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CITIZEN SUITS UNDER THE CLEAN AIR ACT: UNIVERSAL STANDING FOR THE UNINJURED PRIVATE ATTORNEY GENERAL?

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I. INTRODUCTION

The summer of 1988 was accompanied by conditions—drought, forest fire, heat wave, medical waste—that accomplished what no politician, professor, or public interest group had managed to accomplish in twenty years of publicity about and debate over the future of the world's environment: they focused public attention on the widespread and intractable nature of the planet's environmental problems. One of the most pervasive fears—that the planet was warming as a result of the so-called "Greenhouse Effect"—was underscored in the Eastern United States by a persistent and frustrating battle with heat, smog and ozone pollution.[1]

Associated with the persistence of these problems was a sentiment that the nation had not made sufficient progress in its eighteen year attempt under the Federal Air Pollution Control Act ("Clean Air Act," "CAA" or "Act")[2] to clean up the ambient air.[3] In contrast to efforts to clean the nation's waters,[4] the achievement of clean air loomed as a distant goal that could be reached only at the expense

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* Executive Editor, 1988-89, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

[1] *Ozone Pollution Is Found at Peak in Summer Heat*, N.Y. Times, July 31, 1988, at 1, col. 1.

[2] 42 U.S.C. §§ 7401–7642 (1982 & Supp. IV 1986).

[3] N.Y. Times, July 31, 1988, at 1, col. 1 ("Instead of progressing toward the goal in the clean air law of reducing ozone to safe levels, the country appears to be losing ground.").

[4] *Most Sewage Plants Meeting Latest Goal of Clean Water Act*, N.Y. Times, July 28, 1988, at 1, col. 1 (noting "significant step toward the goal of making the nation's [waters] fishable and swimmable again.").

of serious economic dislocation.[5] Congress and the Environmental Protection Agency ("EPA") effectively admitted that air quality standards established under the Clean Air Act in the mid-1970's were not and could not be met in accordance with established deadlines.[6] Meanwhile, as Congress and the EPA concluded that changes in the law would be more practicable than efforts to enforce compliance with existing standards,[7] citizens waged battle with the torpidity and morbidity of the smoggy summer.[8]

Citizens, however, are not without power to assist in the effort to clean the air. The Clean Air Act includes a citizen suit provision[9] designed to augment and buttress federal enforcement of existing air pollution control legislation. The citizen suit provision—section 304 of the Act—allows "any person" to bring suit under the Act.[10]

Such suits may be brought against a party in violation of either standards promulgated under the Act or of an enforcement order issued under the Act.[11] Suits may also be brought against the Ad-

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[5] *See To Live and Breathe in L.A.*, N.Y. Times, Aug. 7, 1988, § 3, at 1, col. 2 (Los Angeles presented with choice between clean air and a vital economy).

[6] In 1987 Congress extended the deadline for cities' compliance with Clean Air Act carbon monoxide and ozone standards from December 31, 1987 to August 31, 1988. *See* 18 Env't Rep. (BNA) 1948 (Dec. 25, 1987). The EPA, in anticipation of "the likely persistence in many urban areas of violations of the [National Ambient Air Quality Standards] for ozone and [carbon monoxide] beyond . . . the latest date for attainment explicitly mentioned in the Act," has promulgated regulations governing the revised schedule for compliance. 52 Fed. Reg. 45,044 (1987). The EPA estimates that 68 major metropolitan areas missed the August 31, 1988 deadline for ozone compliance. N.Y. Times, July 31, 1988, at 1, col. 1.

[7] The EPA suggests that it will take enforcement measures against only those metropolitan areas that have not made serious efforts to comply with the extended deadline. N.Y. Times, July 31, 1988, at 24, col. 1.

[8] *See, e.g., Achoo! Pollen's Mischief Begins Before Allergy Season*, N.Y. Times, Aug. 13, 1988, at 29, col. 2 (attributing allergy-like symptoms to, among other things, increased levels of ozone in lower atmosphere).

[9] 42 U.S.C.§ 7604 [hereinafter section 304].

[10] *Id.* This section provides in relevant part:

> Except as provided in subsection (b) of this section, any person may commence a civil action in his own behalf —
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> (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a state with respect to such a standard or limitation,
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or
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> (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under . . . this chapter . . . .

Id. § 7604(a)(1).

[11] *Id.* § 7604(a)(1).

ministrator of the EPA[12] for failure to perform non-discretionary duties required under the Act.[13]

The use of the term "any person" to define the class of persons entitled to bring suit under the Act ostensibly creates "universal standing"[14]—standing regardless of any interest the plaintiff may have in the resolution of the suit. A grant of universal standing, however, seems inconsistent with the general doctrine of standing as developed under the case and controversy clause of the Constitution. Because of the fundamental relationship between the case and controversy clause and the proper role of the federal courts in our system of government, a grant of universal standing has implications for the doctrine of separation of powers. Despite the apparent constitutional problems inherent in universal standing, numerous federal environmental statutes contain citizen suit provisions that grant standing to unlimited classes of plaintiffs.[15]

This Comment explores Congress's authority to grant universal standing to further a national policy favoring the vigorous enforcement of environmental legislation. In this light, the Comment touches upon the general doctrine of standing and its origins in the Supreme Court. The Comment then examines the doctrine of standing as applied to organizational plaintiffs, such as those commonly involved in the prosecution of environmental citizen suits. The Comment further examines Congress's ability to extend standing to new classes of plaintiffs to vindicate rights and concerns unknown at common law. It then reviews the treatment that section 304 of the Clean Air Act has received in lower federal courts. Finally, the Comment suggests that the power of citizens groups to engage in the enforcement of federal environmental legislation is limited by constitutional standing rules, no matter how compelling the congressional reason for adopting broad statutory definitions of standing. The Comment concludes that, despite its desirability from a policy standpoint, section 304 is constitutionally invalid as a grant of universal standing. This is especially true in respect to the use of section

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[12] *Id.* § 7601 (delegates administrative duties to Environmental Protection Agency).

[13] *Id.* § 7604(a)(2).

[14] Natural Resources Defense Council v. EPA, 484 F.2d 1331, 1337 (1st Cir. 1973).

[15] *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (1982) (allows suits by "any person"); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1982 & Supp. IV 1986) (allows suits by "any person"); Noise Control Act, 42 U.S.C. § 4911 (1982) (allows suits by "any person"); Energy Policy Conservation Act, 42 U.S.C. § 6305 (1982) ("any person"); Resource Recovery and Reclamation Act (RCRA), 42 U.S.C. § 6972 (1982 & Supp. IV 1986) ("any person").

304 as a means of challenging governmental or administrative conduct.

II. THE GENERAL DOCTRINE OF STANDING

The federal judiciary, under article III of the Constitution, is limited to hearing only cases and controversies.[16] This vague language has resulted in the general theory that federal courts are limited to hearing the claims of only those plaintiffs who can allege to have suffered or to be threatened with some sort of injury in fact,[17] resulting from the defendant's conduct,[18] which can be redressed by the court.[19] This theory has come to be known as the doctrine of standing.

Standing is, generally stated, the ability to be a plaintiff in a lawsuit.[20] Standing is premised on the theory that only those who have a genuine stake in the outcome of a particular lawsuit should be able to participate in the suit.[21] As the Supreme Court commented in one recent standing decision, absent the standing requirement courts would be threatened with transformation into "debating societies."[22] Courts in this position would be forced to perform functions inconsistent with their place in a system of separated powers.[23]

In the Supreme Court, the standing doctrine has its origins in *Frothingham v. Mellon*.[24] In *Frothingham*, a federal taxpayer challenged Congress's decision to allocate federal funds for the assistance

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[16] U.S. CONST. art. III, § 2. This provision provides, in relevant part:

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

[17] *See infra* notes 77–78 and accompanying text.

[18] *See infra* note 79 and accompanying text.

[19] *See infra* note 80 and accompanying text.

[20] *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 24:1–24:36 (2d ed. 1982) [hereinafter K. DAVIS].

[21] *Id.*

[22] Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 477 (1981) (challenge to gratuitous conveyance of government property to sectarian school, made on grounds that conveyance violated the establishment clause, dismissed for lack of standing).

[23] *See infra* notes 44–54 and accompanying text.

[24] 262 U.S. 447 (1923).

of mothers and their newborn infants in the hope of lowering infant mortality rates.[25]

The *Frothingham* Court held that the plaintiff had suffered no tangible injury that would confer standing to challenge the expenditure.[26] Instead, the Court found that the plaintiff's "liability as a taxpayer is unaffected by the disposition which Congress . . . may make of the public revenues or property."[27] The Court declined to adjudicate "abstract questions which do not appreciably or practically affect" a plaintiff who alleges such minor and unredressable harm,[28] that is, harm shared "in common with people generally . . . ."[29]

The Supreme Court has since decided over 200 cases involving questions of standing.[30] Because of the preponderance of Supreme Court opinions, the doctrine has become one of "'the most amorphous [concepts] in the entire domain of public law.'"[31]

A. Standing Bifurcated: Prudential Doctrine and the Article III Minima

The Supreme Court rarely addresses the issue of standing without dividing its analysis into two separate, but hardly distinct,[32] concepts: standing in the article III or constitutional sense, and standing as a "prudential" rule of judicial self-governance.[33] Understanding this bifurcation is crucial in considering the permissibility of universal standing, because Congress can extend standing to new classes of plaintiffs by eliminating only prudential barriers to standing.[34]

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[25] *Id.* at 479.

[26] *Id.* at 488–89.

[27] *Id.* at 451.

[28] *Id.* at 451–52.

[29] *Id.* at 488.

[30] K. DAVIS, *supra* note 20, § 24.1, at 208.

[31] Flast v. Cohen, 392 U.S. 83, 99 (1968) (quoting *Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 89th Cong., 2d Sess. 465, at 498 (statement of Paul Freund)).

[32] *Id.* at 96-97 (successful taxpayer challenge to disbursement of federal funds to religious and sectarian schools on establishment clause grounds).

[33] *E.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1981) (standing "subsumes" a combination of constitutional requirements and prudential concerns); Warth v. Seldin, 422 U.S. 490, 498 (1975) (the standing inquiry involves both constitutional limitations on the jurisdiction of federal courts and prudential limitations on the exercise of that jurisdiction).

[34] *See infra* notes 139–61 and accompanying text.

1. "Prudential" Standing

Prudential standing is a concept created by the federal courts *sua sponte*, as part of a system of self-imposed limitations on the exercise of federal court jurisdiction.[35] Prudential standing is not concerned primarily with the existence of a justiciable controversy.[36] In prudential standing terms, a "controversy" within the meaning of article III may exist, but the particular plaintiff may not be the proper party to bring suit in the controversy.[37]

As will be seen, "prudential" considerations present no barrier to congressional attempts to grant standing to new classes of plaintiffs.[38] As rules of judicial self-governance, prudential considerations are not mandated by the Constitution.[39] They are not related to the goal of confining "federal courts to a role consistent with a system of separated powers . . . ."[40]

Prudential rules are not always clearly distinct from those standing rules which find their source in the Constitution.[41] Standing is ultimately based on more fundamental ground than policy.[42] It is upon this constitutional ground that Congress may not intrude as it

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[35] *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1935). In his concurring opinion, Justice Brandeis outlined seven rules for the self-governance of the Supreme Court in deciding constitutional questions: (1) the Court will not entertain friendly or collusive suits; (2) the Court will not pass upon a question before it is ripe for decision; (3) the Court will not formulate overly broad constitutional rules; (4) the Court will not dispose of a case on constitutional grounds if alternative, non-constitutional, grounds exist; (5) *the Court will not decide the constitutionality of a statute unless the plaintiff shows an injury as a result of its operation*; (6) the Court will not hear the complaint of plaintiffs who have availed themselves of any benefits conferred by the statute they challenge; and (7) the Court will avoid, when alternative constructions permit, holding a statute unconstitutional. *Id.* at 346–48 (Brandeis, J., concurring). The fifth rule relates to standing and is a prudential limitation not only because Brandeis labelled it a rule of the Court's "own governance," but more importantly because it presupposes the existence of "cases confessedly within [the Court's] jurisdiction." *Id.* at 346.

[36] An example is afforded by the plaintiff who asserts the rights of others. While a justiciable controversy within the meaning of article III may exist, the third party plaintiff is *not* the proper party to invoke the Court's jurisdiction, and is barred by prudential standing rules. Warth v. Seldin, 422 U.S. 490, 509 (1975) ("the prudential standing rule . . . normally bars litigants from asserting the rights or legal interests of others"); *see also*, Singleton v. Wulff, 428 U.S. 106, 123 (1975) (Powell, J., concurring in part and dissenting in part) (standing poses question of whether "it is prudent to proceed to decision on particular issues even at the instance of a party whose Art. III standing is clear").

[37] *Singleton*, 428 U.S. at 123.

[38] *See infra* notes 196–211 and accompanying text.

[39] Flast v. Cohen, 392 U.S. 83, 97 (1967) (prudential rules "find their source in policy, rather than purely constitutional considerations").

[40] *Id.*

[41] *Id.* (quoting Barrows v. Jackson, 346 U.S. 249, 255 (1953)).

