege only that he was adversely affected by violations of the applicable statute.³⁰⁶

As Congress extended the reach of administrative agencies by enacting statutes which recognized a broad spectrum of diffuse and intangible interests to the public at large, the role of the judge changed dramatically.³⁰⁷ Instead of being asked to resolve private disputes between private individuals according to the principles of private law, judges were being asked to deal with grievances over the administration of public or quasi-public programs and to vindicate the public policies embodied in the governing statutes or constitutional provisions.³⁰⁸ Professor Chayes called this fundamental change in the classic private rights litigation model “public law litigation.”³⁰⁹

Public law litigation, particularly environmental litigation, is rarely a bilateral conflict between two sets of private interests. Environmental disputes involve “moral, aesthetic, cultural, and political” issues.³¹⁰ Public values occupy a prominent position. The major environmental statutes of the 1960s and 1970s were explicitly forms of social regulation.³¹¹ The preservation of species and wilderness and the restoration and maintenance of clean air and clean water were declared by Congress to be national goals.³¹² Congress

302. Barry Boyer & Erroll Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Law*, 34 BUFF. L. REV. 833, 846 (1985).

303. See S. Rep. No. 91-1196, at 36-37 (1972).

304. A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 819 (1973).

305. See *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found.*, 484 U.S. 49 (1987).

306. See Fletcher, *supra* note 91, at 252-53. See also *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

307. See Chayes, *supra* note 95, at 4.

308. See *id.*

309. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

310. Poisner, *supra* note 100, at 389 (quoting MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* 6 (1988)).

311. See *id.*

312. See *id.*

designed many of the environmental statutes to further environmental protection, even where the costs outweighed the benefits in economic terms.³¹³ These statutes reflected a judgment that the public demanded this effort.³¹⁴ They also reflected a decision to involve the public in enforcement in a new way, through the citizen suit provision.

The consequences of public law for litigation are several. Not only are the injuries suffered by potential plaintiffs of a different kind, but causation is more likely to be indirect and the relief sought injunctive and prospective, rather than compensatory.³¹⁵ Consequently, the link between right and remedy that exists in private law actions may be more abstract.³¹⁶ Public law litigants typically challenge the government's regulation of a third party, not the party itself, and request that the regulation be corrected to halt and prevent further instances of the complained of conduct.³¹⁷ Litigants may also seek to correct agency implementation of a statute when the agency's actions adversely affect the litigants' interests in the subject matter of the statute.³¹⁸

Professor Chayes has observed that the relief sought in public law litigation is not usually compensation for a past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties.³¹⁹ Instead, "it is forward looking [and] fashioned *ad hoc* on flexible and broadly remedial lines."³²⁰ The judge is frequently the "creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court."³²¹

Professor Sunstein believes that "[r]edressability in the conventional sense is irrelevant" in public law litigation.³²² Congress creates a procedural right in a statute "not because it necessarily yields particular outcomes, but because it structures incentives and creates pressures that Congress has deemed important to effective regulation."³²³ Although conventional redressability may be absent,

313. *See id.*

314. *See id.*

315. *See Chayes, supra* note 95, at 46.

316. *See id.*

317. *See id.*

318. *See id.* EPCRA's citizen suit provision offers a variation on these options. It permits persons to sue federal, state and local governmental entities *and* alleged violators.

319. *See Chayes, supra* note 309, at 1302.

320. *Id.*

321. *Id.* at 1284.

322. Sunstein, *supra* note 100, at 226.

323. *Id.*

as Justice Scalia believed it to be in *Steel Company*, there is no doubt that Congress intends injury to the procedural interests it creates to be judicially cognizable.³²⁴

Public law litigation developed dramatically during and after the New Deal.³²⁵ One of the principal reasons for its growth was the fact that the private law model distinguished between the legal rights of private entities, especially private industry, regulated by statute, and the rights of regulatory beneficiaries, the segments of the public protected or otherwise receiving benefit from the statute's regulation.³²⁶ The interests of regulated industries could be protected through the courts, as they could meet the traditional requirements for standing, but the interests of regulatory beneficiaries were to be addressed through the political process or not at all.³²⁷ The private law model was repudiated as the courts acknowledged that regulatory beneficiaries often were adversely affected by the failure of agencies to regulate or by inadequate or ineffective regulation.³²⁸ The courts ruled that the interests protected by statute are judicially cognizable.³²⁹

Initially, the Supreme Court found standing based solely on violations of a statute and surrogate standing for individuals to assert the interests of statutory beneficiaries.³³⁰ The Burger Court tried to contain this development through imposition of private rights restrictions on standing.³³¹ Justice Scalia clearly is continuing this effort in *Steel Company*. He is unconcerned, for standing purposes, with the fact that Congress made the public, particularly members of communities located in the vicinity of facilities regulated by EPCRA, the beneficiaries of the statute. He denied CBE's standing in order to preserve what he perceives to be the constitutionally approved role of the courts, which is decidedly *not* to vindicate the public goals and policies embodied in statutes.

