# Reconciling *Lujan v. Defenders of Wildlife* and *Massachusetts v. EPA* on the Set of Procedural Rights Eligible for Relaxed Article III Standing

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## INTRODUCTION

Article III standing has emerged as an important threshold issue for litigation in federal courts, especially for claims involving environmental harms.[1] The Supreme Court's 2007 decision in

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1. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488 (2009) (denying Article III standing for claims of injuries to aesthetic and recreational enjoyment of various parcels of

*Massachusetts v. EPA* attracted significant attention for its discussion of Article III standing for state sovereign litigants. However, *Massachusetts* also engaged with, and modified, an approach to adjudicating Article III standing for claims involving procedural rights that originated in *Lujan v. Defenders of Wildlife*. This aspect of the *Massachusetts* opinion has been underdiscussed. It also presents something of a puzzle because *Massachusetts* does not explain how its modification can be reconciled with the logic of the *Lujan* framework.

This Note explores the interplay of *Massachusetts* and *Lujan* with respect to Article III standing for procedural rights claims. In Part I, this Note analyzes the *Lujan* approach to Article III standing analysis for claims involving procedural rights and explains how *Lujan* altered the causation and redressability requirements for certain procedural rights claims. In Part II, this Note demonstrates that *Massachusetts* modified the *Lujan* approach by expanding the definition of procedural rights accorded relaxed Article III standing requirements. This Note then develops an account of how this modification can be reconciled with the underlying structure of the *Lujan* framework. In Part III, this Note assesses how the *Massachusetts* modification has been applied and observes that, despite its relatively modest doctrinal implications, it has been neglected by federal courts.

## I. THE *LUJAN* PROCEDURAL RIGHTS DEFINITION

### A. Article III Standing Background

To begin, some review of the fundamentals of Article III standing may be useful. The general function of standing doctrine is to decide whether a particular person can bring a particular claim at a

national forests); Massachusetts v. EPA, 549 U.S. 497 (2007) (recognizing Article III standing for a claim of injuries accruing from climate change); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000) (recognizing Article III standing for a claim of harms to aesthetic and recreational enjoyment of a river); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (denying Article III standing for claims of injuries to a right to information about toxic chemical releases); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (denying Article III standing for claims of injuries to interests in studying and observing wildlife overseas); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) (denying Article III standing for claims of injuries to aesthetic and recreational enjoyment of various parcels of public lands); Sierra Club v. Morton, 405 U.S. 727 (1972) (denying Article III standing for claims of injuries to aesthetic and recreational enjoyment of a parcel of public land).

particular time.[2] The Supreme Court has instructed federal courts to apply two distinct lines of doctrine in adjudicating standing.[3] First, a federal court must assess whether the plaintiff's claim falls within the constitutional limits of federal jurisdiction, which are grounded in Article III of the United States Constitution. Second, a federal court must assess whether, even if the constitutional requirements are met, it would comport with "prudential considerations that are part of judicial self-government"[4] for the court to accept the case.[5] The two types of standing raise distinct issues. This Note will focus exclusively on Article III standing because Article III standing has emerged as a particularly challenging requirement for environmental plaintiffs to meet.[6]

In reviewing Article III standing doctrine, the text of Article III is a logical starting place. However, the brief text of the article provides surprisingly little insight into the complexities of contemporary Article III jurisprudence, which has developed primarily through the accumulation of common law precedent. In relevant part, Article III provides:

> 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

2. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975) ("[I]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60 (3rd ed. 2006) (asking "whether a specific person is the proper party to bring a matter to the court for adjudication . . . .").

3. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) ("Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing."); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99–100 (1979) ("The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant . . . . Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." (citation omitted)). *See generally* CHEMERINSKY, *supra* note 2, at 50; 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 14 (2011).

4. Lujan v. Defenders of Wildlife, 504 U.S. at 560.

5. This doctrine is sometimes called "prudential standing." *See supra* note 3.

6. *See supra* note 1.

> two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.[7]

The Constitution, therefore, provides that federal courts have jurisdiction to hear both "cases" and "controversies," but provides no definition for either term.

Given this "slender textual base,"[8] Article III standing doctrine has taken its shape primarily through case law.[9] A three-part rule articulated by the Supreme Court in *Lujan* has come to provide the current framework for analysis of Article III standing claims.[10] First, there must be an "injury in fact" which is "concrete," "particularized," and "imminent."[11] Second, there must be a causal connection between the injury and the defendant's conduct that is "fairly . . . trace[able] to the challenged action of the defendant."[12] Third, it must be "likely" that the injury is redressable by a favorable decision.[13] These three requirements have been dubbed "injury," "causation," and "redressability."[14]

However, as a leading treatise observes, "the difficulty lies not in identifying the current requirements for standing, but in determining how each one of them applies."[15] Accordingly, this

7. U.S. CONST. art. III, § 2, cl. 1; Lujan v. Defenders of Wildlife, 504 U.S. at 560 ("One of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—'serv[ing] to identify those disputes which are appropriately resolved through the judicial process,' is the doctrine of standing." (citation omitted)).

8. William Buzbee, *The Story of* Laidlaw, *in* ENVIRONMENTAL LAW STORIES 200, 205 (Richard Lazarus & Oliver A. Houck eds., 2005).

9. The historical origin of standing doctrine in American law is contested. One prominent view locates standing doctrine as "largely a phenomenon of the last half of the twentieth century." PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 1126 (10th ed. 2003); *see also* JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 55 (1978); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 (1976). Others have put forth the theory that standing doctrine dates back to the nineteenth century. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1377 (1988).

10. Lujan v. Defenders of Wildlife, 504 U.S. at 560–61 (holding that past cases had created a minimum of three elements of standing and detailing those elements).

11. *Id.* at 560.

12. *Id.*

13. *Id.*

14. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998) ("This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement . . . ."); *see also* CHEMERINSKY, *supra* note 2, at 63; WRIGHT & KANE, *supra* note 3, § 14.

15. WRIGHT & KANE, *supra* note 3, § 14.

Note now turns to the complex question of how to apply the Article III triad to injuries involving procedural rights claims, a critical issue in both *Lujan* and *Massachusetts*.