[42] *See infra* notes 48–55 and accompanying text.

statutorily broadens the class of plaintiffs eligible to sue in federal court.[43]

2. Article III, or Constitutional, Standing

Standing in the constitutional sense has its source in article III's case or controversy clause,[44] which operates to limit the jurisdiction of the federal courts. While some uncertainty in the area of standing jurisprudence stems from the indistinct boundary between prudential and constitutional considerations,[45] additional problems arise from the difficulty of determining what "case or controversy" meant to the framers of the Constitution.[46]

Although a precise definition of article III's limiting words is not ascertainable, the Supreme Court has concluded that the case and controversy clause operates to limit the exercise of federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."[47]

This emphasis on having courts act in a manner consistent with their usual adjudicatory function is "built on a single basic idea—the idea of separation of powers."[48] In the absence of a justiciable case or controversy a matter is more properly resolved in another forum. Thus, the standing requirement, as a function of the separation of powers, can serve as a bar to a plaintiff who alleges only a general grievance of broad public import. Questions of broad public import may be characterized as political questions more worthy of consideration in representative fora.[49]

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[43] *See infra* notes 196–211 and accompanying text.

[44] *See supra* note 16.

[45] *Flast*, 392 U.S. at 97.

[46] The *Flast* Court concludes that the "implicit policies embodied in Article III, and not history alone" often give needed content to the case and controversy clause. *Id.* at 95–96.

[47] *Id.* at 97.

[48] Allen v. Wright, 468 U.S. 737, 752 (1984) (suit brought by parents of black schoolchildren alleging that failure of Internal Revenue Service to properly implement rules denying tax-exempt status to schools engaging in racial discrimination encouraged schools to continue discriminatory practices).

[49] *See id.* at 751 (generalized grievances are more appropriately addressed in representative branches); *see also* Valley Forge College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1981) (generalized grievances are most appropriately addressed in representative branches); Center For Auto Safety v. National Highway Transportation Safety Ass., 793 F.2d 1322, 1345 (D.C. Cir. 1986) (Scalia, J., dissenting) (that which is of interest to "society at large" should be resolved through the political processes by which society acts).

If application of article III standing barriers results in the absence of any eligible plaintiffs, then the evidence is strong that the issue is a political one.[50] This line of reasoning is particularly applicable to citizen suits that challenge agency action, rather than the activities of private actors.[51] In such cases, policy decisions are at issue, not discrete violations of, for example, emissions standards promulgated under the CAA. Policy is the realm of the representative branches.[52]

Thus, the case or controversy clause "forecloses the conversion"[53] of a federal court into a forum that entertains "generalized grievance[s] about the conduct of government . . . ."[54]

The inexorable nature of article III standing is demonstrated by the Supreme Court's statement that "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States."[55] Despite the fundamental nature of constitutional standing, however, it, "like the prudential component . . . incorporates concepts concededly not susceptible of precise definition."[56] Despite the problems of imprecision inherent in constitutional standing, the Supreme Court has established an irreducible test for determining whether a plaintiff has article III standing.

B. Injury in Fact: The Test of Constitutional Standing

The Supreme Court, in an attempt to give content to the constitutional standing requirement, has concluded that a plaintiff must show "injury in fact" to establish article III standing.[57] Injury in fact

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[50] *See* United States v. Richardson, 418 U.S. 166, 179 (1973) (absence of any plaintiff who can meet the threshold standing test lends support to argument that the subject matter is properly addressed by Congress and ultimately by political processes); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 227 (1973) (again, in context of lack of eligible plaintiffs, this system of government defers many crucial decisions to political processes).

[51] See *infra* notes 237–69 and accompanying text for discussion of legislative history of section 304 (citizen suit a mechanism to encourage government to comply with statutory mandate to enforce environmental laws).

[52] *See* Maher v. Roe, 432 U.S. 464, 479 (1976) (in a democracy the legislature is the appropriate forum for the resolution of policy issues); *accord* Harris v. McRae, 448 U.S. 297, 326 (1979).

[53] *Valley Forge*, 454 U.S. at 473.

[54] Flast v. Cohen, 392 U.S. 83, 106 (1967).

[55] *Valley Forge*, 454 U.S. at 475–76.

[56] Allen v. Wright, 468 U.S. 737, 751 (1984).

[57] *See* Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152 (1969) (first question in considering article III standing is whether plaintiff has suffered injury in fact); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (plaintiff must show "actual or threatened injury" resulting from defendant's putatively illegal conduct).

is "an irreducible minimum" below which a plaintiff may not fall and still have article III standing.[58]

The source of the injury in fact requirement and its relation to the proper functioning of the federal courts in a system of separated powers is the case of *Baker v. Carr*.[59] In *Baker*, the Court ruled on the standing of the plaintiffs to challenge the alleged malapportionment of Tennessee voting districts.[60] Justice Brennan framed the standing inquiry in the following terms: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult . . . questions?"[61]

Baker v. Carr's requirement that a plaintiff have a "personal stake" in a controversy[62] has evolved into a requirement of injury in fact.[63] In *Flast v. Cohen*[64] the Court, as it had in *Frothingham*,[65] ruled on whether the plaintiff had standing, as a taxpayer, to challenge the expenditure of federal funds for objectionable purposes.[66] Specifically, the plaintiffs alleged that the use of federal funds for the support of sectarian schools violated the establishment and free exercise clauses of the first amendment.[67]

For the first time since *Frothingham*, the Court had to conduct a "fresh examination"[68] of whether taxpayers suffered injury in fact sufficient to establish standing if some of their taxes were spent for purposes they found objectionable.[69] The Court decided that in certain limited instances article III standing may be premised on a plaintiff's status as a taxpayer.[70] In such instances, where the objectionable expenditure is of such a nature as to be particularly

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[58] *Valley Forge*, 454 U.S. at 472.

[59] 369 U.S. 186 (1961).

[60] *Id.* at 187–88. Although malapportionment is concededly a wrong, a challenge to this sort of government misconduct is generally not considered justiciable. *See infra* notes 132–37 and accompanying text.

[61] *Baker*, 369 U.S. at 204.

[62] *Id.*

[63] *E.g.*, Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 151–52 (1969) (standing related to ability of plaintiff to create adversary context; first inquiry in determining standing is whether plaintiff alleges injury in fact).

[64] 392 U.S. 83 (1968).

[65] 262 U.S. 447 (1922).

[66] *Flast*, 392 U.S. at 85.

[67] U.S. CONST. amend. I.

[68] *Flast*, 392 U.S. at 94.

[69] *Id.* at 85–86.

[70] *Id.* at 101.

offensive, an injury arises that allows plaintiffs to frame their cases with the "necessary adverseness" called for in *Baker v. Carr*.[71]

The *Flast* Court related the injury in fact requirement to the separation of powers.[72] Subsequently, it has become clear that the requirement of adverseness or injury in fact is related to the separation of powers because, without the requirement, federal courts cease to function as courts.[73] Standing protects the federal courts from conversion into "publicly funded forums for the ventilation of public grievances . . . ."[74] Plaintiffs lacking injury in fact do not have a cognizable interest in the resolution of a case,[75] and therefore will not be sufficient adversaries to allow the court to function properly.[76]

The question remains as to what sort of injury qualifies for article III standing. The Court has asserted that the claimed injury must be "distinct and palpable."[77] It must be concrete, not "conjectural" or "hypothetical."[78] The injury must also be traceable to the defendant's alleged activity[79] and the plaintiff must expect relief from the injury to follow from a favorable decision in the case.[80] The Court's

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[71] *Id.* at 101–06.

[72] *See id.* at 97 (power of federal judiciary limited to those disputes that fit in framework of separated powers).

[73] *See* Valley Forge College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1981) (case and controversy clause precludes conversion of federal courts into equivalent of debating societies).

[74] *Id.*

[75] The other requirement of constitutional standing, that the plaintiff must expect relief to follow from a favorable decision in the case, is related to the requirement that the plaintiff have suffered injury in fact. *See* Gwaltney of Smithfield v. Chesapeake Bay Found., 108 S. Ct. 376, 385 (1987); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976).

[76] This reasoning, however, has been criticized by both courts and commentators. It has been noted that many plaintiffs, unable to allege a "personal stake" in the resolution of a case, are nevertheless vigorous advocates of their position. *See* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 891 (1983) (parties not injured in fact are often diligent advocates); *see also* K. DAVIS, *supra* note 20, § 24.18, 281–85; CURRIE, AIR POLLUTION, FEDERAL LAW AND ANALYSIS, § 9.19 (1981) ("no one can honestly entertain fears of inadequate representation when the Sierra Club sues to protect the environment."). In apparent contradiction of its emphasis on the relation of a plaintiff's ability to allege injury in fact to the proper functioning of a court, the *Valley Forge* Court says that "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." 454 U.S. at 473.

[77] Warth v. Seldin, 422 U.S. 490, 501 (1975).

[78] Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1982) (standing denied in challenge to use of chokeholds by Los Angeles police officers because plaintiff, who had been victim of chokehold in past, sued to enjoin future use of chokeholds).

[79] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976) (standing denied plaintiff organizations that challenged Internal Revenue Service policy of extending tax-exempt status to hospitals that refuse to provide services to indigent patients).

[80] *Id.*

insistence that "injury" meet certain standards so as to be sufficient for article III purposes places additional limitations on Congress's power to confer standing to plaintiffs through the use of statutorily created injuries.[81]

"Injury" is not limited in scope to the sort of economic harm traditionally thought of as the proper object of judicial relief.[82] The Supreme Court no longer questions that aesthetic harm may "amount to an 'injury in fact' sufficient to lay the basis for standing . . . ."[83]

In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*[84] the Court noted the amenability of federal courts to the hearing of cases relating to aesthetic injuries.[85] In *SCRAP*, the Court greatly liberalized the concept of injury in fact by allowing an organization to sue to enjoin the Interstate Commerce Commission from collecting a surcharge on shipments by railroads.[86] Alleging that the surcharge resulted in "increased pollution,"[87] the organization claimed to have standing through injuries suffered by each of its members.[88]

SCRAP, with its broad construction of the "injury" required for injury in fact, is illustrative of what Justice Scalia has referred to as the federal judiciary's "love affair with environmental litigation."[89] The decision to grant standing, based on largely conjectural injuries,[90] would probably not issue from the post-*SCRAP* Supreme Court if the precise issue presented in *SCRAP* were presented again.[91]

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[81] *See infra* notes 146–50 and accompanying text.

[82] Sierra v. Morton, 405 U.S. 727, 733–34 (1971) (it has long been accepted that economic injury is sufficient to confer standing).

[83] *Id.* (noting that destruction of wildlife is still injury in fact although not economic injury).

[84] 412 U.S. 669 (1972) [hereinafter SCRAP].

[85] *Id.* at 686–87.

[86] *Id.* at 674–78.

[87] *Id.* at 678.

[88] *Id.*

[89] Scalia, *supra* note 76, at 884.

[90] The organization in *SCRAP* filed suit in May, 1972, to challenge a surcharge which went into effect less than four months earlier. *SCRAP*, 412 U.S. at 678. Still, the group alleged that the increased expense of hauling scrap metal had resulted in the degradation of the air, "forests, rivers, streams, mountains, and other natural resources" surrounding Washington, D.C. *Id.* The group also alleged that its members had to pay increased taxes as a result of the surcharge. *Id.* Unless it is reasonable to believe that all of these injuries had or could have resulted in such a short span of time, or that the group was immediately in danger of sustaining these injuries, then the injuries alleged in *SCRAP* were of a primarily conjectural nature. *See* Los Angeles v. Lyons, 461 U.S. 95, 102 (1982).

[91] *See, e.g., Lyons*, 461 U.S. at 101–02 (to have article III standing, plaintiffs may not allege

III. THE ORGANIZATIONAL PLAINTIFF AND GENERALIZED GRIEVANCES

The organizational standing question raised in *SCRAP* has received considerable attention from federal courts. The organizational standing issue frequently involves a consideration of the standing of one party to sue on behalf of another.[92] This issue frequently arises in the context of citizen suits.

Citizen suits are an increasingly popular and effective means of enforcing federal environmental statutes.[93] They are often challenged on a number of grounds not going to the merits of the suit,[94]

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merely conjectural or hypothetical injury); Center for Auto Safety v. National Highway Transportation Safety Ass., 793 F.2d 1322, 1342–43 (D.C. Cir. 1986) (Scalia, J., dissenting) (citing litany of cases urging more stringent application of injury in fact requirement). *See also* Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863, 869 (1977) (sees reversal of liberalization of standing effected under Warren Court); CURRIE, AIR POLLUTION, FEDERAL LAW AND ANALYSIS § 9.19 (1981) (on the basis of recent Supreme Court dicta, predicts that "Congress will be held without power to confer standing on one who is not injured").

[92] *See generally* Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981).