D. Justice Scalia, Standing, and the Separation of Powers

Justice Scalia's theory of the relationship between standing and the separation of powers is a private rights formulation far more extreme than previous Supreme Court jurisprudence. It is unclear to

324. See EPCRA, 42 U.S.C. § 11046 (1997).

325. See Sunstein, *supra* note 101, at 1433-40.

326. See *id.*

327. See *id.*

328. See *id.* at 1433.

329. See *id.* at 1438.

330. See Poisner, *supra* note 100, at 339; Sunstein, *supra* note 101, at 1440-41.

331. See Poisner, *supra* note 100, at 339; Sunstein, *supra* note 101, at 1440-41.

what extent the justices who joined him in *National Wildlife Federation*, *Defenders of Wildlife*, and now *Steel Company* actually agree with it. Should Justice Scalia's views gain the support of a majority of the Court, however, the consequences for environmental, and other public law litigation, could be severe.

As noted in the summary of *Steel Company* in Section III above, for Justice Scalia, standing is a "crucial and inseparable element" of the doctrine of separation of powers which confines each of the three branches to its constitutionally allocated sphere of activity.³³² While he acknowledges that the separation of powers doctrine is not explicit in the Constitution, he finds the principle expressed through "the structure of the document which describes where the legislative, executive, and judicial powers, respectively, shall reside."³³³

For Justice Scalia, the role of the judicial branch is to protect individuals and minorities from the tyranny of the majority, not to "prescribe how the other two branches should function."³³⁴ Limitations on standing must be strictly enforced in order to confine the courts to their constitutional role of protecting individual rights, and to prevent the "overjudicialization of the processes of self-governance."³³⁵ Except when an individual has suffered a specific and concrete injury at the hands of the Executive branch, courts do not review and constrain actions assigned to that branch by the Constitution. To allow them to do so would involve them in the political policy process, convert political decisions into legal ones, and usurp the authority of the political branches as guarantors of majority rights.³³⁶

The central principle defining institutional roles in the administration of government is *not* federalism.³³⁷ Justice Scalia's model of government is formalistic, rather than functional and pragmatic.³³⁸ He speaks of "separate and coordinate" powers of each

332. Scalia, *Oversight and Review*, *supra* note 7, at 686.

333. Scalia, *Doctrine of Standing*, *supra* note 7, at 881.

334. *Id.* at 890-93. For this proposition, Justice Scalia is fond of quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The role of the courts, said Justice Marshall, is "solely to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion." *Id.* at 170.

335. Scalia, *Doctrine of Standing*, *supra* note 7, at 881.

336. *See id.* at 893; Richard A. Brisbin, Jr., "Administrative Law is not for Sissies" . . . *Justice Antonin Scalia's Challenge to American Administrative Law*, 44 ADMIN. L. REV. 107, 122-23 (1992).

337. *See* Brisbin, *supra* note 336, at 109.

338. *See id.* at 109-10; M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1465-68 (1990).

branch of government³³⁹ which are exclusive, not equal.³⁴⁰ Checks and balances are provided only as a function of the exercise of these exclusive powers, and it is possible that some power may be abused.³⁴¹

Even Madison did not agree fully with this concept, although Justice Scalia credits him with it.³⁴² In Federalist 47, Madison said that the separation of powers doctrine “did not mean that these departments ought to have . . . no *control* over the acts of each other.”³⁴³ In Number 48, he stated that “unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”³⁴⁴

Although it was written before Justice Scalia’s tenure on the Supreme Court, Professor Berger has provided a cogent response to the Justice’s coordinate branches of government construct and the idea that injury in fact is necessary to maintain the separation of powers.³⁴⁵ Professor Berger pointed out that Madison called for a “blending” of powers, to make the separation of powers work, and was more concerned that the courts engage in cases of a “judiciary nature” than he was about who sought their assistance in the resolution of a dispute.³⁴⁶ Berger said:

Overemphasis of the “separation of powers”[]is apt to obscure the no less important system of “checks and balances.” Judicial checks on legislative excesses represent a deliberate and considered departure from an abstractly perfect separation of powers, part of what Madison called a necessary “blending” of powers that was required to make the separation work. Litigation that challenges unconstitutional legislation does not constitute an “improper interference” with nor an “intrusion” into the legislative domain. No authority to make laws in excess of granted powers was “committed” to Congress; instead courts were authorized to check Congressional excesses. “Case or controversy,” to be sure, seeks to confine the courts to what Madison termed cases of a “judiciary nature” as distinguished from a roving revision of legislation. Legislation is emphatically not for the courts; but after the legislative process is completed the courts may decide in the frame of litigation that a statute is invalid as a legislative usurpation.

339. *Morrison v. Olson*, 487 U.S. 654, 703 (1987) (Scalia, J., dissenting).

340. *See id.* at 705, 709-11 (Scalia, J., dissenting).

341. *See id.* at 710-11 (Scalia, J., dissenting).

342. *See id.* at 697-99 (Scalia, J., dissenting).