## B. *Lujan* and Procedural Rights

### 1. The *Lujan* Procedural Rights Standing Rule

In *Lujan*, several environmental organizations challenged a regulation of the Department of the Interior (DOI) promulgated under the Endangered Species Act (ESA). The regulation required federal agencies to consult with DOI about potential harms to endangered or threatened species if the proposed agency action was to occur in the United States or on the high seas but not if the action was to occur in a foreign country.[16] The government sought to dismiss the case for lack of standing, but the Eighth Circuit held that the plaintiffs had standing to challenge the regulation.[17]

The government appealed the case to the Supreme Court, which issued an opinion dedicated almost entirely to Article III standing issues.[18] The Court rejected the plaintiffs' claims of plans to visit the locations of various endangered species that might be affected by federal agencies' work abroad as too speculative. Thus, the Court concluded that the plaintiffs had no concrete claims of injury.[19] The Court also rejected the argument that an alleged violation of the ESA's requirement of agency consultation with DOI, combined with the provision of the ESA authorizing citizens to sue the government for violating the ESA, could create a "procedural injury," which could, in and of itself, fulfill Article III's injury in fact requirement.[20] The Court emphasized that even if

16. *See* Brief for the Respondents at 1–3, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (No. 90-1424), 1991 WL 577004 at *1–3; *see also* Lujan v. Defenders of Wildlife, 504 U.S. at 559. The relevant provision of the ESA reads: "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ." 16 U.S.C. § 1536(a)(2) (2006).

17. Defenders of Wildlife v. Lujan, 911 F.2d 117, 122 (8th Cir. 1990) (holding that "Defenders' evidence of both substantive and procedural injury . . . establish[es] standing sufficiently to survive both a motion to dismiss and to prevail on summary judgment"), *rev'd sub nom.* 504 U.S. 555 (1992).

18. *Id.* at 560 (explaining the importance of Article III standing).

19. *Id.* at 562.

20. *Id.* at 571–73 ("The [Court of Appeals] held that, because § 7(a)(2) requires

plaintiffs seek to enforce a procedural requirement, those plaintiffs must demonstrate that "a separate concrete interest" is at stake.[21] As the *Lujan* opinion intoned at its closing, "the concrete injury requirement must remain."[22]

However, moving beyond the concrete injury requirement, the Court did recognize that causation and redressability can be major hurdles for plaintiffs seeking to enforce procedural rights under a statute. By definition, procedural rights are rights to a certain kind of process, not rights to a specific outcome. As a result, demonstrating that concrete injuries resulting from a flawed process would necessarily be redressed by a court order directing proper process may, in many circumstances, be difficult.[23] The *Lujan* Court acknowledged this problem and developed a framework for analyzing Article III standing that takes into account some of the difficulties faced by plaintiffs bringing procedural rights claims. The Court explained that "[t]here is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[24]

interagency consultation, the citizen-suit provision creates a 'procedural righ[t]' to consultation . . . so that anyone can . . . [challenge a] failure to follow . . . consultative procedure . . . . [However,] this is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs . . . . Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law. We reject this view." (citation omitted)).

21. *Id.* at 572.

22. *Id.* at 578.

23. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 225 (1992) ("It is almost always the case that procedural rights have only speculative consequences for a litigant. If a judge is found to have ruled in favor of party A after taking a bribe from party A, it remains speculative whether an unbiased judge would have ruled for party B. Does party B therefore lack standing?").

24. Lujan v. Defenders of Wildlife, 504 U.S. at 572 n.7. This rule, elaborated in footnote seven of the *Lujan* opinion, has also been referred to as "footnote seven standing." *See* Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 35 (2009); Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 824 (2009); Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 231 (2008); Bradford C. Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1716 (2008); Brian J. Gatchel, *Informational and Procedural Standing After* Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75, 91 (1995).

Translated into chart form, this framework contemplates three different types of standing claims, summarized in Figure 1. In a Type 1 standing claim, the plaintiff can demonstrate a concrete injury, but has not been accorded any procedural rights by statute. Thus, the normal requirements for causation and redressability will apply.[25] In a Type 2 standing claim, the plaintiff can demonstrate both a concrete injury and an applicable procedural right granted by statute. Here, the requirements of causation and redressability will be relaxed.[26] In a Type 3 standing claim, the plaintiff cannot demonstrate any concrete injury to the court's satisfaction, and there the standing inquiry ends. In *Lujan*, as discussed above, the Court treated the plaintiffs as presenting a Type 3 claim, holding that the plaintiffs did not adequately establish any concrete injury.[27]

FIGURE 1: THE *LUJAN* PROCEDURAL RIGHTS STANDING RULE

| **Type of Standing Claim** | **Type 1** | **Type 2** | **Type 3** |
|---|---|---|---|
| I. Injury in Fact | | | |
| Concrete Injury? | Yes | Yes | No |
| Procedural Right? | No | Yes | Irrelevant |
| II. Causation | | | |
| Level of Requirement | Normal Requirement | Relaxed Requirement | Irrelevant |
| III. Redressability | | | |
| Level of Requirement | Normal Requirement | Relaxed Requirement | Irrelevant |

### 2. The *Lujan* Procedural Rights Definition

Having assessed the implications of procedural rights for Article III standing analysis, the next step is to determine which types of

25. *See* Lujan v. Defenders of Wildlife, 504 U.S. at 560–61 ("Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent' . . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (citations omitted)).

26. *See id.* at 572 n.7.

27. *See id.* at 562.

claims qualify as "procedural rights" claims. The *Lujan* Court did not provide a clear definition of a "procedural right," but it did present a hypothetical illuminating the operation of the rule. As the Court explained:

> [O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement (EIS), even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.[28]

As this hypothetical indicates, the EIS requirement of the National Environmental Policy Act (NEPA) provides a paradigm for what the *Lujan* Court had in mind when it discussed "procedural rights."

However, while the *Lujan* Court recognized NEPA as the source of a procedural right, the Court did not rule on whether the *Lujan* plaintiffs' claimed procedural right to an interagency consultation actually qualified as a procedural right. The Court simply held that a violation of the interagency consultation requirement cannot *alone* fulfill the injury in fact requirement.[29] But the Court provided no guidance on whether a claim of a violation of the interagency consultation requirement, if paired with an appropriate claim of a concrete injury, would be recognized as a "procedural rights" claim that should be accorded relaxed causation and redressability requirements.

### C. Post-*Lujan* Cases

Following the *Lujan* decision in 1992, the Supreme Court adjudicated several cases involving Article III standing disputes that implicated mixed substantive and procedural claims.[30] Yet, it was not until *Massachusetts* was decided in 2007 that a Supreme Court opinion again mentioned or applied the *Lujan* procedural rights standing rule.[31] The Court's Article III standing decisions in the

28. *Id.* at 573.

29. *See id.* at 571–73.

30. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180 (2000); FEC v. Akins, 524 U.S. 11, 23–26 (1998); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105 (1998); Bennett v. Spear, 520 U.S. 154, 167–69 (1997).