[93] The right of private citizens to sue to enforce federal statutes, whether expressly or impliedly granted, is well-settled. *See* Miller, *Private Enforcement of Federal Pollution Control Laws, Part I*, 13 Envtl. L. Rep. 10309 (Envtl. L. Inst.) [hereinafter Miller]; *see also* Meier, *Citizen Suits' Become a Popular Weapon in the Fight Against Industrial Polluters*, Wall St. J., April 17, 1987, at 17, col. 3. The Bureau of National Affairs, Inc. has published a report documenting the fact that "[p]rivate citizens are increasingly filing lawsuits against corporate polluters . . . ." 18 Env't Rep. 2227 (BNA) (Feb. 26, 1988). An example of the power of citizens to bring suit for violations of non-environmental statutes is the implied private right of action that the Supreme Court found in § 14(a) of the Securities Exchange Act of 1934. J.I. Case Co. v. Borak, 377 U.S. 426 (1963) (implied private right of action to seek redress of violation of '34 Act's prohibition of misleading proxy statements). Environmental citizen suit provisions, however, are not necessarily designed to vindicate the economic interests of the plaintiff. See *supra* notes 82–92 and accompanying text for discussion of non-pecuniary injury and the liberalization of the injury in fact requirement. Rather, environmental citizen suit provisions are motivated primarily by a desire to involve "real private attorneys general" in the enforcement of federal environmental statutes. Miller, *supra*, at 10,309–10. However, because the Constitution requires plaintiffs to have more than the general public interest in mind, *see, e.g.*, Sierra v. Morton, 405 U.S. 727, 739 (1971), *qui tam* actions are, absent express statutory authorization, of dubious validity in the United States. Miller, *supra*, at 10,309 n.2 (noting unsuccessful attempts at establishing *qui tam* standing). The *qui tam* is a statutorily provided form of action in which a private party invokes the government's standing in an attempt to enforce a law. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 3531.13, at 76 (2d ed. 1982) [hereinafter C. WRIGHT]. Two commentators, believing that citizen suit provisions are an underutilized means of involving citizens in environmental enforcement, have recently offered advice intended to facilitate public participation in the pollution control effort. Babich and Hanson, *Opportunities for Environmental Enforcement and Cost Recovery by Local Governments and Citizen Organizations*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,165 (May, 1988).

[94] *See, e.g.*, Gwaltney of Smithfield v. Chesapeake Bay Found., 108 S. Ct. 376 (1987) (citizen

including the ground that the plaintiff, or one of the plaintiffs, is an organization[95] that has suffered only an abstract and general "injury" to its interests and thus has suffered no actual injury in fact.[96] It is argued that the the organization therefore lacks standing to sue.

The issue of whether an organization or institution has standing to sue on behalf of its members was addressed by the Supreme Court in *Sierra Club v. Morton*,[97] *Warth v. Seldin*,[98] and more recently in *Hunt v. Washington State Apple Advertising Commission*.[99]

In *Sierra v. Morton* the Sierra Club sought to enjoin the United States Forest Service from authorizing Walt Disney Enterprises to construct a ski resort in the Mineral King Valley in the Sequoia National Forest.[100] Sierra brought suit pursuant to the judicial review provision of the Administrative Procedure Act ("APA").[101] The Court had to determine whether the Sierra Club was "adversely affected or aggrieved"[102] by the Forest Service's decision to permit the ski resort.

The Court noted that because the "Sierra Club failed to allege that it or one of its members would be affected in any of their activities or pastimes"[103] by the proposed development, it therefore lacked standing.[104] The Court further noted that the Sierra Club's

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suit successfully defended on ground that alleged violations of Clean Water Act had occurred wholly in the past); Natural Resources Defense Council, Inc. v. New York State Department of Environmental Conservation, 834 F.2d 60 (2d Cir. 1987) (would-be intervenor in CAA section 304 citizen suit denied party status pursuant to FED. R. CIV. P. 24 because its interests were adequately represented by governmental defendant).

[95] *See* Meier, *supra* note 93. The participation of environmental organizations in citizen suits is attributable to various obvious logistical factors, such as the added resources and litigation expertise the specialized organization can bring to the lawsuit. *Id.* (suggests preeminence of certain organizations in the field of citizen suits). *See also* United Auto Workers v. Brock, 106 S. Ct. 2523, 2533 (1986) (notes various advantages of involving associations in litigation).

[96] Reference to many cases involving citizen group action in an environmental context reveals the frequency with which standing defenses are raised—and generally defeated. *See, e.g.*, National Wildlife Federation v. Burford, 835 F.2d 305 (D.C. Cir. 1987) (EPA questioned NWF's standing in case where pleadings did not mention injury to specific members of organization).

[97] 405 U.S. 727 (1971).

[98] 422 U.S. 490 (1975).

[99] 432 U.S. 333 (1976).

[100] *Sierra*, 405 U.S. at 728–30.

[101] *Id.* at 730. The judicial review provision, 5 U.S.C. § 702 (1982), provides in part: "A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[102] 5 U.S.C. § 702.

[103] *Sierra*, 405 U.S. at 735.

[104] *Id.* at 740.

general interest in environmental preservation was an inadequate basis upon which to establish the club's standing as an organization.[105]

In *Warth v. Seldin*,[106] decided several years after *Sierra*, the Supreme Court expanded on its earlier holding by noting that organizations that are not legitimately able to assert their own legal interests or rights, but must assert instead the legal rights of third parties,[107] do not have standing.[108]

The *Warth* Court noted that constitutional problems arise when an organization brings before a court an issue in which the organization has no apparent stake.[109] Organizations, which in light of *Sierra*'s reasoning have no standing by virtue of a special interest in a matter,[110] threaten to place courts in the position of adjudicating "abstract questions of wide public significance . . . ."[111]

The *Warth* Court held that organizations bringing suit under a statute expressly or impliedly granting a cause of action may have standing so long as they meet the requirements of article III.[112] So long as article III's requirements are met, the organization may seek to vindicate the rights of others.[113]

The "others" to which the Court refers are the members of the organization in question.[114] The *Warth* Court interpreted the *Sierra* holding to be a formulation of the following organizational standing requirements:

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a jus-

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[105] *Id.* at 739–41.

[106] 422 U.S. 490 (1974).

[107] The *jus tertii*, or the legal rights of third parties, is traditionally not a basis upon which to establish standing. *See, e.g.*, Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576 (1914). For a general discussion of third party standing, *see generally* Rohr, *supra* note 92.

[108] *Warth*, 422 U.S. at 499.

[109] *Id.* (article III judicial power exists only to redress injury to the complaining party, even though court's judgment may benefit others incidentally).

[110] *Sierra*, 405 U.S. at 739.

[111] *Warth*, 422 U.S. at 500. The Court calls the limitation on general interest standing "essentially [a matter] of judicial self-governance" but still "closely related to Art. III concerns . . . ." *Id.* The "general grievance" standing question is *so* closely related to article III concerns that it is often indistinguishable from prudential standing concerns. *See infra* notes 212–32 and accompanying text.

[112] *Warth*, 422 U.S. at 501.

[113] *Id.*

[114] *Sierra*, 405 U.S. at 740. That an organization can claim injury in fact only if it or any of its members has suffered injury in fact is the central teaching of *Sierra*. (Sierra's failure to allege that its members had suffered from the Forest Service's decision fatal to its case).

> ticiable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.[115]

After *Warth* and *Sierra*, the Court further refined the organizational standing test in *Hunt v. Washington Apple Advertising Commission*.[116] In *Hunt*, a commission representing apple growers from Washington state sued to enjoin the implementation of a North Carolina statute which required that apples shipped into that state "bear 'no grade other than the applicable U.S. grade or standard.'"[117]

The Commission challenged the statute because it allegedly posed an unconstitutional restraint on interstate commerce in that it prevented apples from Washington from bearing notice of compliance with that state's heightened quality standards.[118] North Carolina claimed that the Commission, which was "charged with . . . promoting and protecting the state's apple industry," lacked the personal stake in the controversy necessary to confer standing.[119]

The *Hunt* Court, in concluding that the Commission did have standing to seek injunctive relief,[120] set forth the following three-part test of organizational standing:

> Thus we have recognized that an association has standing to bring suit on behalf of its members[121] when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[122]

The *Hunt* formulation of the organizational standing test differed from previous formulations in that it required that the organization seek to protect interests "germane" to its purpose.[123]

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[115] *Warth*, 422 U.S. at 511 (citation omitted).

[116] 432 U.S. 333 (1976).

[117] *Id.* at 335.

[118] *Id.* at 335–36.

[119] *Id.* at 341.

[120] *Id.* at 345.

[121] North Carolina claimed that the Commission lacked "members" in the usual sense because it represented local growers who had not volunteered to be represented. *Id.* at 342. The Court, however, found that "while the apple growers and dealers are not 'members' . . . in the traditional trade association sense, they possess all of the indicia of membership in an organization." *Id.* at 344.

[122] *Id.* at 343.

[123] The meaning of the "germaneness" requirement is far from settled. *See, e.g.*, Humane

The Supreme Court's position that an individual or an organization does not have standing merely by virtue of its interest in a problem retains its vitality.[124] One court[125] recently considered whether a Senator had standing[126] to challenge the appointment of a fellow member of Congress to the D.C. Circuit Court of Appeals on the ground that his appointment violated the ineligiblity clause of the Constitution.[127] The court first decided the Senator's standing "as a private individual."[128] It then considered whether the Senator had standing not as an individual, but as a Senator—a member of Congress with "special duties and responsibilities."[129]

Deciding both questions negatively, the court cited *Ex Parte Lévitt*,[130] a Supreme Court case in which it was said that a plaintiff must show that he "has sustained or is immediately in danger of sustaining a direct injury . . . and it is not sufficient that he has merely a *general interest common to all members of the public.*"[131]

Additional support for this proposition is found in two Supreme Court cases in which standing was denied to groups challenging actions taken by members of Congress. In *Schlesinger v. Reservists Committee to Stop the War*[132] standing was denied to a plaintiff organization that challenged the ability of various members of Congress to be members of the Army Reserve, in apparent violation of the Incompatibility Clause.[133] It was held, in reliance on *Ex Parte Lévitt*,[134] that "standing to sue may not be predicated upon an inter-

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Society of the United States v. Hodel, 840 F.2d 45, 53–61 (D.C. Cir. 1988) (advocates "mere pertinence between litigation subject and organizational purpose").

[124] *See, e.g.*, Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 39–40 (1975) (plaintiff organizations could not establish standing solely by virtue of their interest in providing health services to indigents); *see also* Sierra Club v. SCM Corp., 747 F.2d 99, 103 (2d Cir. 1984) (Sierra's general interest in environmental protection inadequate to confer standing).

[125] McClure v. Carter, 513 F. Supp. 265 (D. Idaho), *aff'd mem. sub nom.* McClure v. Reagan, 454 U.S. 1025 (1981).

[126] *McClure*, 513 F. Supp. at 269. The Senator brought suit pursuant to an Act of October 12, 1979, Pub. L. No. 96-86, § 101(c), 93 Stat. 656 (not codified).

[127] *McClure*, 513 F. Supp. at 266. The ineligibility clause of the Constitution provides that no members of Congress will be appointed to an office that was created or that was voted a higher salary during their term of service in Congress. U.S. CONST. art. I, § 6, cl. 2.

[128] 513 F. Supp. at 269–70.

[129] *Id.* at 270.

[130] 302 U.S. 633 (1937) (member of Supreme Court bar challenged appointment of Justice Black on grounds that appointment violated eligibility clause of Constitution).

[131] *Id.* at 634 (emphasis added).

[132] 418 U.S. 208 (1973).

[133] *Id.* at 209. The incompatibility clause provides that no one shall occupy an office of the United States and be a member of Congress at the same time. U.S. CONST. art. I, § 6, cl. 2.

[134] 302 U.S. 633 (1937).

est . . . held in common by all members of the public."[135] Similarly, in *United States v. Richardson*,[136] standing was denied on the grounds that the plaintiff had but a generalized grievance.[137]

The question of whether the reluctance to entertain the claims of plaintiffs with generalized grievances is a prudential or constitutional limitation on standing is vital to a consideration of the utility of section 304 as a vehicle for organizational participation in Clean Air Act citizen suits.[138]

IV. CONGRESS'S POWER TO GRANT STANDING

As a starting point in the consideration of whether a congressional attempt to expand standing via a statute such as section 304 is a valid exercise of legislative power, it must be noted that Congress legitimately exerts control over many aspects of the federal court system.[139] As to control of the exercise of federal court jurisdiction through an expansion of standing, it has been held that Congress may abrogate traditional standing requirements up to the limits imposed by the Constitution.[140]

Congress may grant a right to sue for plaintiffs who "otherwise would be barred by prudential standing rules."[141] Although it is clear that Congress may not go beyond the article III limits,[142] it is unclear as to where these limits lie.[143] When he was sitting on the District of Columbia Circuit Court of Appeals, Justice Scalia summarized the current state of the law when he wrote that "even Congress itself may not confer standing to sue where the case and controversy requirements of Article III of the Constitution are not met."[144] Although succinctly stated, the meaning of this limitation on Congress's power is, in the view of one commentator, "rather puzzling."[145]

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[135] *Reservists*, 418 U.S. at 220.

[136] 418 U.S. 166 (1973) (taxpayers objection to CIA's apparent failure to comply with accounts clause held a general grievance inadequate to confer standing).

[137] *Id.* at 175.

[138] *See infra* notes 212–32 and accompanying text.

[139] U.S. CONST. art. III, § 1. This is the source of the systemic control that the legislature exercises over the judiciary: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.*

[140] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 501 (1975) (Congress may grant express right of action, but article III's requirement that plaintiff show a distinct injury remains).

[141] *Id.*

[142] *Id.*

[143] *See supra* note 32 and accompanying text.

[144] Safir v. Dole, 718 F.2d 475, 479 (D.C. Cir. 1983).