343. THE FEDERALIST NO. 47 (James Madison).

344. THE FEDERALIST NO. 48 (James Madison).

345. *See Berger, supra* note 266, at 828 n.67.

346. *Id.* at 828-29.

A legislative usurpation does not change character when it is challenged by a stranger; and judicial restraint thereon remains a “judicial” function, not an “intrusion,” though undertaken at the call of one without a personal stake.³⁴⁷

A more recent response to Justice Scalia’s theory of the separation of powers was offered by the district court in *Atlantic States Legal Foundation v. Buffalo Envelope*.³⁴⁸ In *Buffalo Envelope*, the defendant argued, based on Justice Scalia’s opinion in *Defenders of Wildlife*, that the citizen suit provision of EPCRA violated the separation of powers principle by granting to private parties powers vested exclusively in the Executive Branch.³⁴⁹ By permitting private organizations to seek civil penalties to be paid to the U.S. Treasury, the statute allowed private parties to vindicate public rights, which is the sole province of the Executive.³⁵⁰

The court held that the separation of powers doctrine applies to the three branches of government, not to private entities who have been given authority by statute to undertake Executive type functions.³⁵¹ “The Framers of the Constitution appear to have understood the separation of powers as a principal that applies to inter-branch relationships within the government itself,” not to private parties exercising rights granted by the legislature.³⁵² The court noted that Congress may create statutory rights and obligations, and it is “entirely appropriate” for Congress to decide who may enforce them, and in what manner.³⁵³ Congress may expand or limit the scope of the statutory rights it creates, including the grant of standing to sue.³⁵⁴ A constitutional concern arises only where Congress reserves for itself the right to control the enforcement of the rights it has created.³⁵⁵

Under EPCRA, said the *Buffalo Envelope* court, Congress has not retained any supervision or control over enforcement of the statute.³⁵⁶ EPCRA grants concurrent enforcement rights to the EPA

347. *Id.*

348. 823 F. Supp. 1065 (W.D.N.Y. 1993).

349. *See id.* at 1073.

350. *See id.*

351. *See id.* at 1075.

352. *Id.* at 1073. The Supreme Court has agreed with this assessment. “The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). *See also Morrison v. Olson*, 487 U.S. 654, 693 (1987).

353. *See Buffalo Envelope*, 823 F. Supp. at 1073 (quoting *Davis v. Passman*, 442 U.S. 228, 241 (1979)).

354. *See id.* at 1073-74.

355. *See id.*

356. *See id.* at 1073-75.

Administrator and to those aggrieved by violations of the statute.³⁵⁷ The fact that civil penalties are paid to the United States Treasury, not to the plaintiffs, is “of no moment.”³⁵⁸ Such penalties redress the injuries of private parties whose interests are met through compliance with EPCRA’s reporting requirements.³⁵⁹

Justice Scalia declares that the injury in fact test is necessary to prevent the “over judicialization” of the processes of government.³⁶⁰ Professor Fletcher points out that insistence on this requirement may have the opposite consequence.³⁶¹ If the Supreme Court limits the power of Congress to create statutory rights enforceable by certain persons or groups of persons—in other words, if the Court restricts standing—it has interfered with the power of Congress to legislatively define and protect against certain kinds of injury.³⁶² The Court is thus very much “judicializing” the legislative process, while at the same time preventing the judicial branch from its proper role of review of legislative actions.

For Justice Scalia, this is a perfectly acceptable outcome. Indeed, it is the logical and expected consequence of the structure of government he perceives the Framers created. Under this model, as he said in *Steel Company*, “The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.”³⁶³ The implications for environmental law are obvious. Judicial review of significant areas of governmental decisionmaking related to the management of the environment may be completely precluded.³⁶⁴

E. *The Effect of Justice Scalia’s Views on Citizen Suits*

Prior to *Defenders of Wildlife*, it could be stated without reservation that Congress had the authority to create legally enforceable rights and obligations, even where none existed before.³⁶⁵

357. *See id.* at 1076.

358. *Id.* at 1075.

359. *See id.*

360. *Id.* at 1075-76.

361. *See* Fletcher, *supra* note 91, at 233.

362. *See id.*

363. *Steel Co. v. Citizens for a Better Env’t*, 118 S. Ct. 1003, 1016 (1998).

364. *See* Poisner, *supra* note 100, at 354. Poisner argues that, as a consequence, the role of the judiciary in a democratic society will be minimized. *See id.* at 354-66.

365. *See* Warth v. Seldin, 422 U.S. 490, 514 (1975); Nichol, *supra* note 266, at 90-91.

Such interests could be tangible and widely shared.³⁶⁶ They could even be simply interests in the enforcement of statutory procedures.³⁶⁷ Environmental statutes, for example, granted “any person” the right to seek judicial review for “any” violations of the statute.