31. A search of Supreme Court decisions from *Lujan* to October 2011 for the term "procedural right" yielded no instance, other than *Massachusetts v. EPA*, in which the *Lujan* precedent on Article III standing was applied to recognize a procedural right. One 2009

fifteen-year period between the issuance of the *Lujan* and *Massachusetts* opinions therefore raised a number of questions about the rule's application and scope.

Notably, in *Steel Co. v. Citizens for a Better Environment*, plaintiffs challenged a steel company's failure to provide information regarding toxic chemical releases in their community under the Emergency Planning and Community Right to Know Act (EPCRA).[32] On its face, the case appeared to share a number of similarities with the *Lujan* NEPA hypothetical: both NEPA and EPCRA are procedurally-focused, information-forcing statutes, and in both the *Lujan* NEPA hypothetical and *Steel Co.*, the parties affected lived directly adjacent to the relevant danger.[33]

Analogizing the facts of the case to the *Lujan* NEPA hypothetical, the Natural Resources Defense Council, the Sierra Club, the United States Public Interest Research Group, and others filed an amicus brief supporting the plaintiffs' claim to standing, which stated:

> At the outset, we note that, since [plaintiff organization] CBE "has been accorded a procedural right to protect [its] concrete interests,"

Supreme Court case discussed, but did not apply, the *Lujan* procedural rights precedent because the Court found no concrete injury. *See* Summers v. Earth Island Inst., 555 U.S. 488, 496–97 (2009); *see also* discussion *infra* Part III.A. In addition, Justice Scalia, joined by Justice Thomas, once discussed the *Lujan* procedural rights precedent in an opinion concurring in part and dissenting in part. Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 537 n.3 (2007) (Scalia & Thomas, JJ., concurring in part and dissenting in part) ("Of course when parents assert procedural violations, they must also allege that those violations adversely affected the outcome of the proceedings. Under Article III, one does not have standing to challenge a procedural violation without having some concrete interest in the outcome of the proceeding to which the violation pertains, here the parents' interest in having their child receive an appropriate education." (citation omitted)).

32. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. at 86; *see also* 42 U.S.C. §§ 11001–11050 (2006).

33. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. at 104–05 ("The complaint asserts that respondent's 'right to know about [toxic-chemical] releases and its interests in protecting and improving the environment and the health of its members have been, are being, and will be adversely affected by [petitioner's] actions in failing to provide timely and required information under EPCRA.' The complaint also alleges that respondent's members, who live in or frequent the area near petitioner's facility, use the EPCRA-reported information 'to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit.' The members' 'safety, health, recreational, economic, aesthetic and environmental interests' in the information, it is claimed, 'have been, are being, and will be adversely affected by [petitioner's] actions in failing to file timely and required reports under EPCRA.'" (citations omitted)); Lujan v. Defenders of Wildlife, 504 U.S. at 572 n.7.

> it "can assert that right without meeting all the normal standards for redressability and immediacy."[34] In such cases, the primary focus of the standing inquiry is whether plaintiff has sued a defendant who has caused that injury. The Court suggested in [*Lujan*] that plaintiffs living near a site for a proposed federal dam would have procedural standing to sue if the licensing agency failed to prepare an EIS, even though the EIS might have no impact on the plans for the dam. Similarly, CBE has standing to sue petitioner for its failure to submit EPCRA reports, even if the filing of those reports may not reduce the impact of releases of toxic chemicals in the community in which CBE's members live.[35]

The Court did not acknowledge or answer this argument because it concluded, for various reasons, that redressability was impossible and so there could be no standing. The Court stated:

> [R]espondent asserts petitioner's failure to provide EPCRA information in a timely fashion, and the lingering effects of that failure, as the injury in fact to itself and its members . . . . [W]e need not reach that question in the present case because, assuming injury in fact, the complaint fails the third test of standing, redressability.[36]

The Court's decision not to analyze the procedural rights dimension of the case and to instead dispose of the case on redressability grounds was curious because redressability is one of the requirements that is, per *Lujan*, to be relaxed if a valid procedural rights claim is established.

The Court also avoided applying the *Lujan* procedural rights standing rule in the 1998 case *FEC v. Akins*, though by a different doctrinal tack.[37] In *Akins*, the plaintiffs sought a court order forcing a political committee to release information that it was obliged to disclose under the Federal Election Campaign Act (FECA).[38] Rather than analyzing the right to information as a procedural right, as in the *Lujan* Court's NEPA hypothetical, the *Akins* Court found that the denial of information to the plaintiffs in

34. Lujan v. Defenders of Wildlife, 504 U.S. at 572 n.7.

35. Brief Amici Curiae of Natural Resources Defense Council, Inc., Sierra Club, United States Public Interest Research Group, Friends of the Earth, Atlantic States Legal Foundation, Trial Lawyers for Public Justice, and other members of Amici (Additional members listed on inside cover) in Support of Respondent at 18, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (No. 96-643), 1997 WL 351105 at *18 (citation omitted).

36. Steel Co. v. Citizens for a Better Env't, 523 U.S. at 84.

37. *See* FEC v. Akins, 524 U.S. 11, 21 (1998).

38. *See id.* at 16; *see also* 2 U.S.C. §§ 431–55 (2006).

and of itself constituted a concrete injury in fact.[39] The *Akins* Court did not cite the *Lujan* discussion of procedural rights, nor did it explain why a violation of FECA's procedural requirements sufficed to establish a concrete injury in fact while a violation of the ESA's procedural requirements did not.[40]

*Akins* represents an interesting and unresolved thread of doctrine, but it is separate and distinct from the *Lujan* procedural rights standing rule, which the Court applied and modified in *Massachusetts*. Where *Akins* suggests that, in certain circumstances, an agency's violation of procedural requirements can suffice in and of itself to create an injury in fact, the *Lujan* procedural rights rule applies in the space where establishing some type of separate concrete injury is required.[41] The balance of this Note will focus on exploring the doctrinal framework, elaborated in *Lujan* and *Massachusetts*, that governs that space.

## II. THE *MASSACHUSETTS* MODIFICATION TO THE *LUJAN* PROCEDURAL RIGHTS DEFINITION

As explained above, what little assistance the Supreme Court offered for understanding the *Lujan* framework was found only in

39. *See* FEC v. Akins, 524 U.S. at 21.