[145] C. WRIGHT, *supra* note 93, § 3531.13, at 67.

A. Statutorily Created Rights: The Shifting Contours of Injury in Fact

Through the typical legislative process in which statutes either codify common law or alter common law doctrine, the enactment of a statute often creates judicially cognizable rights and, *a fortiori*, standing to vindicate those rights.[146] The invasion of these legislatively created rights often constitutes the injury in fact requisite to establish standing.[147]

The newly created rights may be visited by harm that does not conform to any traditional conception of what constitutes a legally cognizable injury.[148] It is conceivable that in the exercise of this power Congress may elect to create innumerable rights and concomitantly an innumerable class of federal court plaintiffs. The Supreme Court, however, has never fully accepted Congress's power to do so.[149] This unwillingness suggests that there exist limits on how far Congress can go to create "injuries" that do not fit any traditional conception of harm.[150]

In turn, the limitation on Congress's power to create injuries suggests that there are also limits to Congress's power to exercise the reasoning that rights may be legislatively created, that the violation of these rights constitutes an injury, and that standing can therefore exist where it did not exist before.[151] One court suggested recently that Congress's power in this direction is indeed checked by the Constitution, ruling that a congressional intention to confer

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[146] *Warth*, 422 U.S. at 514 (Congress may create statutory rights and entitlements that, if deprived, create standing even though plaintiff would have suffered no "judicially cognizable injury" in the statute's absence).

[147] *See* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1972) (Congress may pass statutes that create legal rights, the invasion of which confers standing, although no cognizable injury would arise in the statute's absence); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 224 (1973) (Court has "no doubt" that once Congress enacts a statute creating a legal right, the injury required for standing can be found in the invasion of that right); *Warth*, 422 U.S. at 500 (injury in fact necessary for article III standing may exist solely as a result of a statute creating a legal right).

[148] C. WRIGHT, *supra* note 93, § 3531.13, at 75. This point is distinct from the broadening of judicially cognizable injuries represented by *SCRAP* and other decisions recognizing injuries apart from economic harm. *See supra* notes 82–91 and accompanying text.

[149] C. WRIGHT, *supra* note 93, § 3531.13, at 77.

[150] The Court has remarked that Congress may not confer jurisdiction on federal courts to resolve "political questions." Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1971) (citing Luther v. Borden, 48 U.S. (1 How.) 1 (1848)). Certain injuries, of a general character, have been likened to "political questions." *See supra* notes 49–52 and accompanying text.

[151] *See* C. WRIGHT, *supra* note 93, § 3531.13, at 76–77 (noting that Congress' power to expand legally cognizable rights is limited).

standing is not always "consistent with the Article III minima" of injury in fact.[152]

It has been held that the requirement of injury in fact remains in place despite an apparent congressional intent to confer standing on everyone.[153] To the extent that standing is a prudential concept, Congress's power to create standing is well settled.[154] To the extent that standing is a constitutionally based doctrine—based on the separation of powers and the role of the federal courts in the federal system[155]—Congress's power is limited to the abrogation of only the prudential barriers on standing.[156]

B. Bice and Scalia: Conflicting Interpretations of Congress's Power to Expand Standing

When standing is viewed as a function of the separation of powers inherent in the Constitution,[157] it is premised on a belief that certain tasks in a tripartite government are inherently judicial, others legislative, and still others executive in nature.[158]

According to commentators who maintain that standing is essentially a function of the separation of powers, the case or controversy clause insures that courts will perform only judicial tasks.[159] Congress cannot delegate to courts responsibilities that must be carried out in a representative forum.[160]

The federal courts have an interest in limiting their jurisdiction in order to insure their proper role in the constitutional system of

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[152] Sierra Club v. SCM, 747 F.2d 99, 103 (2d Cir. 1984) (Congressional intention to extend standing to those not injured in fact may not be permissible).

[153] *Warth*, 422 U.S. at 501 (Congress may grant an express right of action to plaintiffs but article III requirement remains in place).

[154] *Id.* (Congress may grant right of action to plaintiffs who would normally be barred by prudential standing considerations).

[155] *See supra* notes 44–56 and accompanying text.

[156] *Warth*, 422 U.S. at 501. Similarly, the courts have no power to erect prudential barriers against a plaintiff clearly authorized to sue under a statute. Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1981) (in citizen suit under Fair Housing Act, Congress' creation of a right of action cannot be defeated by judicial erection of prudential barriers).

[157] *See supra* notes 44–56 and accompanying text.

[158] In civics class terms: the legislature enacts laws (U.S. CONST. art. I, § 1); the executive "takes care" that they are executed (U.S. CONST. art. II, § 3); and the judiciary interprets them (U.S. CONST. art. III). Rarely is the matter so simple when raised in the context of the modern federal government. *See, e.g.*, Morrisson v. Olson, 108 S. Ct. 2597 (1988) (unsuccessful challenge to constitutional validity of Ethics in Government Act's provision for judicially appointed independent counsel).

[159] *See supra* note 16.

[160] *See supra* notes 49–52 and accompanying text.

government.[161] That role may be compromised when Congress refers new business to the courts that expands their jurisdiction to resolve matters previously left to legislative, executive or administrative resolution.[162] Alternatively, separation of powers concerns generated by a fear of "judicial legislation" may be averted when Congress has expressly invited the courts to intervene.[163]

1. Professor Bice: Separation of Powers as a Function of Congressional Acquiescence to Judicial Review

There are some functions that the Executive cannot allow Congress to perform,[164] some that Congress cannot ask the Executive to perform,[165] and, logically, some that Congress cannot ask the judiciary to perform.[166] Professor Scott Bice[167] hypothesizes, for example, that Congress cannot request the Supreme Court to provide advice and consent to the Executive for the appointment of one of its own members.[168] The task of providing advice and consent to the Executive's appointments is Congress's, and Congress's alone.[169]

The use of citizen suits presents a separation of powers problem in that the citizen suit reflects a congressional willingness to delegate additional responsibilities to the Federal judiciary.[170] The fear is that Congress, by ignoring such concepts as injury in fact, will convert the courts into open forums for the resolution of political disputes.[171]

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[161] *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 37 (1976) (concept of standing part of method of limiting judiciary to its proper role in constitutional system of government).

[162] *See supra* notes 49–52 and accompanying text.

[163] *See* Center for Auto Safety v. National Highway Transportation Safety Ass., 793 F.2d 1322, 1337 (D.C. Cir. 1986) (separation of powers concerns should not restrain judicial review once Congress has extended standing to broadened class of plaintiffs).

[164] *E.g.*, Buckley v. Valeo, 424 U.S. 1, 118 (1975) (officers of the United States must be appointed by Executive, not Congress).

[165] *E.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1934) (Congress may not delegate law-making function to the Executive).

[166] *E.g.*, Morrisson v. Olson, 108 S. Ct. 2597 (1988) (congressional power to delegate arguably executive function to judiciary challenged but upheld). *See also* Buckley v. Valeo, 424 U.S. 1, 123 (1976) ("executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constititution.").

[167] Bice, *Congress' Power to Confer Standing in the Federal Courts*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 291 (Collins ed. 1980) [hereinafter Bice].

[168] *Id.* at 295.

[169] U.S. CONST. art. II, cl. 2.

[170] *See supra* notes 49–52 and accompanying text. In some instances, plaintiffs in citizen suits invoke the court's jurisdiction to settle what are arguably "political questions." *Id.*

[171] *Id. See also* United States v. Richardson, 418 U.S. 166, 189 (1973) (Powell, J., concurring) ("Unrestrained standing in . . . citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government.").

Professor Bice maintains that the answer to how far Congress may go to abrogate traditional standing requirements can be divined in the rationale underlying the injury in fact requirement.[172]

Bice commences by positing that the assessment of Congress's ability to create "judicially enforceable citizen interests"[173] should focus on an inquiry into the rationale underlying the injury in fact requirement.[174] Bice senses two possible reasons for the requirement: (1) the requirement serves to prevent the judiciary from infringing on the province of the political branches; or (2) the requirement insures the "effective functioning of the judiciary."[175]

According to Bice, if the requirement is designed to serve the effective functioning of the judiciary, then the Supreme Court is correct in concluding that Congress cannot confer standing in the absence of injury in fact.[176] If, however, the requirement serves the other goal—that of preventing the judiciary from intruding on the province of political branches—then "congressional power to confer standing in the absence of injury in fact would be greater . . . ."[177]

Bice concludes that it is more reasonable to view the injury in fact requirement as related not to the effective functioning of the judiciary, but rather as intended to prevent judicial intrusions on the province occupied by other branches of government.[178] Bice further concludes that "[a]rticle III does not require an injury in fact beyond the alleged invasion of a congressionally created citizen interest . . . ."[179]

Bice endeavors to go beyond the familiar but confusing "prudential" and "constitutional" rhetoric.[180] He concludes that the standing

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[172] Bice, *supra* note 167, at 296.

[173] Prof. Bice uses this term to describe the type of non-injury-based standing embodied in statutes such as Section 304. *Id.* at 293.

[174] *Id.* at 296.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.* at 297. Bice reaches this conclusion based on the example of Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1975). He reasons that if Congress consents to judicial review of its own alleged wrongdoing, that is, to review of the merits of a "generalized grievance" based on governmental misconduct, then separation of powers concerns are rendered moot. Bice, *supra* note 167, at 297.

[179] Bice, *supra* note 167, at 299. Bice goes on to agree with the D.C. Circuit's holding in Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809 (D.C. Cir. 1975), decided in the context of a section 304 suit. *See infra* notes 300–10 and accompanying text. Bice takes issue with the contrary result reached in Natural Resources Defense Council, Inc. v. EPA, 481 F.2d 116 (10th Cir. 1973). *See infra* notes 282–87 and accompanying text; Bice, *supra* note 167, at 300.

[180] *See* Bice, *supra* note 167, at 297 (notes that prudential and constitutional distinctions are of little help in answering question of how far Congress may expand standing).

requirement is related to a fear that the judiciary tends to address abstract issues when it expands standing, and thereby encroaches on the province of more responsive, representative branches.[181] According to Bice, once the legislature has spoken, and has acquiesced to the court's jurisdiction over a particular issue, the citizen suit does not infringe on the essential functions of other branches.[182]

2. Justice Scalia: Separation of Powers Concerns Cannot Be Legislated Away

In contrast to Bice, Justice Scalia believes that standing is ultimately related to separation of powers concerns.[183] The power of Congress to expand standing is, therefore, inescapably limited.[184] In Scalia's view, congressional approval, express or implied, to expanding standing "cannot validate judicial disregard" for the boundaries that exist between branches of government.[185]

Scalia bases this theory—that courts are subject to certain irreducible and unavoidable constraints on their role—on the notion that courts traditionally perform "undemocratic" functions.[186] Other branches of government, by contrast, are democratic, representative, and majoritarian.[187] Courts protect minority interests against the tyranny of the majority.[188] Ideally, the executive and the legislative branches serve the majoritarian interests. Courts are not the proper arbiter of how the majority is best served.[189]

A universal grant of standing, even though an "acquiescence" of Congress to judicial intervention, forces courts to hear the claims of the majority because plaintiffs need not allege palpable injuries that

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[181] *Id.* Bice notes: "It is [easy] to see a relationship between injury in fact and prevention of judicial intrusion on the other branches." *Id.*

[182] *Id.*

[183] Scalia, *supra* note 76. It has been questioned whether subsequent decisions from Justice Scalia are entirely consistent with the theories advanced in this 1983 article. *See* Comment, *Justice Scalia: Standing, Environmental Law and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 165 (1988).

[184] Scalia, *supra* note 76, at 886. Scalia notes: "there is a limit upon even the power of Congress to convert generalized benefits into legal rights—and that is the limitation imposed by the so-called 'core' requirement of standing." *Id.*

[185] *Id.* at 893–94 n.58.

[186] *Id.* at 894.

[187] *Cf. id.* at 894–97 (noting that the judiciary is inherently undemocratic as compared to other two branches).

[188] *Id.* at 894 (courts protect individuals and minorities from impositions of the majority).

[189] *Id.* Scalia suggests that it is an undemocratic function for a court to prescribe "how the other two branches should function in order to serve the interest *of the majority itself.*" *Id.*

set themselves apart from the general public.[190] According to this view, moreover, the counter-majoritarian role of the federal judiciary is so inherent that standing doctrine should preclude the allowance of a claim by the majority-as-plaintiff even if a "concrete injury" is alleged, such as an injury to "all who breathe [the air]."[191] The democratic process that inheres in the executive and legislative branches, and not the undemocratic process that inheres in the courts, should resolve and protect the interests of "all-inclusive" classes of citizens.[192] In light of this theory, section 304 would be unconstitutional even if a majoritarian plaintiff suing under the provision is able to claim injury in fact.[193]

It would seem that Scalia's view may prevail over Bice's. Even before Justice Scalia's ascension to the Supreme Court, one commentator had noticed that the liberalization of the standing doctrine which occurred under the early Burger Court has been modified in favor of a more rigid adherence to the injury in fact standard.[194] The commentator notes that standing has once again become a "formidable obstacle to judicial review."[195]

C. The Supreme Court has Provided Confused Guidance as to Congress's Power to Expand Standing

Analyzing the future course of Supreme Court standing jurisprudence is of course an exercise in speculation. Evaluating the Court's historic position on the issue of Congress's power to expand standing is an equally speculative task. In light of Supreme Court precedents, the limits to which Congress may expand standing are "rather puzzling"[196] at best, and are consistent with the generally amorphous nature of standing, at worst.[197]

The Court's treatment of Congress's power to expand standing up to the limits of article III is relatively clear in cases such as *Glad-*

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[190] *Id.* at 895–96.