Prior to *Defenders of Wildlife*, the Supreme Court held that it was “entirely appropriate” for Congress to decide who may enforce statutory rights, and in what manner.³⁶⁸ Although in some cases the Court stated that the power of Congress to grant standing is limited by Article III, it did not require any showing of injury other than violation of the statute.³⁶⁹ Professor Nichol summarized the common understanding of Congress’s authority:

Congress creates legal interests—it does so every day, in myriad ways, for a huge variety of reasons and to benefit a wide array of persons. Creating legal interests, in fact, is what Congress does for a living. When those interests, having been brought into existence, are threatened or transgressed, the conclusion that the interest-holder has been injured is unavoidable. . . . [I]t is very hard to see how a statutory grant of standing can be obliterated through the use of an injury calculus, and it is difficult to perceive a justifiable constitutional limitation on the sorts of interests Congress may create. That is why, until *Defenders*, if a plaintiff came within the terms of a statutory grant of standing, the injury in fact test was deemed to have been satisfied.³⁷⁰

As discussed above, Justice Scalia, in his *Defenders of Wildlife* opinion, flatly rejected the judgment that the injury in fact requirement can be satisfied by a citizen suit, *i.e.*, a “congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law.”³⁷¹ A plaintiff must show that the violation of the statute “endangers a concrete interest . . . (apart from his interest in having the procedure observed).”³⁷² The “core” requirement of particularized harm is a consistent limitation “upon the congressional power to confer standing.”³⁷³

For Justice Scalia, the courts play no role in the protection of shared or “majoritarian” interests, that is the job of the Congress or

366. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978); Nichol, *supra* note 266, at 91.

367. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

368. See *Davis v. Passman*, 442 U.S. 228, 241 (1979).

369. See, e.g., *Havens Realty Corp.*, 453 U.S. 363; *United States Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980); Fletcher, *supra* note 91, at 253-54.

370. Nichol, *supra* note 100, at 1157.

371. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

372. *Id.* at 573 n.8.

373. Scalia, *Doctrine of Standing*, *supra* note 7, at 886.

the Executive. To allow Congress to use a citizen suit to “convert the undifferentiated public interest in executive officers’ compliance with law into an ‘individual right’ vindicable in the courts” would 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.’”³⁷⁴ This reference to Article II hearkens back to Justice Scalia’s description of the “separate and coordinate” branches of government.³⁷⁵ Under the Constitution, the tasks and powers of the three branches are exclusive, not equal. Thus, the Constitution “restrain[s] the courts from acting at certain times, and even restrain[s] them from acting permanently regarding certain subjects.”³⁷⁶ Apparently, because the interests in protection of the environment recognized in the citizen suit provisions of the major environmental statutes are majoritarian, they are among the subjects that are off limits to the courts. In his dissent in *Defenders of Wildlife*, Justice Blackmun remarked that he did not think that environmental plaintiffs suffer “special constitutional standing disabilities.”³⁷⁷ In the wake of *National Wildlife Federation*, *Defenders of Wildlife* and now *Steel Company*, it would seem that they do.

VI. CRITIQUE OF THE SUPREME COURT’S RELIANCE ON INJURY IN FACT

A. *The Manipulability of the Injury Concept*

The Supreme Court has rooted its Article III jurisprudence firmly in the soil (or “shifting sands”)³⁷⁸ of the particularized injury concept. With Justice Scalia writing for the plurality or the majority in cases such as *Defenders of Wildlife* and *Steel Company*, injury in fact is now the core component of the case or controversy requirement. The injury in fact test was designed to simplify and liberalize the standing inquiry³⁷⁹ by making the laymen’s sense of harm, rather than the lawyer’s legal injury, the test for standing.³⁸⁰ It has proven to be value laden and malleable, although, as Professor Nichol remarked, “the

374. *Defenders of Wildlife*, 504 U.S. at 577 (quoting U.S. CONST. Art. II, § 3).

375. See *Morrison v. Olson*, 487 U.S. 654, 703, 705, 708-10 (1987) (Scalia, J., dissenting). See also discussion in text accompanying notes 105-116 & 332-364.

376. *Steel Co. v. Citizens for a Better Env’t*, 118 S. Ct. 1003, 1016 (1998).

377. *Defenders of Wildlife*, 504 U.S. at 595 (Blackmun, J., dissenting).

378. Nichol, *supra* note 100, at 1154.

379. See *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-43 (1970); Nichol, *supra* note 100, at 1154; Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 156-60 (1987).

380. See Nichol, *supra* note 100, at 1154.

Supreme Court has managed to pretend that . . . [it] is something other than what it is—a vehicle through which judges implement their own perceptions of the proper scope of article III power.”³⁸¹

The premise of the Supreme Court’s rulings on injury in fact appears to be that analysis of injury is a straightforward, simple assessment that will produce an objective and rational basis for granting jurisdiction. The reality is that injury involves a great deal more than a factual inquiry.³⁸²

Injury is an intensely malleable and manipulable concept. How an injury is defined will determine whether both causation and redressability can be found. Thus, how a court characterizes a plaintiff’s injury will determine whether he has standing to sue.³⁸³

Two nonenvironmental cases are frequently used to illustrate this point. In *Linda R.S. v. Richard D.* the mother of an illegitimate child sued the district attorney on the grounds that his policy of not prosecuting fathers of illegitimate children for failure to pay child support violated the Equal Protection clause.³⁸⁴ The Court characterized the plaintiff’s injury as failure to obtain child support.³⁸⁵ It ruled that the mother lacked standing because she could not show that a criminal action by the prosecutor would redress her injury.³⁸⁶ The Court concluded that even “if appellant were granted the requested relief, it would result only in the jailing of the child’s father. The prospect that prosecution will . . . result in payment of support can, at best, be termed only speculative.”³⁸⁷

The Court could have defined the injury in a quite different way. Because the mother in *Linda R.S.* sought to be treated on an equal basis with married mothers, the Court could have characterized her injury as denial of equal protection under the law. Such an injury would have been redressed by a court order requiring enforcement of child support orders against unmarried fathers.