40. The American Bar Association, in an article reviewing federal administrative law, has attempted to distinguish *Lujan* and *Akins* on this point. The article suggests that the reason that procedural requirements were treated differently in *Akins* was that the information-forcing requirements implicated in that case involved "individual participation or access." Am. Bar Ass'n, *Special Feature: A Blackletter Statement of Administrative Law*, 54 ADMIN. L. REV. 17, 55 (2002). In contrast, the ESA's interagency consultation procedure, had it been conducted as the plaintiffs wished, would not have allowed for any participation or access by the plaintiffs. *Id.* at 54–55; *see also* Brown, *supra* note 24, at 231 (arguing that "[b]ecause Akins is not easily squared with Lujan, it has been largely considered sui generis, confined to voter cases involving requests for information, and its irreconcilability with Lujan has invited relitigation of the literal Akins holding even in cases brought under the FECA."); Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 616 (1999).

41. *See* FEC v. Akins, 524 U.S. at 21; Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992). A concurring opinion in *Lujan*, signed by Justices Kennedy and Souter, emphasized that Congress has the power to define injuries that can suffice as injury in fact for Article III standing purposes, though it concluded that Congress had not done so in the case at hand. *Id.* at 579 (Kennedy & Souter, JJ., concurring in judgment and concurring in part) ("In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view."). However, this issue—the definition of concrete injury—while important in its own right, is distinct from the issue of the definition of a procedural right which, if paired with a concrete injury, triggers relaxed causation and redressability requirements.

*Lujan* itself until the *Massachusetts* decision. This Note will now turn to a detailed consideration of how *Massachusetts* engaged with and expanded the *Lujan* definition of procedural rights.

### A. *Massachusetts* and Procedural Rights

As with *Lujan*, Article III standing was a central issue in *Massachusetts*.[42] The *Massachusetts* case originated when a coalition of environmental organizations, state governments, and local governments filed a lawsuit in the D.C. Circuit seeking judicial review of the Environmental Protection Agency's (EPA's) decision to deny their petition for a rulemaking that would regulate the greenhouse gas emissions of new motor vehicles under the Clean Air Act (CAA).[43] The D.C. Circuit avoided issuing a definitive ruling regarding the parties' standing, but held that EPA had properly exercised its discretion in denying the plaintiffs' petition.[44] The parties appealed to the Supreme Court, which granted certiorari.[45]

In the course of its standing analysis, which concluded by finding that the petitioners did have Article III standing,[46] the Supreme Court held that the petitioners' procedural right claim triggered relaxed causation and redressability requirements.[47] In the terms of Figure 1, therefore, *Massachusetts* presented a Type 2 standing claim.[48] As the Court explained, quoting *Lujan*, "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests,'—here, the right to challenge agency action unlawfully withheld, § 7607(b)(1)—'can assert that right without meeting all the normal standards for redressability and immediacy.'"[49]

42. *See* Massachusetts v. EPA, 549 U.S. 497, 516–17 (2007).

43. Massachusetts v. EPA, 415 F.3d 50, 54 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007).

44. Massachusetts v. EPA, 549 U.S. at 514.

45. Massachusetts v. EPA, 548 U.S. 903 (2006) (granting certiorari).

46. The Court observed, at the outset, that only one of the petitioners needed to demonstrate standing. Massachusetts v. EPA, 549 U.S. at 518 ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."). The Court concluded that the Commonwealth of Massachusetts had demonstrated standing. *Id.* at 521 ("[I]t is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.' There is, moreover, a 'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce that risk." (citations omitted)).

47. *Id.* at 517–18.

48. *See supra* Figure 1.

49. Massachusetts v. EPA, 549 U.S. at 517–18 (citations omitted).

The Court emphasized the importance of § 7607(b)(1) to the overall standing analysis. The Court noted:

> Congress has . . . authorized this type of challenge to EPA action. *See* 42 U.S.C. § 7607(b)(1). That authorization is of critical importance to the standing inquiry: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[50]

As indicated above, the Court expressly identified the "right to challenge agency action unlawfully upheld" as a *Lujan* procedural right, and the Court traced the source of this procedural right to 42 U.S.C. § 7607(b)(1).[51] The Court reiterated this interpretation further on in its standing analysis: "Congress has . . . recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607(b)(1)."[52]

Initially, this holding presents a puzzle. While the Supreme Court stated that § 7607(b)(1) indicates a Congressional intent to authorize various types of legal challenges to EPA actions, that provision discusses little besides jurisdictional matters.[53] As some scholars have noted, the Court had not, prior to *Massachusetts*,

50. *Id.* at 516 (citation omitted).

51. 42 U.S.C. § 7607 (2006).

52. Massachusetts v. EPA, 549 U.S. at 520.

53. *See* 42 U.S.C. § 7607 (2006). Several commentators have noted this tension. *See* JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 1111 (6th ed. 2009) ("Justice Stevens' discussion of standing begins with the suggestion that the State of Massachusetts is defending a procedural right under the Clean Air Act . . . [for which] Justice Stevens cites 42 U.S.C. § 7607(b)(1). But, that section of the statute is part of the Clean Air Act's judicial review provisions and only establishes the appropriate venue for challenges to EPA decisions."); Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1076 (2009) ("The only congressional enactment cited by the Court as a justification for easing standing's traditional redressability and immediacy requirements was Section 307(b)(1) of the Clean Air Act. Here, according to the Court, is where Congress had 'authorized this type of challenge to EPA action' . . . . By its terms, this provision does not create a new procedural right, let alone 'identify' an injury and 'relate the injury to the class of persons entitled to bring suit.'"); Tyler Welti, Massachusetts v. EPA*'s Regulatory Interest Theory: A Victory for the Climate, not Public Law Plaintiffs*, 94 VA. L. REV. 1751, 1765 (2008) ("Section 7607(b) is merely a jurisdictional provision; it does not create a new cause of action. The Section does not provide any procedural right, and surely none that could be claimed to have been violated by the EPA's refusal to regulate carbon dioxide."); Ronald A. Cass, Massachusetts v. EPA*: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75, 79–80 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf ("Unfortunately, that provision, codified at 42 U.S.C. § 7607(b)(1), provides no procedural right at all, and certainly none that could be claimed to have been violated in the EPA's decision not to institute a rulemaking proceeding.").

recognized such a judicial review provision as constituting part of a *Lujan* procedural right.[54] However, to place that observation into context, it should be recalled that after announcing the procedural rights rule in *Lujan*, the Court did not again discuss any aspect of the rule until *Massachusetts*.[55]

A second, related puzzle presented by *Massachusetts* is the nature of the procedural right the Court recognized, which seems to differ from the type of procedural right contemplated by *Lujan*. As some commentators have observed, the right to challenge agency implementation of the CAA is less clearly a procedural right than the right to agency compliance with NEPA's EIS requirement.[56] As a leading administrative law casebook notes, "The mystery . . . is what procedural right the State of Massachusetts was vindicating."[57]

## B. Reconciling *Lujan* and *Massachusetts*

This section will outline an approach to making sense of the Supreme Court's discussion of procedural rights in *Massachusetts* and will discuss how the *Massachusetts* holding can be reconciled with the logic of *Lujan*. In short, both cases share an underlying two-part structure in their definitions of procedural rights, but the Court in *Massachusetts* applied that two-part structure to recognize a new category of procedural right. As will be explained in greater detail below, in the terms of the familiar rule versus standard distinction,[58] where *Lujan* contemplated a procedural right based on a rule-type procedural requirement, *Massachusetts* recognized a procedural right based on standard-type procedural requirement.