[191] *Id.* (citing *U.S. v. SCRAP*, 412 U.S. 669 (1973)).

[192] *Id.* at 896.

[193] *See id.* Scalia suggests that the plaintiff with a grievance held in common with and indistinguishable from "all who breathe" would "receive fair consideration in the normal political process." *Id.* Such a plaintiff presents a political question the type of which the Constitution delegates to representative fora. *See supra* notes 49–52 and accompanying text.

[194] Sedler, *supra* note 91, at 868.

[195] *Id.*

[196] C. WRIGHT, *supra* note 93, § 3531.13, at 67.

[197] Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

stone, Realtors v. Village of Bellwood.[198] In *Gladstone*, the Court ruled on the standing of various citizens to sue under the citizen suit provision of the Fair Housing Act of 1968.[199] This section authorized the initiation of civil suits in U.S. District Court, but did not define which citizens had standing to sue.[200]

The realtor petitioners in *Gladstone* claimed that, because respondents had not really been seeking housing, but rather had acted as "testers" to determine the amenability of petitioners to renting housing units to blacks, they lacked standing to sue under the Act.[201] The Court found that in the Fair Housing Act Congress had attempted to "expand standing to the full extent permitted by article III."[202]

The Court held that Congress "may" expand standing to a great degree, but that "[i]n no event . . . may Congress abrogate the article III minima" of injury in fact.[203] The *Gladstone* Court found support for its analysis in *Warth v. Seldin*,[204] in which the Court had held that Congress may grant a right of action to plaintiffs who would normally be barred by prudential considerations, but may not abrogate the article III injury in fact requirement.[205]

While the Court's treatment of article III in these cases is clear on its face, it becomes less clear[206] when considered in light of the fact that Congress may create rights, the violation of which is a legal injury.[207] If Congress may broaden standing by creating an infinite array of injuries, then the Court's adamant defense of the article III minima is swallowed by its equally adamant defense of Congress's right to create legally cognizable rights.[208] The Court, however, has

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[198] 441 U.S. 91 (1978).

[199] *Id.* at 94.

[200] 42 U.S.C. § 3612 (1982).

[201] *Gladstone*, 441 U.S. at 97.

[202] *Id.* at 100.

[203] *Id.*

[204] 422 U.S. 490 (1974).

[205] *Id.* at 501.

[206] It is also customary for the Court to "answer" the question of how far Congress may go to confer standing with language such as that found in Linda R.S. v. Richard D., 410 U.S. 614 (1972): "*at least in the absence* of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury." *Id.* at 617 (emphasis added). It is unclear whether this language permits an inference that the injury in fact requirement may be dispensed with when a statute expressly grants a right of action. If so, this reasoning is clearly at loggerheads with the court's forceful assertion that the injury in fact requirement cannot be legislated away. *See Gladstone*, 441 U.S. at 100.

[207] *See supra* notes 146–152 and accompanying text.

[208] *See* Braveman, *The Standing Doctrine: A Dialogue Between Court and Congress*, 2 CARDOZO L. REV. 31, 51 (1980) (Congress, in its role as fact finder is the arbiter of relevant

said that this broadening of injuries[209] is a "different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."[210] The solution to this seeming paradox might perhaps be found in the Court's consistent insistence that a plaintiff not have an injury "common to all members of the public."[211]

D. The General Grievance Barrier: Prudential or Constitutional?

The power of Congress to create standing in citizen suit provisions is directly related to the question of whether the commonly expressed standing rule barring litigants with "general" or "widely shared" grievances is constitutionally or prudentially grounded.[212] This, again, is an area enshrouded in the inherent indistinctness of the prudential and constitutional doctrines.[213]

In *Warth v. Seldin*,[214] Justice Powell wrote that the federal judiciary's reluctance to grant standing to a plaintiff with a "generalized grievance" exists "apart from [the] minimal constitutional mandate [of injury in fact]."[215] Powell perceived the generalized grievance rule as "closely related to Art. III concerns"[216] but essentially prudential.[217] In his opinion, he cites *United States v. Richardson*[218] and *Schlesinger v. Reservists Committee to Stop the War*[219] for the proposition that standing, in both its constitutional and prudential senses, is related to the "role of the courts in a democratic society."[220]

In *Richardson*, however, Chief Justice Burger seems to have concluded that the plaintiff with a generalized grievance is barred from court by a constitutional barrier.[221] The generalized grievance, according to Burger, is no substitute for "particular *concrete* in-

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constitutional values, and may conclude that a plaintiff need not show injury in order to satisfy the article III minima of case and controversy).

[209] *See supra* notes 82–91 and accompanying text.

[210] Sierra Club v. Morton, 405 U.S. 727, 738 (1971).

[211] *Ex Parte* Lévitt, 302 U.S. 633, 634 (1937) (per curiam).

[212] *See supra* notes 141–45 and accompanying text (Congress may not abolish the article III mimima). The question, stated differently, is whether the "general grievance" is not, as a matter of constitutional law, an "injury in fact".

[213] *See supra* note 32–34 and accompanying text.

[214] 422 U.S. 490 (1975).

[215] *Id.* at 499.

[216] *Id.* at 499–500.

[217] *Id.*

[218] 418 U.S. 166 (1973).

[219] 418 U.S. 208 (1973).

[220] *Warth*, 422 U.S. at 498.

[221] *Richardson*, 418 U.S. at 177–78.

jury."[222] Also, the generalized grievance, despite "the acceptance of new categories of judicially cognizable injury,"[223] is not sufficient to endow a plaintiff with the personal stake in the outcome of a controversy necessary for article III standing.[224]

In *Schlesinger v. Reservists Committee to Stop the War*,[225] decided the same day as *Richardson*, the Chief Justice further indicated that the general grievance does not always amount to injury in fact.[226] In *Reservists*, the general grievance is equated with the abstract grievance.[227] The Court has recently reaffirmed that "abstract" injuries are not a sufficient basis upon which to establish article III standing.[228]

Reservists' caveat that the general injury is in some instances abstract means that, contrary to Powell's dicta in *Warth*,[229] the barrier to plaintiffs with generalized grievances is not always prudential. Therefore, the power of Congress to grant standing to an organization that would otherwise fail to have standing[230] may, in instances where the organization seeks to vindicate a general grievance,[231] go beyond the limits of article III. The hazy nature of the boundary between the general and the abstract, and between the prudential and the constitutional, has accounted for much confusion in lower courts that have inquired into the standing of plaintiffs suing under citizen suit provisions.[232]

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[222] *Id.* at 177 (emphasis added).

[223] *Id.* at 179.

[224] *Id.* at 179–80.

[225] 418 U.S. 208 (1973).

[226] *Reservists*, 418 U.S. at 217.

[227] The "claimed nonobservance [of the incompatibility clause], standing alone, would adversely affect only the *generalized interest* of all citizens in constitutional governance, and that is an *abstract injury*." *Id.* (emphasis added) (footnote omitted).

[228] In Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1982), the Court noted: "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged . . . conduct and the injury . . . must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'"

[229] 422 U.S. 490 (1973). *See supra* notes 214–20 and accompanying text.

[230] *See supra* notes 93–124 and accompanying text.

[231] This is especially true when the statute, like section 304, authorizes suits against the government or an agency thereof. This is the challenge to government conduct which the *Reservists* Court deemed to be based on a general (and therefore abstract) injury. Reservists, 418 U.S. at 217.

[232] *See infra* notes 270–310 and accompanying text. The Supreme Court's ambiguity in this area has led to conflicting results in lower federal courts. One court has flatly asserted that Congress may grant standing to whom it pleases, without consideration of the injury in fact requirement. Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809, 814 n.26 (D.C. Cir. 1975) (section 304 suit to enforce D.C. air quality standards against municipal incinerator). Other courts have explicitly denied Congress the right to

E. Summary

Congress's power to extend standing to new classes of plaintiffs is extensive. That power, however, is limited to the abrogation of prudential barriers to a plaintiff's standing.[233] Although the Supreme Court's position on this issue has been inconsistent and confusing,[234] it is clear that Congress may not legislatively discard the injury in fact requirement.[235]

Congress may create new legal rights, the invasion of which creates standing.[236] The validity of section 304's universal standing grant hinges, then, on whether the provision can be construed as creating a cognizable legal right or merely as creating a mechanism by which plaintiffs may gain access to federal court to vent their dissatisfaction with enforcement efforts. The answer to this question cannot be found without reference to the legislative history of the Clean Air Act.

V. THE LEGISLATIVE HISTORY OF SECTION 304

Having set forth the nature of Congress's ability to grant standing, it is logical to next consider Congress's intentions in enacting section 304 of the Clean Air Act. It is well established that "[t]he starting point for interpreting a statute is the language of the statute it-

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declare everyone an eligible plaintiff. *E.g.*, Sierra Club v. SCM Corp., 747 F.2d 99, 103–05 (2d Cir. 1984) (questions constitutionality of intent to confer standing on groups such as Sierra Club); Safir v. Dole, 718 F.2d 475, 479 (D.C. Cir. 1983) (Congress may not confer standing to sue when the case and controversy requirements are not met). Some courts, following the example of the Supreme Court, have wavered. *E.g.*, RITE—Research Improves the Environment, Inc. v. Costle, 650 F.2d 1312, 1319 (5th Cir. 1981) (in context of Clean Water Act citizen suit provision, existence of provision makes plaintiff's claim to standing "even stronger"). This ambiguity is especially reflected in section 304 suits in which the court inquires into a plaintiff's standing even though the statute permits "any person" to sue, without considering whether section 304 renders this inquiry unnecessary. *E.g.*, State of New York v. Thomas, 613 F. Supp. 1472, 1480 (D.D.C. 1985) (denying section 304 standing for the assertion of a general grievance), *rev'd on other grounds*, 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987); Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 654 (7th Cir. 1986) (questions and then grants citizen group standing in section 304 suit even though provision seems to render such an inquiry unnecessary); Sierra Club v. Ruckleshaus, 602 F. Supp. 892, 896–97 (N.D. Cal. 1984) (inquires into organization's standing in section 304 suit).

[233] *See supra* notes 202–05 and accompanying text.

[234] *See supra* notes 197–226 and accompanying text.

[235] *See supra* notes 202–05 and accompanying text. The Supreme Court's position on this point is well-settled. The debate represented by the Bice and Scalia views is centered not around the viability of the injury in fact requirement as the test of constitutional standing, but is concerned instead with the question of whether the injury in fact requirement is a proper and indispensable corollary to the case and controversy clause.

[236] *See supra* notes 146–56 and accompanying text.

self."[237] The language of section 304, however, reveals only an apparent attempt to confer standing to sue under the Act to "anyone."[238] A meaningful attempt at statutory interpretation in this instance requires viewing section 304 from the perspective of those who drafted and enacted it.

It is not helpful to engage in a "comparative analysis" of section 304 by setting it against citizen suit provisions that embody standing grants more in accord with orthodox constitutional standing doctrine.[239] Most of the citizen suit provisions in federal environmental statutes were passed after the ruling in *Sierra Club v. Morton*,[240] which provided Congress with more guidance as to the validity of citizen standing.[241] Instead, because section 304 was passed before the decision in *Sierra*, it is necessary to rely almost exclusively on the legislative history of section 304. Unfortunately, the legislative history of the CAA amendments of 1970 sheds little light on Congress's uncharacteristic use of the words "any person" in section 304.

Section 304 was passed in 1970 as part of wholesale revisions in existing air pollution control legislation.[242] The broad purpose of the revised statute was to effectuate a better mechanism for addressing the nation's air pollution problems.[243] Congress determined that "[a]ir pollution continues to be a threat to the health and well-being of the American people."[244] One reason for the new standing provision was the perceived failure of the National Air Pollution Control Administration[245] to adequately enforce existing pollution legislation.[246]

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[237] *See, e.g.*, Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

[238] The statute, read literally, grants standing to plaintiffs regardless of their interest in the dispute: "Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf. . . ." 42 U.S.C. § 7604(a). Subsection (b) introduces no limitation on standing. *Id.* § 7604(b).

[239] *E.g.*, Clean Water Act Amendments of 1972, § 505, 33 U.S.C. § 1365 (1982) [hereinafter section 505]. For additional discussion of the Clean Water Act's citizen suit provision see *infra* notes 324–25 and accompanying text.

[240] 405 U.S. 727 (1971).

[241] Miller, *supra* note 93, at 10315–16.

[242] The new act replaced the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

[243] H.R. REP. No. 1146, 91st Cong., 2d Sess. 7, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5356.

[244] 1970 U.S. CODE CONG. & ADMIN. NEWS 5360.

[245] The National Air Pollution Control Administration was EPA's predecessor agency in the air pollution regulation field.

[246] 1970 U.S. CODE CONG. & ADMIN. NEWS 5360.