The Court manipulated the injury in *Regents of the University of California v. Bakke*,³⁸⁸ as well, with a distinct impact on the redressability prong of the test. Bakke claimed that, as a white male, he was denied admission to the University of California medical

381. Nichol, *supra* note 264, at 1919.

382. *Id.* at 1917-18.

383. See Sunstein, *supra* note 101, at 1432, 1452-53; Nichol, *supra* note 266, at 79-80; Poisner, *supra* note 100, at 367.

384. 410 U.S. 614, 615-16 (1973).

385. See *id.* at 618.

386. See *id.*

387. *Id.*

388. 438 U.S. 265 (1978).

school because of the University's affirmative action program.³⁸⁹ He could not show, however, that he would have been admitted to the medical school in the absence of the affirmative action program.³⁹⁰ The Court recharacterized Bakke's injury as the University's interference with his opportunity to compete for all the available places in the class.³⁹¹ That injury, a violation of the Equal Protection Clause, could be redressed, of course, by an order directing the medical school to allow him to do so.

To achieve the results he wanted in *Steel Company*, Justice Scalia recharacterized CBE's injury, with a quite astonishing sleight of hand. First he said, "respondent asserts petitioner's failure to provide EPCRA information in a timely fashion, and the lingering effects of that failure, as the injury in fact to itself and its members."³⁹² Shortly thereafter, he continued, "We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA . . . [constitutes an] injury in fact that satisfies Article III."³⁹³ Missing from his second formulation of the injury were the elements of timeliness and the ongoing harm resulting from the company's failure to submit the required reports, two significant aspects of CBE's harm. Justice Scalia then *assumed* the injury he had articulated for purposes of the standing analysis, and concluded that it could not be redressed by the relief plaintiffs sought.³⁹⁴ CBE's injury could not be redressed, not because the plaintiffs would have been unsatisfied receiving the relief requested in their lawsuit, but because, as a general matter, such relief cannot redress a cognizable Article III injury.³⁹⁵ Justice Scalia made a tidy loop: an injury to an interest in agency compliance with a law is not distinct and concrete, it is shared by everyone, and, therefore, will not suffice for standing under Article III. Relief which seeks compliance with law cannot redress an injury to an interest in compliance with law because injury to an interest in compliance with law is not an Article III injury. Justice Scalia did not need to consider whether CBE had suffered an injury under EPCRA, he could "assume" it did and still deny CBE's standing.

What Justice Scalia's analysis omitted was that CBE did not represent the "undifferentiated public interest" in compliance with

389. *See id.* at 277-78.

390. *See id.* at 279.

391. *See id.* at 280-81 n.14.

392. *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1018 (1998).

393. *Id.*

394. *See id.* at 1018-20.

395. *See id.* at 1019.

EPCRA. Rather, the organization spoke for individuals who live and work in the community where the Steel Company facility is located. In support of its lawsuit, CBE described the particular interests of these members and their use of the information reported under EPCRA “to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit.”³⁹⁶

The Steel Company’s compliance with the EPCRA reporting requirements only after receipt of CBE’s sixty day notice did not undo the harm caused by its failure to file for seven years. Fortunately there was no disastrous release of toxic chemicals during this period, but CBE’s members and others in their communities were at risk because of the lack of information. Justice Scalia’s reformulation and assumption of CBE’s injury ignored this aspect of the harm suffered.

All of the lower courts interpreting EPCRA, but one, concluded that the statute’s timetables were a significant part of its enforcement scheme, and that violations of the timetables were appropriate claims for citizen enforcement. In *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Corp.*, for example, the court noted that the reporting provisions of EPCRA establish both mandatory dates for initial compliance and annual filing dates for hazardous-chemical and toxic-chemical release forms.³⁹⁷ The court found that the mandatory compliance dates constituted requirements for purposes of the citizen suit civil penalty provision.³⁹⁸

The *Whiting Roll-Up* court emphasized that the achievement of EPCRA’s “fundamental objectives [of] public access to information concerning hazardous chemicals in the community and use of this information to formulate and administer local emergency response plans in case of a hazardous chemical release . . . depends on accurate and current information.”³⁹⁹ The court continued,

If owners or operators fail to comply with the reporting requirements, including the mandatory compliance dates, the development and success of emergency response plans would be seriously, if not critically, undercut, and the entire thrust of EPCRA could be defeated. . . . Moreover, the public has no mechanism to ensure the accuracy of information which is unreported. EPCRA provides that mechanism. Clearly, for all these

396. *Id.*

397. 772 F. Supp. 745 (W.D.N.Y. 1991). See EPCRA §§ 311(d), 312(a)(2), and 313(a), 42 U.S.C. §§ 11021, 11022(a)(2), 11023(a) (1997).