54. Adler, *supra* note 53, at 1076 ("This was an innovative reading of the Clean Air Act. Up until *Massachusetts*, Section 307(b)(1) had been recognized as little more than a jurisdictional provision, identifying which petitions for review of EPA action under the Clean Air Act must be filed in the U.S. Court of Appeals for the D.C. Circuit as opposed to regional circuit courts of appeals."); Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1524 (2008) ("The idea that procedural injuries have a lower threshold for standing was not new, but the Court had not previously indicated that judicial review of an agency action might itself be a component of such a 'procedural' right.").

55. *See supra* Part I.C.

56. Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After* Massachusetts v. EPA, 29 STAN. ENVTL. L.J. 130, 146 n.90 (2010) ("[T]he case does not fit neatly within the relaxed standing afforded to plaintiffs asserting a procedural right. The paradigmatic procedural injury case is one brought under NEPA challenging the failure to create an Environmental Impact Statement." (citations omitted)).

57. MASHAW ET AL., *supra* note 53, at 1111.

58. *See generally* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (discussing the differences between rules and standards).

To begin the process of reconciling *Lujan* and *Massachusetts*, it is necessary to return to how the *Lujan* opinion discussed procedural rights. Two examples of potential procedural rights can be found in the *Lujan* opinion, both of which can usefully be understood as composed of two elements: a procedural requirement on an agency and a person's right to enforce compliance with that requirement.

The first potential procedural right is introduced in the *Lujan* Court's explanation of the Eighth Circuit's decision. The Court noted that the Eighth Circuit claimed that a procedural right emerged from the combination of two provisions of the ESA.[59] First, § 7(a)(2) requires interagency consultation.[60] Second, 16 U.S.C. § 1540(g) authorizes any person to sue to challenge any government agency's violation of any provision of the ESA.[61] These two statutory provisions comprise, in turn, a procedural requirement and a right to enforce that requirement that could combine to constitute a procedural right.

As explained in Part I, the Court never reached the issue of whether this claimed procedural right qualified for relaxed standing because the Court concluded that there was no concrete injury and ended the Article III standing inquiry there. However, as discussed above, the Court did provide the example of NEPA's EIS requirement as a procedural right.[62] This procedural right can also be understood as emerging from the conjunction of two elements: a procedural requirement and a right to enforcement of that requirement. NEPA's requirement for an EIS is expressed in

59. Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–72 (1992) ("The so-called 'citizen-suit' provision of the ESA provides, in pertinent part, that 'any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.' 16 U.S.C. § 1540(g). The [Eighth Circuit] held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a 'procedural righ[t]' to consultation in all 'persons'. . . .").

60. *Id.* at 572.

61. *Id.* at 571–72.

62. *Id.* at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.").

42 U.S.C. § 4332(c).[63] The right of persons to sue to enforce the EIS requirement is not explicit in the statute, but has been identified by federal courts as implicit in the statute.[64]

This two-element framework can also be applied to the procedural right identified in *Massachusetts*. To start, the "right to enforce" element is relatively clear. In explaining the procedural right at stake, the Court repeatedly cited to § 7607(b)(1),[65] which outlines the procedures for seeking judicial review of various types of agency decisions related to implementing the CAA.[66] As the Court emphasized, "Congress has . . . authorized this type of challenge to EPA action."[67] The key ambiguity in the *Massachusetts* opinion, however, is what constitutes the "procedural requirement" element. The Court provided several clues. In discussing the procedural right it recognized under the CAA, the Court alternately formulated the procedural right as a "right to challenge the rejection of its rulemaking petition as arbitrary and capricious"[68] and a "right to challenge agency action unlawfully upheld."[69] These formulations indicate that, in the Court's view, the procedural right at issue was a right to a certain kind of non-arbitrary, non-capricious, and overall lawful process. The Court seemed to suggest that what was at stake was a standard of process and a quality of reasoning, which must be followed even in discretionary agency actions.[70]

63. 42 U.S.C. § 4332(C) (2006) ("[A]ll agencies of the Federal government shall . . . (C) include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action . . . .").

64. *See, e.g.*, Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002) (noting that NEPA duties are judicially enforceable); Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971) ("We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties."); *see also* RICHARD LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 81 (2004); Dan Tarlock, *The Story of* Calvert Cliffs*: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, *in* ENVIRONMENTAL LAW STORIES, *supra* note 8, at 77, 97–100.

65. Massachusetts v. EPA, 549 U.S. 497, 516–17, 520 (2007).

66. 42 U.S.C. § 7601(b)(1) (2006).

67. Massachusetts v. EPA, 549 U.S. at 516.

68. *Id.* at 521.

69. *Id.* at 517.

70. *Id.* at 534 ("EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious . . . or otherwise not in accordance with law." (citing 42 U.S.C. § 7607(d)(9)(A) (2006))).

As intimated above, the difference between the type of procedural right identified in *Lujan* and the type of procedural right identified in *Massachusetts* tracks to the familiar distinction between rules and standards. Rules prescribe a sequence of specific, nondiscretionary steps, while standards articulate more abstract, context-dependent parameters.[71] This difference is exemplified in the famously differing views of Justice Holmes and Justice Cardozo on the requirements for drivers approaching railroad crossings: Holmes held that the driver must always stop and look (a rule), while Cardozo held that the driver must exercise reasonable caution (a standard).[72] In many ways, NEPA's EIS requirement is a requirement that agencies stop and look, while the requirement that EPA implement the CAA in a non-"arbitrary and capricious" fashion is a requirement that EPA exercise reasonable caution.