There is some indication in the legislative history of section 304 that Congress felt that citizens should feel unconstrained to bring enforcement actions in special situations, such as when a violator of an emission standard fails to comply with an EPA enforcement order.[247] The perceived inadequacies of federal enforcement and their relation to the need for citizen suits are echoed in a Senate Report: "[g]overnment initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."[248]

One witness before a Senate committee hearing on the citizen suit provision stated that it is important to involve citizens in policy-setting.[249] Another witness stated that for a number of reasons it is not feasible to rely solely on government agencies to enforce the air pollution laws.[250] This witness characterized the citizen suit provision as a "private attorneys general provision."[251] The witness viewed the provision as a way to ensure the participation of "frustrated"[252] citizens in the enforcement process.[253]

The House of Representatives did not suggest inclusion of a citizen suit provision in its recommended 1970 Amendments to CAA.[254] The Senate version would have authorized suits against violators and government agencies, subject only to certain notice requirements, but without any sort of limitation on standing.[255]

The conference bill would have limited citizen standing "to the extent permitted by the Constitution."[256] It is unclear why this

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[247] *See generally* 116 CONG. REC. 33,103–05 (1970) (Senate debate focused on beneficial effect of liberalized standing on enforcement process).

[248] S. REP. NO. 1196, 91st Cong., 2d Sess. 36–37 (1970).

[249] *The Clean Air Act Amendments of 1970: Hearings on S.3466 Before the Subcommittee on Air and Water Pollution*, 91st Cong., 2d Sess. 619–21 (1971) [hereinafter *Hearings*] (statement of Rep. Abner Mikva, D. Ill.).

[250] *Id.* at 622 (statement of James Moorman, esq., Washington D.C.).

[251] *Id.*

[252] *Id.* It is interesting to note the use of the word "frustrating" rather than injured. *Id.*

[253] *Id.*

[254] H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. 55, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5388.

[255] *Id.* The Senate version is the essence of the bill eventually enacted. The divergence of views between the House and Senate is probably related not to any standing issue (*see infra* notes 259–66 and accompanying text) but rather to conflicting perceptions of the need to buttress federal enforcement efforts.

[256] H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. at 56. This phrase probably refers to Flast v. Cohen, 392 U.S. 83 (1967), and the standing doctrine announced therein.

language was not included in the enacted bill.[257] It is clear, however, that the language suggested by the conferees would have cured any constitutional deficiencies in section 304. Instead, the Senate version was finally enacted, incorporating the controversial "any person" language.[258]

Congress did not directly address the possible constitutional implications of section 304's universal standing grant.[259] There is no evidence that Congress believed that the status of the plaintiff would affect the justiciability of the lawsuit.[260] Instead, much of the debate over section 304 centered around the tangential issue of the burden the provision might place on the federal judiciary.[261]

One witness before the Senate Subcommittee on Air and Water Pollution came close to addressing the universal standing grant in constitutional and not merely policy terms.[262] Private plaintiffs, according to this witness, find it "frequently impossible"[263] to show a justiciable controversy in air pollution cases.[264]

This does not necessarily indicate, however, that in enacting section 304 Congress intended to circumvent traditional injury in fact requirements. By addressing the issue of "justiciability," the hearings were dealing, if only tangentially, with the constitutionality of the standing grant.[265] It is therefore conceivable that Congress was exercising its power to create a legally cognizable right, the invasion

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[257] In light of the ground swell in favor of the heightened citizen participation in the enforcement process (*see supra* notes 242–50 and accompanying text) and because little consideration was paid to the constitutional implications of a universal grant (*see infra* notes 259–66 and accompanying text) it is not unlikely that the conferee's language was dismissed because it seemed only to undermine the Act's utility as an aid to official enforcement.

[258] *See* 42 U.S.C. § 7604(a).

[259] The record of the floor debate in the Senate reveals that there were five objections raised to § 304: (1) the measure was of a type with which Senators were unfamiliar; (2) the provision may encourage the bringing of frivolous suits; (3) the provision would unduly burden federal courts; (4) the provision implied agency (EPA) incompetence; and (5) federal courts lack expertise in environmental matters. 116 CONG. REC. 33,103 (1970). In contrast to congressional expectations, the Chairman of Health Education and Welfare, the agency initially responsible for enforcement of the Act, voiced concern that citizen suits would impair the statutory scheme by "distorting [agency] enforcement priorities . . . ." 116 CONG. REC. 42,390.

[260] *See* LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, vol. I, ch. 3, 273–81 (1974).

[261] *See, e.g., id.* at 274–79.

[262] *Hearings, supra* note 249, at 818 (statement of Stanley Preiser, attorney, Charleston, W.Va.).

[263] *Id.*

[264] *Id.* It is interesting to note that Senator Muskie did not pursue the implication that the provision circumvented the justiciability problem. *Id.*

[265] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975) (in constitutional terms, standing "imports" justiciability).

of which creates standing.[266] Alternatively, and perhaps more reasonably,[267] it is inferrable that Congress merely intended to create a class of private attorneys general to aid in the enforcement of the statute.[268] A congressional intent to extend standing in a manner consistent with article III standing doctrine is not readily discernible in the legislative history. It has been left to the courts to fill the gap between section 304's language and the article III injury in fact requirement.[269]

VI. STANDING TO SUE IN SUITS UNDER CLEAN AIR ACT AND CLEAN WATER ACT CITIZEN SUIT PROVISIONS: CIRCUITS CONFLICT ON THE NECESSITY OF INJURY IN FACT

Despite the universal grant of standing embodied in section 304 of the Clean Air Act, some courts have denied standing to certain plaintiffs bringing citizen suits under the Clean Air Act.[270] Some of the cases resolved on standing grounds have involved actions brought under section 304.[271] Others have been decided in the context of suits brought under section 307 of the Act,[272] a section that

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[266] *See supra* notes 146–56 and accompanying text. *See also* C. WRIGHT, *supra* note 93, § 3531.13, at 73 (notes that question of whether Congress broadened categories of legal rights in passage of statute is one of legislative intent).

[267] Because the citizen suit provision was addressed primarily in terms of its beneficial effect on federal enforcement (*see supra* notes 247–62 and accompanying text) this interpretation is more reasonable.

[268] A congressional intent to confer standing on a class of private attorneys general is not *per se* valid in article III terms. See *infra* notes 311–23 and accompanying text for a discussion of Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972).

[269] *See, e.g.*, Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975) (section 304 represents a congressional desire to widen citizen access to courts, but not to fling courts' doors "wide open").

[270] *See infra* notes 278–98 and accompanying text.

[271] *See infra* notes 300–05 and accompanying text.

[272] Clean Air Act of 1970, § 307, 42 U.S.C. § 7607 (1982) [*hereinafter* Section 307]. This provision would likely be invoked to challenge administrative decisions of the type discussed at *supra* notes 6–7 and accompanying text. Section 307(b)(1) provides:

> (b)Judicial Review
>
> (1) A petition for review of an action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of

for the purposes of this Comment is treated as embodying the same policy considerations and embracing the same cases as does section 304.[273]

A number of cases have been decided in suits brought under section 505, the citizen suit provision of the Clean Water Act.[274] The Clean Water Act citizen suit provision is substantially similar and parallel to section 304, and cases decided under section 505 are therefore instructive as to the validity of section 304.[275]

> Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

Id., 42 U.S.C. § 7607(b)(1).

[273] This position is by no means unanimous among circuit courts. *See, e.g.*, Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1335–36 (1st Cir. 1973) (a section 307 petition for review is regarded as an action under section 304(a)); *see also* Roosevelt Campobello International Park Commission v. EPA, 711 F.2d 431, 434 (1st Cir. 1983). *Roosevelt Campobello* involved a petition for review under the Clean Water Act, which the court deemed pursuant to that statute's citizen suit provision. 711 F.2d at 434. Also, in reference to the CAA, "any citizen" standing of section 304(a) deemed applicable to both sections 304 and 307. *Id.*; *but see* Natural Resources Defense Council, Inc. v. EPA, 512 F.2d 1351, 1355 (D.C. Cir. 1975) (concludes that sections 304 and 307 contemplate distinct types of actions). The First Circuit believes that its analysis in the 1973 *NRDC* case was confirmed by Congress' passage of the Clean Air Act amendments of 1977, in which § 305(f) expressly adopts a fee award provision with result that no substantive distinctions can be drawn between sections 304 and 307 for the purpose of denying § 307 petitioners attorney's fees, as the D.C. Circuit had done. *Roosevelt Campobello*, 711 F.2d at 436. One commentator has labelled the First Circuit's approach "highly creative" but ultimately unconvincing. CURRIE, *supra* note 91, § 9.18. In this view, section 304's antecedents in the common law writ of mandamus substantively distinguish it from section 307. *Id.*

[274] Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1365 (1982 & Supp. IV 1986).

[275] There is much case law supporting an analogy between § 304 of the CAA and § 505 of the CWA. *See, e.g.*, Middlesex County Sewerage Authority v. National Sea Clammers Ass., 453 U.S. 1, 17–18 n.27 (1981) (CWA provision "expressly modelled" after CAA provision); Gwaltney v. Chesapeake Bay Found., 108 S. Ct. 376, 383–84 (1987) (explicit connection

A. NRDC I, NRDC II *and* Mountain States*: Standing Denied in Section 307 Suits*

Three courts have denied standing to plaintiffs suing under section 307 of the Clean Air Act.[276] Each court was faced with the issue of whether "any person" may file a section 307 suit.[277] The courts were also required to decide if standing to sue under section 307 was defined by the "any person" language of section 304, or by the "adversely affected or aggrieved" language of the Administrative Procedure Act's analogue to section 307.[278] The holdings in each case demonstrate a reluctance to permit universal standing under the Clean Air Act, despite the likelihood that sections 304 and 307 contemplate the same types of cases.[279] Dicta in all three cases suggest that if each court were called upon to rule directly on the plaintiff's standing in a section 304 suit,[280] the result would not have been any different.[281]

In *Natural Resources Defense Council v. EPA*,[282] Judge Breitenstein noted that section 307, like section 304, does not contain the familiar "adversely affected or aggrieved" language which limits standing in suits brought under the APA.[283] He refused, however, to rely on standing as defined in section 304.[284] Instead Judge Breitenstein chose to deny the NRDC standing to challenge the EPA's

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between the two provisions); Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 701 (D.C. Cir. 1975) (citizen suit provisions alike in most respects save wording of standing grant); *Roosevelt Campobello*, 711 F.2d at 434 (two provisions "almost identically worded" and "parallel").

[276] Natural Resources Defense Council, Inc. v. EPA, 481 F.2d 116 (10th Cir. 1973); Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905 (9th Cir. 1974); Mountain States Legal Found. v. Costle, 630 F.2d 754 (10th Cir. 1980).

[277] Section 307, *supra* note 272. This section does not set forth the requirements for standing to file such a petition. *Id.*

[278] Administrative Procedure Act, 5 U.S.C. § 702 (1982). This section provides for judicial review of a type similar to that provided for in section 307. *Id.* However, the APA limits the right to file a petition for review to those persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." *Id.*

[279] *See supra* note 273.

[280] If, in other words, an action to compel the Administrator to perform a non-discretionary act, rather than a petition for review of the validity of the Administrator's actions, had been filed.

[281] This, in turn, suggests an unwillingness to hear challenges to government conduct in any instance where the plaintiff has not been injured in fact.

[282] 481 F.2d 116 (10th Cir. 1973).

[283] *Id.* at 118–19 (noting that judicial review provision does not provide any guidance as to who may file such a petition).

[284] *Id.* at 120.

decision to approve the air quality implementation plans submitted by three western states.[285] The court found "no allegation of harm to any individual, to any organization, or to any member of any organization."[286] The court provided the following obiter discussion of the desirability of standing absent injury in fact:

> From a practical standpoint, it seems unreasonable to interpret [section 307] as expressing a congressional intent to permit a New York subway rider to challenge in the . . . Tenth Circuit actions of the Administrator affecting the Four Corners area . . . . If such be the intent of Congress, let it say so explicitly . . . . We have [in section 307] a blanket authorization, nothing more . . . . We believe that any congressional authorization of suits by private attorney generals [sic] must be unequivocal and appropriate. We further believe that under the doctrine of separation of powers the question of the validity and extent [of] congressional authorization is for determination by the judicial branch.[287]

This can properly be interpreted as a condemnation of universal standing to bring suits challenging governmental conduct.

The Ninth Circuit later reached a similar result in a section 307 case, again called *National Resources Defense Council, Inc. v. EPA*.[288] As in the first *NRDC* case, the *NRDC II* court addressed the practicability of a statute expressly abrogating the injury in fact standing requirement:

> The court [in *NRDC I*] refused to read into Section 307(b)(1) of the Act . . . a standing requirement more liberal than that applied by the Supreme Court in other cases in which standing to sue was predicated upon a specific statutory authorization. We agree with this construction . . . . Given the inexorable interrelationship between standing and the constitutional prerequisites of federal jurisdiction under Article III . . . we are unable to accept the NRDC's contention that the statute could confer standing without a prior showing of "injury in fact."[289]

Again, as in *NRDC I*, the court's dicta rejects the notion that universal standing under any provision, whether express or implied, is valid as a matter of constitutional law.[290]

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[285] *Id.* at 117.

[286] *Id.* at 118.

[287] *Id.* at 120.

[288] 507 F.2d 905 (9th Cir. 1974).

[289] *Id.* at 909 (citations omitted).