398. See *Whiting Roll-Up Corp.*, 772 F. Supp. at 751-52.

399. *Id.* at 751.

reasons, to overlook EPCRA's reporting deadlines would subvert the objectives of EPCRA.⁴⁰⁰

It is possible that Justice Scalia was boxed into finessing the injury in *Steel Company*, and had to find an alternative way to deny CBE standing. He has always distinguished between cases involving direct and indirect injury. In *Defenders of Wildlife* he said, "When . . . the plaintiff is himself an object of the action (or foregone action) at issue . . . there is ordinarily little question" that he has standing.⁴⁰¹ "When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."⁴⁰² In this circumstance, courts should rule that Article III imposes "a limit upon even the power of Congress to convert the generalized benefits into legal rights."⁴⁰³

EPCRA was enacted to provide the public with information about hazardous materials used, produced or stored in their communities.⁴⁰⁴ Assuring the right of the public to know about these materials and prepare to respond to their release into the environment is the central objective of the statute.⁴⁰⁵ Companies that use, produce and store toxic materials are the regulated entities under the statute; the public, particularly in local communities near regulated facilities, is the beneficiary.⁴⁰⁶ The EPCRA citizen suit authorizes suits directly against violators of the statute. In *Steel Company*, CBE did not sue the EPA to require the Agency to force the company to comply; it sued the Steel Company directly for particularized injuries to interests recognized by the statute.⁴⁰⁷ Justice Scalia's own analysis would suggest that CBE should have had standing.

More likely, Justice Scalia finessed the definition of injury and focused on redressability because he was then able to fit CBE's standing into his view of the Article III requirements. Under the old private rights model, entities regulated by statute have a right to judicial review, beneficiaries of regulation do not.⁴⁰⁸ As discussed by Professors Chayes and Sunstein, this view is considerably out of

400. *Id.*

401. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). *See also* Scalia, *Doctrine of Standing*, *supra* note 7, at 894.

402. *Defenders of Wildlife*, 504 U.S. at 562; *see also* Scalia, *Doctrine of Standing*, *supra* note 7, at 894.

403. Scalia, *Doctrine of Standing*, *supra* note 7, at 886.

404. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1008-09 (1998).

405. *See id.*

406. *See id.* at 1009.

407. *See id.*

408. *See Chayes*, *supra* note 309, at 1285-88.

date.⁴⁰⁹ Courts realized long ago that noncompliance with statutory requirements by regulated entities can cause legally cognizable harm to regulatory beneficiaries.⁴¹⁰

The relief sought by CBE was not the payment of money or other direct restitution of the kind routine in private law litigation, but the kind of relief characteristic of public law litigation of all sorts.⁴¹¹ Environmental and citizen organizations generally do not sue to redress the personal economic or physical injuries of their members. Rather, on behalf of their members, they sue because of government or corporate action that damages their interests in the environment. They seek injunctive relief so that the harm does not occur, and the actors are deterred from contemplating the action in the future. Justice Scalia would probably dismiss many of the benefits sought in these cases as “psychic;” others would call them environmental, spiritual or ethical interests. Federal statutes express these public values and policies and have directed the agencies of government and the regulated community to carry them out in particular ways.

It is somewhat ironic that “psychic satisfaction” is not a protectable right for the members of CBE or other environmental organization when it would be one of the sticks in their bundle if they owned private property. The common law of nuisance is built on the idea that peaceful enjoyment of property can be protected against harm, even if the harm is not actual physical damage to the property.⁴¹² As a property owner, CBE *could* sue for “comfort and joy.” It could ask for Steel Company to be given “just desserts.” Injunctive relief to protect its “psychic satisfaction” would be entirely appropriate. This irony illustrates the dichotomy between the private law and public law models of litigation. It also reflects a disturbing element in Justice Scalia’s theories of the role of the courts: that the judicial branch is not generally available to redress the grievances of those without property.

What should be done to correct the difficulty of proving a concrete injury and redressability in the environmental law context? Some have suggested that the simplest solution is for Congress to amend the environmental laws to provide monetary compensation to citizens for their enforcement efforts.⁴¹³ The old *qui tam* action, which paid a bounty to plaintiffs in suits brought against the

409. *See id.* at 1288-98.

410. *See id.*; Sunstein, *supra* note 101, at 1433, 1438-45.

411. *See Steel Co.*, 118 S. Ct. at 1008-09.

412. *See* RESTATEMENT OF TORTS § 322 (1982).

413. *See* Sunstein, *supra* note 100, at 232.

government, is a historical precedent for this suggestion.⁴¹⁴ Most environmentalists find the idea of bounties offensive, however. They ain't in it for the money.