Because the Supreme Court in *Massachusetts* cited to the judicial review provision of the CAA in its discussion of procedural rights, some commentators have asked whether *Massachusetts* intended to "transform[] the right to judicial review of an agency decision into a procedural right."[73] However, for the reasons discussed above, it would be more accurate to characterize the procedural right identified in *Massachusetts* as a right to rational deliberation, rather than a right to judicial review. Judicial review is the means of enforcing the entitlement, not the ultimate thing to which parties are entitled, which is a certain kind of rational, lawful process in implementing the CAA.

The expansion of the meaning of the term "procedural right" to include standard-type procedural rights, as well as rule-type procedural rights, can be understood as the "*Massachusetts* modification" to the *Lujan* procedural rights standing rule. Figure 2 below summarizes the scope of this modification by charting the differing ways in which *Lujan* and *Massachusetts* handled the Article III standing analysis for procedural rights claims:

71. *See* Schlag, *supra* note 58, at 381–83.

72. *See* Pokora v. Wabash Ry., 292 U.S. 98, 105–06 (1934); Balt. & Ohio R.R. v. Goodman, 275 U.S. 66, 69–70 (1927); MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 60–66 (8th ed. 2006).

73. MASHAW ET AL., *supra* note 53, at 1111; *see also* Farber, *supra* note 54, at 1554 (discussing "the suggestion in *Massachusetts v. EPA* that judicial redress is itself a procedural right").

FIGURE 2: PROCEDURAL RIGHTS IN *LUJAN* AND *MASSACHUSETTS*

| | ***Lujan*** | ***Lujan*'s NEPA Hypothetical** | ***Massachusetts*** |
|---|---|---|---|
| I. Constitutive Elements | | | |
| 1. Procedural Requirement on Agency | Interagency Consultation Requirement of ESA | Environmental Analysis Requirements of NEPA | Rational Process in Implementing CAA |
| 2. Right to Enforce | 16 U.S.C. § 1540(g) | *Calvert Cliffs* | 42 U.S.C. § 7607(b)(1) |
| II. Recognition as a Procedural Right Triggering Relaxed Requirements? | Issue Not Reached | Yes | Yes |
| III. Type of Procedural Right | Rule | Rule | Standard |

As Figure 2 demonstrates, there are clear structural similarities between the ways in which *Lujan* and *Massachusetts* framed Article III standing analysis for procedural rights claims. Both use a two-element definition of procedural rights, and both relax the redressability and causation requirements for procedural rights claims. However, the *Massachusetts* Court, without acknowledging that it was doing so, modified *Lujan*'s procedural rights definition by recognizing a new category of procedural right—standard-type procedural rights.[74]

## III. APPLICATIONS OF THE *MASSACHUSETTS* MODIFICATION

### A. The Supreme Court

Since *Massachusetts*, the Supreme Court has not again applied the procedural rights standing rule and has discussed the rule only

74. *See* Massachusetts v. EPA, 549 U.S. at 518, 520 (discussing how the "procedural right" held by plaintiffs affects Article III standing analysis).

once.[75] However, the Supreme Court also has not yet repudiated or foreclosed the *Massachusetts* procedural rights precedent. As such, the rule remains unsettled, a doctrinal tool potentially available to resourceful litigants. The procedural rights standing rule has, so to speak, risen from the grave before. As discussed above, prior to *Massachusetts*, it had been fifteen years since the Supreme Court had even mentioned the procedural rights standing rule.

As mentioned above, the Supreme Court has provided no explicit guidance on how the *Massachusetts* procedural rights precedent is to be applied. The Court's only meaningful discussion of the procedural rights standing rule since the *Massachusetts* decision occurred in *Summers v. Earth Island Institute*.[76] *Summers*, however, only reaffirmed the *Lujan* rule that procedural claims, absent a concrete injury, cannot satisfy the injury in fact requirement.[77]

The statute at issue in *Summers*, the Forest Service Decisionmaking and Appeals Reform Act (the "Appeals Reform Act"), was passed in 1992 and required, among other things, that the U.S. Forest Service (USFS) conduct a notice and comment process before making decisions relating to certain forest management projects.[78] The USFS subsequently passed a series of

75. *See* Summers v. Earth Island Inst., 555 U.S. 488, 496–97 (2009).

76. *Id.* Another recent Supreme Court case, *American Electric Power Co. v. Connecticut*, also addressed standing for climate-based harms, but the plaintiffs in that case raised common law nuisance claims, which do not implicate procedural rights grounded in statutes. Because one justice recused herself, and the remaining eight justices divided evenly on whether plaintiffs had standing, the Supreme Court upheld the lower court's finding of standing without issuing its own opinion on the matter. 131 S. Ct. 2527, 2535 (2011) ("The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions, [Massachusetts v. EPA,] 549 U.S., at 520–26; and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts v. EPA*, 549 U.S. at 535, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits. *See* Nye v. United States, 313 U.S. 33, 44, (1941)." (footnote omitted)). For additional commentary on the decision, see generally Daniel A. Farber, *Standing on Hot Air:* American Electric Power *and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121 (2011), http://yalelawjournal.org/images/pdfs/1003.pdf; Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011), http://www.yalelawjournal.org/images/pdfs/1007.pdf.

77. Summers v. Earth Island Inst., 555 U.S. at 496.

78. Forest Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1374, 1419–20 (1992); Summers v. Earth Island Inst.,

regulations implementing the Appeals Reform Act.[79] These regulations included provisions that had the effect of excluding salvage-timber sales of less than 250 acres from the notice and comment requirements of the Appeals Reform Act based on a categorical finding that such sales have no significant environmental impact.[80]

After the USFS applied these regulations to exempt from notice and comment a 238-acre salvage-timber sale called the "Burnt Ridge Project," several environmental organizations sued, claiming that the USFS regulations allowing such exemptions, as well as other USFS regulations not at issue with respect to the Burnt Ridge sale, violated the Appeals Reform Act.[81] The district court granted a preliminary injunction against the Burnt Ridge sale, [82] and the plaintiffs and the government soon after settled their dispute with respect to that specific sale.[83] However, the district court proceeded to adjudicate the issue of whether the challenged regulations violated the Appeals Reform Act.[84] The court ultimately concluded that several of the regulations were invalid, and issued a nationwide injunction against their application.[85] The government appealed, and the Ninth Circuit upheld the district court's injunction with respect to regulations that were at issue in the Burnt Ridge sale, but overturned the district court's findings with respect to regulations that were not at issue in that sale.[86]

After the Ninth Circuit issued its opinion, the government appealed the case to the Supreme Court, arguing, among other things, that the plaintiffs lacked standing, even with respect to regulations at issue in the Burnt Ridge sale, because once the dispute over the Burnt Ridge sale was settled, no concrete injury remained. The Supreme Court held that the plaintiffs had not established Article III standing and overturned the Ninth Circuit's

555 U.S. at 490.

79. Summers v. Earth Island Inst., 555 U.S. at 490.

80. *Id.*

81. *Id.* at 491.