[290] The court's analysis is consistent with the Supreme Court's view of Congress's power to expand standing. *See supra* notes 196–224 and accompanying text.

The *NRDC II* court concluded that the environmental group lacked standing to challenge the EPA's approval of Arizona's proposed air quality implementation plan.[291] Specifically, the court saw no evidence that the NRDC, as a corporation, suffered an injury to its "corporate health" as a result of breathing Arizona's air.[292] Because the NRDC was an "artificial entity separate and apart from its membership,"[293] the requisite elements of organizational standing were found lacking.[294]

In *Mountain States Legal Foundation, Inc. v. Costle*[295] the Tenth Circuit was called upon to rule on the standing of an environmental organization to bring a section 307 suit against the EPA for issuing approval of the air quality implementation program submitted by Colorado.[296] The court held that Mountain States did not have standing to sue on its own behalf because it failed to show that implementation of Colorado's proposal would impair its activities as an organization.[297] Citing *NRDC I* for support, the *Mountain States* court ruled that, notwithstanding section 307's apparently unlimited standing definition, the "adversely affected or aggrieved" language of the APA controlled.[298] The court further ruled that article III requires, in all events, that a plaintiff show injury in fact.[299]

B. Metropolitan Washington: *Section 304 Upheld as a Valid Grant of Universal Standing*

One case decided by the D.C. Circuit Court of Appeals stands alone in its support of section 304 as a valid grant of universal standing: *Metropolitan Washington Coalition for Clean Air v. District of Columbia.*[300] In *Metropolitan Washington* the court ruled on the standing of a citizens group to bring a section 304 suit challenging the operation of a municipally-owned incinerator that was allegedly in violation of the District's promulgated emissions standards.[301]

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[291] 507 F.2d at 910.
[292] *Id.*
[293] *Id.* at 910 n.6.
[294] *Id.*
[295] 630 F.2d 754 (10th Cir. 1980).
[296] *Id.* at 757.
[297] *Id.* at 767.
[298] *Id.*
[299] *Id.*
[300] 511 F.2d 809 (D.C. Cir. 1975).
[301] *Id.* at 810–11.

The court held that in the context of a CAA citizen suit, "[t]he standing argument presents no barrier to plaintiffs' action."[302] The court heralded the citizen suit provision as a means of encouraging citizen participation in pollution control enforcement "in the face of official inaction."[303] The *Metropolitan Washington* court went on to hold that Congress may grant standing to whomever it wishes,[304] thus overruling the trial court's determination that section 304 is not valid as a grant of universal standing.[305]

The circuit court's holding, though facially inconsistent with the Supreme Court's view of Congress's power to expand standing,[306] was made in the context of a discrete, observable violation of standards promulgated under the Act.[307] The existence of a justiciable controversy in this instance could not be challenged.[308] However, the court's language unequivocally supports section 304 as a valid grant of universal standing in any context, whether the challenged action be that of the EPA administrator or of an industrial violator.[309]

The *Metropolitan Washington* court seems to have focused on the congressional intent underlying section 304—an intent to confer standing on an unlimited class of private attorneys general to "invoke the judicial process and assert the public interest."[310] Some support for the proposition that a congressional intent to provide citizen standing in the furtherance of a statutory scheme is a valid basis for

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[302] *Id.* at 814.

[303] *Id.* This analysis squares with Congress' purpose for enacting section 304. *See supra* notes 248–262 and accompanying text. This rationale has been cited in support of universal standing in CAA citizen suits in at least one other case. *See* Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1337 (1st Cir. 1973) (standing in suits brought under sections 304 or 307 should be allowed to plaintiffs who are not "aggrieved" in light of fact that Congress felt such suits would be invaluable mechanism for enforcement of CAA).

[304] *Metropolitan Washington*, 511 F.2d at 814 n.26.

[305] Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F. Supp. 1089, 1092 (D.D.C. 1974), *rev'd*, 511 F.2d 809 (D.C. Cir. 1975).

[306] *See supra* notes 196–232 and accompanying text.

[307] *Metropolitan Washington*, 511 F.2d at 810 (appellants charged that municipally owned incinerator was not being operated in accordance with District of Columbia's air quality implementation plan).

[308] *See supra* notes 33–37 and accompanying text (existence of otherwise justiciable controversy suggests prudential barrier is at issue).

[309] *Metropolitan Washington*, 511 F.2d at 814 ("Under the Clean Air Act's citizen suit provision, the general requirements for standing have been relaxed to permit suits by 'any citizen.'") Hence, it seems that the court would not have credited an argument that the act unconstitutionally opens the court's doors to "political questions." *See supra* notes 49–52 and accompanying text. The court does, however, indicate that it is consciously making this statement in the context of an "otherwise" justiciable controversy. 511 F.2d at 814 n.26.

[310] *Metropolitan Washington*, 511 F.2d at 814; *accord* Duquesne Light Company v. EPA, 698 F.2d 456, 468 (D.C. Cir. 1983) (citizens welcome to vindicate their environmental interests).

a liberal standing analysis can be found in the Supreme Court's decision in *Trafficante v. Metropolitan Life Insurance Co.*[311]

In *Trafficante*, the Supreme Court was asked to rule on the standing of two white plaintiffs, residents of an apartment complex from which black tenants had allegedly been excluded, under the Civil Rights Act of 1968.[312] The plaintiffs claimed that they had been denied the privileges and advantages that attach to life in an integrated community.[313]

The *Trafficante* Court endeavored to determine whether the plaintiffs were injured within the meaning of the Civil Rights Act.[314] The Court looked at the legislative history of the Act and determined that Congress felt that even those who were not direct victims suffered from racial discrimination.[315] The Court's inquiry, however, was not whether these plaintiffs had suffered injury in fact, for they had plainly alleged facts sufficient for standing in the article III sense.[316]

Instead the *Trafficante* inquiry was confined to the question of whether this statute authorized these plaintiffs to bring suit.[317] The Court supported its affirmative conclusion to this question with reference to the fact that the Act delegated no enforcement power to the Department of Housing and Urban Development.[318] The government's inability to adequately enforce the statute led the Court to conclude that "the main generating force must be private suits in which . . . the complainants act not only in their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'"[319] This perceived need for the active participation of citizens in the enforcement of the Act persuaded the Court to give a "generous construction" to standing under the Act's citizen suit provision.[320]

While the *Trafficante* decision is careful to permit this broad construction only within the parameters of article III,[321] it does intimate

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[311] 409 U.S. 205 (1972).

[312] *Id.* at 208 (suit was brought under section 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a)).

[313] *Id.*

[314] *Id.* at 210–12.

[315] *Id.* at 210.

[316] *Id.* at 211.

[317] *Id.* at 210–12.

[318] *Id.* at 210.

[319] *Id.* at 211.

[320] *Id.* at 212.

[321] *See id.* at 211. The Court noted that because the plaintiff has alleged "[i]njury . . . with

that the resolution of standing questions may be influenced by a congressional intent to involve citizens in the enforcement of an important statutory scheme.[322] Support for this proposition in other cases is limited.[323]

C. Standing Under Section 505 of the Clean Water Act: "Clearer" Language Does Not Preempt the Standing Question

When Congress passed the Federal Water Pollution Control Act[324] in 1972, it included a citizen suit provision[325] patterned after that found in the CAA.[326] The two sections, section 505 of the Clean Water Act ("CWA") and section 304 of the CAA, are alike in most respects, except with regard to standing.[327]

The legislative history of the passage of section 505 is instructive as to how Congress reacted in the wake of the standing doctrine enunciated in *Sierra v. Morton*.[328] Section 505, in accordance with the *Sierra* holding, limits standing to those "persons having an interest which is or may be adversely affected."[329]

The Senate had proposed that section 505 enable "anyone" to sue.[330] The House took a more restricted view, one well within

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particularity . . . there is not present the abstract question problem raising problems under Art. III of the Constitution." *Id.*

[322] *Id.* at 210–12.

[323] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1971), in which the Court seemed to place the role of the private attorney general outside the reasoning of the injury in fact requirement. *Id.* at 737–38. The private attorney general, according to the *Sierra* Court, must first meet the threshold standing test of injury in fact. *Id.* Once judicial review is "properly invoked," the plaintiff, as private attorney general, may proceed as a "representative of the public interest." *Id.* at 737. *But see* McClure v. Carter, 513 F. Supp. 265, 269 (D. Idaho), *aff'd mem. sub nom.* McClure v. Reagan, 454 U.S. 1025 (1981) (intimates that it may be possible for injury in fact requirement to be dispensed when statute permits actions enforcing the public interest).

[324] 33 U.S.C. §§ 1251–1376 (1982 & Supp. II 1984).

[325] *Id.* § 1365 [section 505].

[326] 42 U.S.C. § 7604(a). *See also supra* note 275.

[327] *See* Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 701 n.47 (D.C. Cir. 1975) (citizen suit provisions in CAA and CWA alike in most respects, save in respect to standing grants).

[328] *See* Miller, *supra* note 93, at 10,316; *see also* Sierra Club v. SCM Corp., 747 F.2d 99, 104 (2d Cir. 1984) (legislative history of Clean Water Act citizen suit provision shows that Congress intended these provisions to confer standing in compliance with the principles set out in then-recent Supreme Court decision of *Sierra v. Morton*).

[329] 33 U.S.C. § 1365(g) [hereinafter Section 505(g)].

[330] S. CONF. REP. NO. 1263, 92d Cong., 2d Sess. 145, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3823.

constitutional standing limits, by suggesting that suits be limited to those persons "directly affected" by violations of the Act.[331]

The conferees arrived at a result that was consistent with *Sierra*'s holding[332] and that struck a compromise between the Senate's desire to seek public enforcement of the Act and the House's desire to limit suits under the Act to those unequivocally injured.[333] The Conference Committee's proposal, which became the enacted bill, limited standing to those persons who have suffered injury in fact.[334]

Despite the pains taken while drafting section 505 to avoid the constitutional problems inherent in section 304, the section has been subjected to an interpretation denying standing to a party who seemed to be aggrieved within the plain meaning of the Act.[335] In this case, Judge Bork of the D.C. Circuit Court of Appeals denied standing to a corporate intervenor in a section 505 suit.[336] In Judge Bork's view, the corporation could not conceivably suffer an aesthetic injury within the meaning of the Act.[337] This holding was issued despite the fact that the corporation seemed eligible for standing under the wording of the CWA, and, moreover, seemed to have met the injury in fact test.[338]

Several years earlier, in an opinion by Judge (now Justice) Kennedy, the Ninth Circuit Court of Appeals ruled on the standing of a citizen to bring a section 505 suit challenging the expenditure of EPA grant money for projects allegedly unrelated to water pollution.[339] The court interpreted the legislative history of section 505 to indicate that the section was "intended to grant standing to a nationwide

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[331] *Id.*

[332] *See* LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Vol. I, ch. III, 221 (1973). The colloquy between Senators Bayh and Muskie reveals a belief that the extension of judicially cognizable injuries to include aesthetic interests announced in *Sierra* (*see supra* notes 82–83 and accompanying text) made a mere interest in a problem sufficient to confer standing. *Id.* This is an apparent misreading of *Sierra*, which forcefully holds that a mere interest in a problem is not tantamount to injury in fact. Sierra v. Morton, 405 U.S. 727, 739 (1971).

[333] *See* H.R. CONF. REP. NO. 1465, 92d Cong., 2d Sess. 145–46.

[334] Section 505(g), *supra* note 329.

[335] Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Auth., 765 F.2d 1169 (D.C. Cir. 1985).

[336] *Id.* at 1173.

[337] *Id.* (corporate plaintiff held not capable of suffering from aesthetic injury resulting from seepage of foul-smelling, contaminated water into basement of corporation's mall).

[338] Section 505, *supra* note 325. This section is preceded by a general definitional section, 33 U.S.C. § 1362, which defines "person" as including corporations. *Id.* § 1362(5).

[339] Gonzales v. Gorsuch, 688 F.2d 1263, 1265 (9th Cir. 1982).

class, comprised of citizens who alleged an interest in clean water."[340] Thus, the court viewed section 505 as giving "*every* citizen a litigable interest" in enforcement of the CWA.[341] Although the court dismissed the case on standing grounds because the relief requested would not redress the injuries claimed,[342] its reading of section 505 may take the provision well *outside* constitutional limits.[343] Judge Bork's ruling[344] limits standing under section 505 to something less than the constitutionally permissible extent.

VII. ANALYSIS

The constitutional validity of Congress's creation of universal standing in section 304 of the Clean Air Act is of considerable doubt. The questionable validity of section 304 applies as well to other citizen suit provisions containing univeral standing grants.[345] In light of both the importance of citizen suits in the enforcement of federal environmental legislation[346] and of the revitalization of standing as a barrier to access to the federal courts,[347] the question of whether grants of universal standing guarantee the participation of interested citizen groups in environmental litigation merits consideration.

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[340] *Id.* at 1266.

[341] *Id.* (emphasis added). This is a surprisingly broad reading of Congress' power to create judicially cognizable rights. *See supra* notes 146–56 and accompanying text.