B. Absence of Constitutional Foundation for Injury in Fact

In his concurrence to the *Steel Company* decision, Justice Stevens tried to inform the Court that the redressability aspect of the standing doctrine is a judicial creation, and a new one at that.⁴¹⁵ His view is supported by an extensive body of scholarship that establishes that standing, particularly the injury in fact requirement, is not constitutionally based. Louis Jaffe,⁴¹⁶ Raoul Berger,⁴¹⁷ Steven Winter,⁴¹⁸ Cass Sunstein,⁴¹⁹ William Fletcher⁴²⁰ and Gene Nichol⁴²¹ have all written that injury was not a requisite for invoking judicial authority in the colonial, framing, or early constitutional periods. Early English and American practice offers “no evidence of constitutional limits on the power to grant standing.”⁴²² Prior to this century, no general doctrine of standing existed.⁴²³ Nor was the term “standing” used to describe a person’s right to sue.⁴²⁴ Professor Fletcher points out that as late as 1923, in *Frothingham v. Mellon*,⁴²⁵ the Supreme Court denied a federal taxpayer the right to challenge the federal Maternity Act on the ground that the taxpayer’s interest was “minute and indeterminable” without ever using the word “standing.”⁴²⁶ According to Professor Sunstein, the first reference to standing as an Article III limitation is found in *Stark v. Wickard*,⁴²⁷

414. See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989).

415. See *Steel Co.*, 118 S. Ct. at 1027 (Stevens, J., concurring).

416. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 462-67 (1965).

417. See Berger, *supra* note 266, at 837-40.

418. See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

419. See Sunstein, *supra* note 100, at 177. In this article Professor Sunstein discusses the fact that, of the 117 occasions on which the Supreme Court has addressed standing, fifty-five, or nearly half, occurred after 1985.

420. See Fletcher, *supra* note 91, at 224.

421. See Nichol, *supra* note 100, at 1151.

422. Sunstein, *supra* note 100, at 171.

423. See Poisner, *supra* note 100, at 338; Chayes, *supra* note 95, at 8 n.27.

424. See Poisner, *supra* note 100, at 338; Chayes, *supra* note 95, at 8 n.27.

425. 262 U.S. 447 (1923).

426. See Fletcher, *supra* note 91, at 224.

427. 321 U.S. 288 (1944).

decided in 1944.⁴²⁸ No court used the phrase “injury in fact” before *Barlow v. Collins*, in 1970.⁴²⁹ Professor Berger stated:

Unlike “case or controversy,” which can summon the express terms of Article III, “standing” is not mentioned in the Constitution or the records of the several conventions. It is a judicial construct pure and simple which, in its present sophisticated form, is of relatively recent origin. . . . Although it has been explained as a description of “the constitutional limitation on the jurisdiction of the Court to ‘cases’ and ‘controversies,’” it apparently entered our law via *Frothingham* in 1923.⁴³⁰

Regardless of whether the separation of powers is the central mechanism of our constitutional government, as Justice Scalia maintains, standing to sue cannot be an integral part of it. As the statutes and legal practice of the time illustrate, the Framers’ “original understanding” of the role of the courts did not limit them to the adjudication of private rights by persons with particularized injuries. The Judiciary Act of 1789 allowed “informer” actions.⁴³¹ English practice of the period, which provided a context for the drafters of the Constitution,⁴³² included prerogative writs, mandamus, certiorari, and prohibition, all designed “to restrain unlawful or abusive action by lower courts or public agencies.”⁴³³ These writs were the precursors of modern statutory provisions for judicial review of administrative actions, in both federal and state courts.⁴³⁴ Individual injury was not required to bring such an action, only a “neglect of justice.”⁴³⁵ “Stranger” suits permitted the assertion of judicial authority without the existence of a personal stake in the controversy.⁴³⁶ The venerable *qui tam* action, which permits a private individual with no interest in the controversy other than the monetary penalty created by the statute to bring suit against the government, has been a feature of the

428. See Sunstein, *supra* note 100, at 169. Clearly there is some disagreement about the exact date and case in which the term “standing” was first used. Winter, *supra* note 418, at 1378 and Poisner, *supra* note 100, at 338, refer to Justice Frankfurter’s concurrence in *Coleman v. Miller*, 307 U.S. 433, 464-68 (1939) (Frankfurter, J., concurring), as the initial appearance of the word in relation to the case or controversy requirement of the Constitution.

429. 397 U.S. 159 (1970).

430. Berger, *supra* note 266, at 818-19. Professor Berger extensively reviews the practices of the English courts of the period, since “it is hardly to be doubted that the Framers contemplated resort to English practice for elucidation, and so the Supreme Court has often held.” *Id.* at 816.