82. *Id.*

83. Earth Island Inst. v. Pengilly, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005).

84. Summers v. Earth Island Inst., 555 U.S. at 492.

85. Earth Island Inst. v. Pengilly, 376 F. Supp. 2d at 1011.

86. Summers v. Earth Island Inst., 555 U.S. at 488; Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 690 (9th Cir. 2007), *aff'd in part, rev'd in part sub nom.* Summers v. Earth Island Inst., 555 U.S. 488 (2009).

decision.[87] The Court determined that the Burnt Ridge sale, having been settled, could not serve as evidence of a concrete injury.[88] Furthermore, in a holding important for its implications for claims of injuries based on probabilistic and risk-based harms, the Court held that statistical evidence showing that a member of one of the organizations would likely visit a parcel affected by the challenged regulations was also insufficient to establish a concrete injury.[89] Having concluded that the plaintiffs could not establish a concrete injury, the Court reiterated the *Lujan* ruling that a procedural rights claim cannot fulfill Article III's injury in fact requirement on its own.[90]

In the terms of Figure 1, *Summers*, like *Lujan*, therefore presented a Type 3 Article III standing claim because the lack of a concrete injury led to a denial of Article III standing—halting any further analysis. As in *Lujan*, the Court did not explicitly state whether the specific procedural right claim advanced by plaintiffs would have triggered a relaxation of causation and redressability requirements had the plaintiffs been able to establish a concrete injury.[91] It simply referred to the right, in passing, as the plaintiffs' "allegedly guaranteed right to comment."[92]

Ultimately, the *Summers* opinion adds almost nothing to the Court's jurisprudence on procedural rights standing and provides little guidance as to the meaning of *Massachusetts*' precedent on procedural rights. Interestingly, and perhaps tellingly, the majority did not cite *Massachusetts* anywhere in its opinion, despite the fact that both cases addressed procedural rights and risk-based harms.[93]

87. Summers v. Earth Island Inst., 555 U.S. at 500–01.

88. *Id.* at 494.

89. *Id.* at 495–96. *See generally* Bradford C. Mank, Summers v. Earth Island Institute*: Its Implications for Future Standing Decisions*, 40 ENVTL. L. REP. 10958 (2010) (explaining that the Court rejected the plaintiffs' theory of probabilistic standing and that the Court held that the plaintiffs could not use the Burnt Ridge sale as evidence of an injury after they settled the dispute over the sale); Maria Banda, Comment, Summers v. Earth Island Institute, 34 HARV. ENVTL. L. REV. 321, 323–26 (2010); Michelle Fon Anne Lee, Note, *Surviving* Summers, 37 ECOLOGY L.Q. 381, 383 (2010).

90. Summers v. Earth Island Inst., 555 U.S. at 496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing.").

91. *Id.* at 488.

92. Summers v. Earth Island Inst., 555 U.S. at 497.

93. *Id.* at 488–501. A brief concurring opinion by Justice Kennedy, which cited his and Justice Souter's concurrence in *Lujan*, made reference to the ability of Congress to "create" by statute Article III injuries, but concluded that Congress had not done so in this case. *Id.* at 501 (Kennedy, J., concurring). The dissent, joined by Justices Breyer, Stevens, Souter, and

## B. The U.S. Courts of Appeals

The U.S. Courts of Appeals also have provided little guidance as to the meaning of *Massachusetts*' procedural rights precedent. As of late 2011, the precedent has received significant attention in only two Court of Appeals cases, *National Resources Defense Council (NRDC) v. EPA*, in the Ninth Circuit,[94] and *North Carolina v. EPA*, in the D.C. Circuit.[95] Though both cases are ambiguous on this point, *NRDC v. EPA* seems to suggest that the *Massachusetts* procedural rights precedent is applicable to all litigants,[96] while *North Carolina v. EPA* seems to restrict it to state sovereign litigants.[97]

In *NRDC v. EPA*,[98] the plaintiffs, including several environmental organizations, the State of Connecticut, and the State of New York, sued the EPA over a failure to issue certain Clean Water Act (CWA) regulations.[99] In their brief on appeal to the Ninth Circuit, the plaintiffs cited *Massachusetts* for the proposition that their suit involved a procedural right predicated on a citizen suit provision in the CWA authorizing challenges to EPA implementation decisions, and that causation and redressability constraints should therefore be relaxed.[100]

The plaintiffs' brief did not go into significant depth on this point. But, citing *Massachusetts*, the plaintiffs argued that "the [s]tates' challenge under CWA § 505(a)(2) to EPA's failure to perform its duty to promulgate Effluent Limitation Guidelines and

Ginsburg, cited *Massachusetts*, among other cases, for the proposition that Congress has the power to define Article III injuries, and criticized the majority for denying Article III standing. *Id.* at 502–05 (Breyer, J., dissenting). However, the dissent did not provide any discussion of the particulars of *Massachusetts* or mention the *Massachusetts* procedural rights precedent. *Id.* Furthermore, as discussed above in Part I.C, the issue of how "concrete injury" is to be defined is separate and distinct from the issue that serves as the focus of this Note, the issue of which rights qualify as "procedural rights," which, if paired with a concrete injury, trigger relaxed causation and redressability requirements.

94. Natural Res. Def. Council v. EPA, 542 F.3d 1235, 1246 n.6 (9th Cir. 2008) (addressing the *Massachusetts* procedural rights precedent).

95. North Carolina v. EPA, 587 F.3d 422, 426 (D.C. Cir. 2009).

96. *See infra* note 104 and accompanying text.

97. *See infra* note 107 and accompanying text.

98. Natural Res. Def. Council v. EPA, 542 F.3d at 1235 (granting partial summary judgment on plaintiffs' claim that the Clean Water Act requires EPA to issue guidelines limiting effluent water pollution and set standards for new sources of pollution discharge in the construction industry, and granting a permanent injunction compelling the EPA to promulgate such guidelines).

99. *Id.* at 1241.

100. Brief for the State Appellees at 31, Natural Res. Def. Council v. EPA, 542 F.3d 1235 (9th Cir. 2008) (Nos. 07-55183, 07-55261), 2007 WL 4559423 at *31.