[342] *Gonzales*, 688 F.2d at 1267. This means of dismissing the case on standing grounds may have been a way for Judge Kennedy to label the cause a "political question." *See supra* notes 49–52 and accompanying text. He found that the challenged expenditure was a wrong that could not be redressed by any "judicial decree properly issued." 688 F.2d at 1268. Because no evidence was adduced that more grants were forthcoming, the court was not in a position to award any meaningful prospective relief. *Id.*

[343] Sierra Club v. Morton, 405 U.S. 727, 739 (1971). The proposition that standing is granted in § 505 to all citizens with an "interest" in water pollution law enforcement conflicts with the *Sierra* Court's insistence that a "mere interest" in a problem is not a sufficient basis for standing. *Id.*

[344] *See supra* note 337 and accompanying text.

[345] *See supra* note 11.

[346] *See supra* note 93.

[347] *See supra* notes 194–95 and accompanying text. Older cases, including *SCRAP*, 412 U.S. 669 (1972), intimate that the standing barrier may become more formidable at any stage subsequent to the filing of a complaint. *See, e.g., id.* at 689 n.15 (if, upon consideration of motion for summary judgment, it became clear that plaintiff's allegations were a "sham . . . rais[ing] no genuine issue fact" then the case would properly be dismissed for want of injury to plaintiff). For recent affirmation of this proposition, *see* Gwaltney of Smithfield v. Chesapeake Bay Found., 108 S. Ct. 376, 385 (1987). *See also* National Wildlife Fed'n. v. Burford, 835 F.2d 305, 811–12 (D.C. Cir. 1987) (degree of specificity required in plaintiff's allegation of injury increases proportionally as case moves from motion to dismiss to motion for summary judgment); *accord* Wilderness Society v. Griles, 824 F.2d 4, 16 (D.C. Cir. 1987).

It is undoubtedly a legitimate exercise of its legislative power for Congress to create rights and extend standing to new classes of plaintiffs.[348] There is a limit, however, to Congress's ability to create rights, the invasion of which constitutes the injury necessary for a plaintiff to have standing. This limit, though as inchoately drawn as the standing doctrine itself, is discernible in the nature of a "general" or "abstract" injury.[349]

The extent of Congress's power to grant standing is often characterized as limited to the abrogation of "prudential" barriers to standing.[350] Normally, prudential considerations render "general grievances" an inadequate basis upon which to predicate standing.[351] However, because the boundary between the prudential and the constitutional is inherently so indistinct,[352] this oft-stated rule of limitation is of little utility in determining the validity of express statutory standing grants.

Justice Scalia has written that there is a limit to "the power of Congress to convert generalized benefits into legal rights . . . ."[353] The theme of "generalized benefit," "generalized grievance," and "abstract" injury is often heard in reference to lawsuits challenging the conduct of government.[354] There are few rights more generalized in a democracy than the right to legitimate governmental conduct. But, the invasion of that right is, in some instances, no substitute for the "particular concrete injury"[355] necessary for article III standing.[356]

It is tempting to assert that section 304 of the Clean Air Act is facially invalid because it purports to grant standing to parties who are not injured in fact.[357] This facile answer to the question of section 304's validity overlooks Congress's power to create legally cognizable rights.[358] The question of whether Congress intended in section 304

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[348] *See supra* notes 146–56 and accompanying text.

[349] *See supra* notes 212–32 and accompanying text.

[350] *See supra* notes 139–45 and accompanying text.

[351] *See supra* notes 214–20 and accompanying text.

[352] *See supra* notes 32–56 and accompanying text.

[353] Scalia, *supra* note 76, at 886.

[354] *See, e.g.*, Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 217 (1973) (challenge to enlistment of members of Congress in armed services reserves based on a general and abstract grievance).

[355] United States v. Richardson, 418 U.S. 166, 177 (1973).

[356] *See supra* notes 57–81 and accompanying text.

[357] See *supra* note 144 and accompanying text, noting that Congress may not abrogate the article III injury in fact requirement.

[358] *See supra* notes 146–56 and accompanying text.

to create a legally cognizable right can be resolved only with reference to the legislative history of the Clean Air Act.[359] The legislative history of section 304 reveals a general intent to engage citizens in the enforcement of the Act.[360] This general intent can be broken down into three specific objectives.

One objective was to "goad"[361] or "motivate"[362] agencies to enforce the Act more diligently. This rationale for citizen suits—the desire to motivate government agencies—would probably not withstand an argument that it serves a political function and is therefore not a proper reason for invoking judicial intervention.[363]

The second objective was that of involving citizens in policy-setting.[364] This, too, although a proper goal of citizen participation in the formulation and implementation of regulatory schemes,[365] arguably serves a political function.[366] The supervision of citizen involvement in policy-setting is a legislative or administrative, not judicial, task.[367]

The third objective was to invoke the aid of citizens, as private attorneys general, in the enforcement of the Act against violators.[368] This objective, formulated in light of the perceived inadequacy of agency enforcement mechanisms,[369] is, as a matter of constitutional law, invalid as a basis for citizen standing if it enables what are purely *qui tam* actions.[370] Provided, however, that each plaintiff bringing suit under the Act meets the injury in fact requirement, reliance on citizens to assist in enforcement is constitutionally per-

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[359] *See supra* notes 237–69 and accompanying text.

[360] *See supra* notes 247–48 and accompanying text.

[361] Miller, *supra* note 93, at 10310.

[362] *See supra* note 248 and accompanying text.

[363] *See supra* notes 49–52 and accompanying text.

[364] *See supra* note 249 and accompanying text.

[365] The APA provides for public participation in agency rulemaking. 5 U.S.C. § 553(c) provides that agencies "shall give interested persons an opportunity to participate in . . . rulemaking . . . ."

[366] *See supra* notes 49–52 and accompanying text.

[367] *Id.* The natural extension of this argument is that citizen suits against an agency bring into a judicial forum issues that the APA provides can be resolved elsewhere. *See supra* notes 231, 365. Citizen suits have predominantly been initiated against agencies, or government in general. *See* Miller, *supra* note 93, at 10,313 (noting that the "most celebrated uses [of citizen suits] have been against EPA for its failures to implement the environmental statutes in a timely and complete manner").

[368] *See supra* note 250 and accompanying text.

[369] *Id.*

[370] *See supra* note 93.

missible.[371] In this respect, Congress's power to grant every citizen a legal right to clean air cannot legitimately be questioned.[372]

Once the power of Congress to create judicially cognizable rights is properly accounted for, it becomes clear that section 304 is invalid in so far as it allows certain types of actions against the government.[373] The objectives underlying the provision are particularly suspect when they reveal that the provision was designed to enable citizen actions to challenge agency decisions.[374] An action against the Administrator of the EPA for, say, authorizing the issuance of a permit[375] presents what is arguably a "political question."[376] Since the issuance of a permit, however, usually affects a discrete group of people in a distinct fashion,[377] the effects of the permit are a legitimate source of a justiciable controversy.[378]

If, however, the challenged action is of regional or national impact, as in the case of the Administrator's supervision of air quality implementation plans,[379] the spectre of a political question looms larger.

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[371] Sierra Club v. Morton, 405 U.S. 727, 737 (1971) (once plaintiffs have shown injury in fact, they may proceed to act as private attorneys general).

[372] *See supra* notes 77–83 and accompanying text. If the standing inquiry were limited to whether a plaintiff falls within a "zone of interests" created by a statute, then it would be beyond peradventure that every citizen is legitimately interested in clean air and would thereby be entitled to bring suit under section 304. The "zone of interests" test for statutory standing established in Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970), however, has remained an "amorphous and unrefined concept" of little utility in answering vexing standing questions. *See* Comment, *supra* note 183, at 140–41.

[373] The same conclusion is applicable to section 307 insofar as standing under section 307 is considered unlimited. *See supra* note 273.

[374] *See supra* notes 359–70 and accompanying text. Suits against agency action were envisioned in all three objectives revealed in the legislative history, with the exception of that which contemplated citizen participation in enforcing the statute against violators of the Act. *Id.*

[375] *See, e.g.*, Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978) (suit pursuant to Clean Water Act's administrative review provision, seeking review of EPA's decision to issue permit to nuclear plant for emission of hot water into bay).

[376] *See supra* notes 49–52 and accompanying text.

[377] *See, e.g., Seacoast*, 572 F.2d 872 (residents of area surrounding nuclear power plant alleged that they would suffer negative consequences of Administrator's decision to issue permit).

[378] *See supra* notes 36–37, 141 and accompanying text. Therefore, the barrier to standing in the absence of a statute is prudential, and may be abrogated.

[379] *See, e.g.*, Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986) (challenge to EPA Administrator's failure to issue implementation plan modification orders to states pursuant to finding of acid rain deposition problem), *cert. denied*, 107 S. Ct. 3196 (1987). *See also supra* notes 6–7 and accompanying text (EPA and Congress customarily extend schedules for compliance with SIP's).

The more general a grievance becomes, the more abstract it seems to a court.[380] At this point, the plaintiff is presenting a political question that could better be resolved in a representative forum.[381] At this point, the court is forced to perform a function inconsistent with its usual role,[382] and separation of powers concerns become legitimate.[383]

Separation of powers concerns therefore interpose a formidable barrier between section 304 and constitutional legitimacy. If section 304 were limited in application to the initiation of suits against violators or potential violators of the Clean Air Act, then standing could legitimately be granted to "any person."[384] This is because suits against violators involve what are otherwise justiciable controversies; in the absence of section 304, the standing barrier is purely prudential.[385]

Section 304, however, as it currently exists, authorizes suits by "any person" against the Administrator of the EPA for failure to perform non-discretionary acts.[386] When the putatively "non-discretionary" act is an act of regional, national, or even international[387] significance, the plaintiff presents a "political question" beyond the scope of an article III court's power to resolve.[388]

Section 304[389] therefore is invalid as a grant of universal standing insofar as it permits suits against the government for actions of regional or national significance. In respect to suits against violators,[390] plaintiffs can establish standing by alleging that the defendant has violated the Clean Air Act in some way. In either case—suits against the government or suits against the violator—section 304 does not operate by displacing the injury in fact requirement.[391]

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[380] *See supra* notes 212–32 and accompanying text.

[381] *See supra* notes 49–54 and accompanying text.

[382] *See supra* notes 186–89 and accompanying text.

[383] *See supra* notes 48–54; *see also* notes 92–116 and accompanying text.

[384] 42 U.S.C. § 7604(a). If the provision were limited in scope to the wording of 42 U.S.C. § 7604(a)(1) and (a)(3), then it would authorize only suits against actual or potential violators of the Clean Air Act.

[385] *See supra* notes 36–37 and accompanying text. Assuming that allegations against a violator are valid, the existence of a justiciable controversy is not questioned.

[386] 42 U.S.C. § 7604(a)(2).

[387] *See, e.g.*, Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986) (failure of Administrator to take steps to halt acid rain deposition had trans-boundary implications), *cert. denied*, 107 S. Ct. 3196 (1987).

[388] *See supra* notes 49–52 and accompanying text.

[389] 42 U.S.C. § 7604(a)(2).

[390] 42 U.S.C. § 7604(a)(1), (2).

[391] *See supra* notes 203–05 and accompanying text. The requirement may not be displaced, congressionally or otherwise.

In cases against violators, however, the requisite injury is always to be found in the mere fact that the statute has been violated. In cases against the government, however, case by case inquiry into whether a general political question is presented is necessary to determine the existence of injury in fact.

Courts faced with a Clean Air Act citizen suit in which the plaintiff alleges a general or abstract grievance should adhere to the policy of avoiding declaring a statute unconstitutional.[392] Instead of ruling that section 304 and other citizen suit provisions are unconstitutional insofar as they grant standing regardless of a plaintiff's ability to show injury in fact, courts should follow the example set by the Supreme Court in *Trafficante v. Metropolitan Life Insurance Company*.[393] The *Trafficante* Court held that when a legislative intent to confer standing on a broad class of citizen enforcers is discernible, courts should resolve the standing issue liberally.[394]

Courts resolving the standing issue in the context of section 304 suits, however, cannot grant standing as liberally as a literal reading of the statute would suggest. Rather, the issue should be resolved with reference to the Administrative Procedure Act's judicial review provision.[395] Such a rule of construction would limit standing in section 304 cases to only those plaintiffs adversely affected or aggrieved by agency action.[396] This would allow for liberal standing grants as envisioned by the *Trafficante* Court without posing a challenge to the constitutionality of section 304.

VIII. CONCLUSION

The universal grant of standing contained in the Clean Air Act's citizen suit provision was designed to provide for the participation of interested citizens in the enforcement of the Act. The susceptibility of government agencies—whether dependent or independent of direct executive control—to political pressures renders agency diligence in the enforcement process both inconstant and unpredictable.

A citizen suit provision with a grant of universal standing cannot be legitimized solely because it reflects political reality. Although

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[392] *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1935) (Brandeis, J., concurring) (Supreme Court will avoid holding statutes unconstitutional).

[393] 409 U.S. 205 (1972). *See supra* notes 311–23 and accompanying text.

[394] *Trafficante*, 409 U.S. at 212.

[395] 5 U.S.C. § 702 (1982).

[396] *Id.*

the validity of the standing doctrine as a necessary corollary to the case and controversy clause and as a necessary function of the separation of powers may be questioned, the vitality of the doctrine is beyond doubt. As organizational or individual plaintiffs in a citizen suit allege increasingly generalized and abstract injuries, they threaten to cross the line that separates justiciable controversies from political questions. The universal standing grants in section 304 of the Clean Air Act and in other federal environmental statutes do not guarantee that this line will not be crossed.