431. See Winter, *supra* note 418, at 1407.

432. See Berger, *supra* note 266, at 816.

433. Winter, *supra* note 418, at 1397.

434. See Sive, *supra* note 100, at 49.

435. Winter, *supra* note 418, at 1397.

436. See Jaffe, *supra* note 416, at 466-67; Berger, *supra* note 266, at 826-27; Winter, *supra* note 418, at 1398-99.

American legal landscape for at least one hundred years.⁴³⁷ Justice Scalia's assertion that injury is an "irreducible constitutional minimum" ignores the historical scholarship, and the fact that "[t]he explosion of judicial interest in standing as a distinct body of constitutional law is an extraordinarily recent phenomenon."⁴³⁸

VII. SUGGESTIONS FOR AN ALTERNATIVE APPROACH TO INJURY IN FACT

A full discussion of alternative approaches to the injury in fact standard is beyond the scope of this Article. However, it is important to note briefly the recommendations of two legal scholars because they suggest an interesting link to Justice Stevens' concurrence in *Steel Company*. Professor Sunstein argues that the injury in fact standard inappropriately "defines modern public law by reference to common law principles."⁴³⁹ It allows standing where it should be denied and denies standing where it should be granted.⁴⁴⁰ He advocates scrapping the whole concept. "The Court should abandon the metaphysics of injury in fact," he has said, and return to the question of whether the law—governing statutes, the Constitution, or federal common law—has conferred on the plaintiffs a cause of action.⁴⁴¹ Professor Fletcher also recommends a focus on the existence of a right of action.⁴⁴² He has proposed that:

[w]e abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of "injury in fact." Instead, standing should simply be a question on the merits of plaintiff's claim. If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty

437. See Caminker, *supra* note 414, at 345; see also Nichol, *supra* note 100, at 1152. The constitutionality of *qui tam* actions has been consistently upheld by the Supreme Court. See, e.g., *Martin v. Trout*, 199 U.S. 212, 225 (1905) (noting that actions in which the plaintiffs have "no interest whatever in the controversy other than that given by the statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government" and the right to recover is given to the "first common informer who brings the action, although he has no interest in the matter whatever except as such informer").

438. Sunstein, *supra* note 100, at 169.

439. *Id.* at 187.

440. See *id.* at 167.

441. *Id.* at 166-67, 191. Professor Nichol cautions against embracing Sunstein's idea too enthusiastically. He points out, correctly, that standing law was circular in the days of the legal interest test, and often seemed to preclude standing for persons with judicially cognizable claims. See Nichol, *supra* note 100, at 1161.

442. See Fletcher, *supra* note 91, at 223-24.

should include the power to define those who have standing to enforce it.⁴⁴³

In his concurrence to *Steel Company*, Justice Stevens urged the Court to consider whether EPCRA confers federal jurisdiction over citizen suits for wholly past violations, before considering the issue of respondent's standing.⁴⁴⁴ He argued that first determining whether respondent had stated a cause of action in its complaint would permit the Court to dispose of the case without having to wrestle with a constitutional issue.⁴⁴⁵ Justice Stevens' recommendation is supported by Professors Sunstein and Fletcher. If his approach had been adopted by the Supreme Court, Justice Scalia's "long front walk" would have been unnecessary. CBE might or might not have been foreclosed from raising claims about past violations of EPCRA, but its standing to seek the assistance of the courts would have been unaffected.

VIII. CONCLUSION: LESSONS TO BE LEARNED

It is clear from *National Wildlife Federation, Defenders of Wildlife and Steel Company* that Justice Scalia is on "a slash and burn expedition" through the law of environmental standing.⁴⁴⁶ What *Steel Company* should teach lawyers who represent citizen and environmental organizations is that proving standing is a critical element of case preparation, involving more than the drafting of good affidavits about injury to environmental interests to support the averments in a complaint. Because standing may be challenged at any time in the course of a lawsuit, either by a defendant or by the court *sua sponte*, and in the context of either a motion to dismiss under Rule 12(b) or in a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, counsel for environmental and citizen plaintiffs must evaluate, plan and prepare to establish standing as a strategic aspect of an entire case.

Steel Company is not the end of environmental litigation. It does not invalidate citizen suits. It reflects a minority view of the role of the courts and the relationship among the branches of government, a view that is not supported either by historical research or modern legal theory. The real issue for EPCRA, whether it applies to past

443. *Id.*

444. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1024 (1998) (Stevens, J., concurring).

445. *See id.* (Stevens, J., concurring).

446. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 606 (1992) (Blackmun, J., dissenting).

violations, remains to be decided. If the statute is to be relevant to community preparedness for toxic chemical releases that issue ought to be resolved, one way or the other. Justice Scalia's *Steel Company* decision does little more than trivialize the statute and the concerns of communities surrounding facilities that use or store hazardous materials. By labeling as "psychic satisfaction" the relief sought by CBE, Justice Scalia showed his disdain for the efforts of a citizen group undertaken on behalf of the public. Would he have had the same reaction if the Steel Company facility accidentally released a highly toxic material causing injuries that could have been avoided had the state and local authorities possessed the information that EPCRA requires to be reported? It would seem the best approach, and the one intended by Congress, is for the courts to redress psychic injuries in order to help prevent physical ones. The other option is to wait for a disaster. It happened in Bhopal; it can happen here.