New Source Performance Standards for construction and development activities is the assertion of a procedural right accorded under federal law, which is subject to relaxed requirements of redressability."[101]

The Ninth Circuit did not directly address this argument, but indicated some receptivity to it. The court concluded that both the environmental organizations and the states independently met standing requirements.[102] The court's only response to the plaintiffs' procedural rights argument was contained in a footnote to its conclusion that the environmental organizations had standing:

> Though Plaintiffs do not claim that the EPA denied them any procedure to which they were entitled, their suit is nevertheless similar to suits where the plaintiff claims such a procedural injury. The Supreme Court has noted that suits to force an agency to engage in a procedure do not require the same certainty that the result of that procedure will have the desired effect. *See Massachusetts v. EPA*, 549 U.S. 497 (2007) (citing *Lujan*, 504 U.S. at 572 n.7). A party can therefore enforce a procedural right "so long as the procedures in question are designed to protect some threatened concrete interest of [theirs] that is the ultimate basis of [their] standing." *Lujan*, 504 U.S. at 573 n.8; *see also Massachusetts v. EPA* (stating that a litigant vested with a procedural right "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision" alleged to have harmed the litigant).[103]

The Ninth Circuit, therefore, granted standing to the environmental organizations, and, citing *Massachusetts*, reaffirmed the importance of relaxing standards of certainty for procedural rights claims such as those raised by the environmental organizations. However, the opinion is somewhat ambiguous because the court did not explicitly spell out how the *Massachusetts* procedural rights precedent affected its standing analysis. It is also noteworthy that the court indicated, by appending the above-quoted footnote to the court's consideration of whether the environmental organizations had standing, that the *Massachusetts* procedural rights precedent is not limited in applicability to state

101. *Id.*
102. Natural Res. Def. Council v. EPA, 542 F.3d at 1244–49.
103. *Id.* at 1246 n.6 (parallel citations omitted).

litigants. The standing of the state litigants was discussed separately in the Ninth Circuit's opinion.[104]

The D.C. Circuit has also discussed the *Massachusetts* procedural rights precedent, though it has suggested several times that only state sovereign litigants may invoke the *Massachusetts* case as precedent.[105] In 2009, the court recognized that, per *Massachusetts*, the judicial review provision of the CAA could function as part of a procedural right entitling the plaintiff to relaxed standing requirements:

> Like Massachusetts, North Carolina is a state challenging EPA's rule pursuant to 42 U.S.C. § 7607(b)(1) in order to reduce its air pollution, which entitles North Carolina to "special solicitude in our standing analysis." *Massachusetts v. EPA*, 549 U.S. at 520. In addition, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518.[106]

The court thus reaffirmed the *Massachusetts* holding that CAA suits based on 42 U.S.C. § 7607(b)(1) implicate procedural rights. However, in focusing on North Carolina's status as a state, the court appeared to suggest that the entitlement to relaxed standing may only accrue to sovereign state litigants, though the court did not say so explicitly.[107]

104. *Id.* In an interesting inversion of *Massachusetts*, the Ninth Circuit concluded that because it found that the non-state plaintiffs had standing and only one plaintiff is required to establish standing, it needed only to discuss the standing of the state plaintiffs briefly. *See id.* at 1248 ("Only one of the Plaintiffs must have standing to permit our review. Thus, we consider the state-intervenors' standing, a matter that industry-intervenors challenge, only very briefly." (citing Massachusetts v. EPA, 549 U.S. 497, 518 (2007)). In *Massachusetts*, of course, the Supreme Court concluded that Massachusetts had standing, and noted that because only one petitioner needed to establish standing, the court did not need to discuss the standing of the other petitioners. Massachusetts v. EPA, 549 U.S. at 518–21.

105. *See* North Carolina v. EPA, 587 F.3d 422, 426 (D.C. Cir. 2009); Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 476–77 (D.C. Cir. 2009).

106. North Carolina v. EPA, 587 F.3d at 426.

107. *Id.* The court's opinion in *Center for Biological Diversity v. Department of Interior*, a case decided several months earlier in 2009, is even less clear. In that case, the court divided the plaintiffs' causes of action into substantive and procedural categories for the purposes of standing analysis. 563 F.3d at 475–79. With respect to substantive claims, the court announced that *Massachusetts* was inapplicable, because none of the plaintiffs were states, and "*Massachusetts* stands only for the limited proposition that, where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests are harmed, wholly apart from the alleged general harm." *Id.* at 476–77.

## IV. CONCLUSION

The *Massachusetts* modification to the *Lujan* procedural rights definition has not gained significant traction in federal courts. Yet even on its own terms, the scope of the *Massachusetts* modification was modest at best. *Massachusetts* simply expanded the types of claims that may qualify as procedural rights for the purposes of the *Lujan* procedural rights standing rule. *Lujan*'s concrete injury requirement remains, as do requirements for some (albeit relaxed) showing of causation and redressability. "Relaxed" causation and redressability standards, just as much as "normal" causation and redressability standards, are malleable common law concepts, the application of which are almost inevitably shaded by the particular facts of a case. As a result, it is difficult to predict in advance whether even relaxed Article III standards will result in a finding of Article III standing for a particular plaintiff.

This malleability of standing doctrine, and the attendant near-metaphysical distinctions it produces, has generated significant frustration. In dissenting from the majority opinion in *Flast v. Cohen*, Justice John M. Harlan memorably compared Article III standing to "a word game played by secret rules."[108] As Chief Justice John Roberts put it in *Massachusetts v. EPA*, "[w]hen dealing with legal doctrine phrased in terms of what is 'fairly' traceable or 'likely' to be redressed, it is perhaps not surprising that the matter is subject to some debate."[109]

However, the stakes in environmental regulation, as with many other regulatory fields, are high. Standing doctrine, though at times obscure and frustrating, can nevertheless be outcome-determinative in regulatory disputes.[110] It is worth the careful study needed to construct at least a provisional theory of how it has worked in the past and how it may work in the future.

The court found no standing for the claims it categorized as substantive. *Id.* at 479. With respect to the procedural claims, the court did find standing, but did not cite *Lujan* or *Massachusetts* or acknowledge the *Lujan/Massachusetts* rule that establishing an eligible procedural right leads to a relaxation of causation and redressability requirements. *Id.*

108. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

109. Massachusetts v. EPA, 549 U.S. 497, 547 (2007) (Roberts, C.J., dissenting).

110. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (commenting that "[t]he structure of standing law in the federal courts has long been criticized as incoherent . . . [but t]his unhappy state of affairs does not result from the unimportance of standing doctrine. If anything, the contrary is true.").