

# Public Interest Standing and Judicial Review of Environmental Matters: A Comparative Approach

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## I. INTRODUCTION

Judicial review is vital to clarifying and enforcing environmental laws in the United States. The public can use judicial review to protect the environment and hold the government accountable for environmental harms. Redressing environmental harm is often led by non-governmental organizations (“NGOs”) specializing in environmental issues. However, the modern standing doctrine can be a barrier to redressing environmental harms because it is not flexible enough to address the unique factual situations that arise in environmental litigation.

One situation that current standing doctrine struggles to address is when government action affects the public generally, but no individual person is harmed in a specific manner. That scenario can occur, for example, when the government fails to address a pollutant known to be harmful due to its climate change implications, as addressed in *Massachusetts v. EPA*.<sup>1</sup> Another frequent situation is when government action affects a particular environment, but no individual has a sufficient direct interest in that environment to satisfy the current standing doctrine’s injury-in-fact or redressability requirements. For instance, when the government grants mineral leases in uninhabited locations such as the Arctic National Wildlife Refuge, often no individual other than the lessee has a sufficient interest.<sup>2</sup>

This Note has two goals. First, the Note provides the reader with an understanding of the extant public interest standing doctrine in England, Canada, and Australia (the “Commonwealth countries”). Next, by utilizing the lessons gleaned from Commonwealth countries’ experiences, this Note advocates that the United States should adopt discretionary public interest standing modeled after the kind that exists in the Commonwealth countries.

1. The Supreme Court granted standing to the state due to its “stake in protecting its quasi-sovereign interests.” *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Also, the majority addressed the question of redressability briefly, *id.* at 525–26, and the minority strongly criticized the majority’s position on redressability, *id.* at 545–46 (Roberts, J., dissenting).

2. At the time of this writing, President Obama has called upon Congress to act and protect the Arctic National Wildlife Refuge by designating it as wilderness. See, e.g., Natasha Geiling, *Obama Is Trying to Protect a Huge Arctic Wildlife Zone, but Congress Likely Won’t Have It*, CLIMATE PROGRESS (Apr. 6, 2015), <http://thinkprogress.org/climate/2015/04/06/3643159/anwr-protections-finalized-obama/> [<https://perma.cc/BW2Y-LAZ2>].

The Commonwealth countries created public interest standing for judicial review as a complement to their traditional private-rights model of standing, which had existed for centuries before the creation of the modern administrative state.<sup>3</sup> In those countries, public interest standing is only granted in judicial review actions that are brought by plaintiffs<sup>4</sup> who have a genuine interest in the subject matter even if they lack a direct interest necessary under traditional doctrines of standing. The doctrine is also dynamic: public interest standing may be granted based upon the pleadings and then later denied if evidence at trial does not support the initial standing.

The public interest standing model adopted by the Commonwealth countries is compared against the U.S. model for four reasons. First, the model in Commonwealth countries was created by their judiciaries; just as in the United States, the judiciary is the sole arbiter of standing doctrine. Second, both the United States and the Commonwealth countries are common law countries and therefore share a legal tradition. This shared tradition is helpful because it means the various judiciaries approach legal questions similarly. Third, the countries have analogous administrative structures and statutory judicial review provisions, and these similarities allow comparative analyses to focus on more nuanced details. Fourth, each country has similar separation of powers doctrines, and this commonality is important due to the role separation of powers doctrine plays when issues of standing arise.

In the United States, there are several arguments against expanded standing; however, the Commonwealth countries faced and overcame similar arguments. Some of these arguments are:

3. In the private-rights model, whether someone could seek relief was not recognized as distinct from whether the complaint stated a cause of action. PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1207 (11th ed. 2011). The modern administrative state brought new questions of who can enforce public rights. *Id.* at 1209. In the United States, the period between the 1960s and 1970s saw the Supreme Court "opening the courthouse doors," and the period that followed saw a "narrowing of access—particularly for claimants who are beneficiaries of regulatory programs (as opposed to those whose conduct is regulated by the programs)." *Id.*

4. In this Note, the term "plaintiff" refers broadly to any party— whether formally designated as a "plaintiff," "petitioner," or otherwise—seeking judicial review of a government action.

(1) liberal standing would distract from the business of governing;<sup>5</sup> (2) liberal standing would increase financial costs and further burden the judicial system;<sup>6</sup> (3) liberal standing would increase the number of judicial review petitions, and thus would increase delay in already overburdened courts;<sup>7</sup> and (4) courts are not the place for citizens to air their intellectual or emotional grievances, however strongly held.<sup>8</sup> Part II reviews the public interest standing doctrine's evolution in the United States and the Commonwealth countries. Part III addresses the above arguments against liberal standing, utilizing lessons from the Commonwealth countries. Part IV concludes, arguing for liberalization of standing in the United States. Before addressing the above arguments and utilizing lessons from the Commonwealth countries, an overview of the standing doctrine's evolution in each country is necessary.

## II. THE EVOLUTION OF PUBLIC INTEREST STANDING

### A. United States

There is no recognition of public interest standing in the United States, but a brief overview of contemporary standing doctrine and judicial review will provide a reference for comparison and discussion with respect to the Commonwealth countries. Judicial review statutory law in the United States comes from the Administrative Procedure Act ("APA").<sup>9</sup> The right to review in the APA states, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."<sup>10</sup> Such person who suffered a legal wrong or is otherwise adversely affected by an agency action must then have standing.

The United States' standing doctrine originates in Article III of the Constitution, which requires a "case" or "controversy."<sup>11</sup> The

5. Konrad Schiemann, *Locus Standi*, PUB. L. 342, 348 (1990) (discussing arguments against an open standing policy).

6. *Finlay v. Canada (Minister of Fin.)*, [1986] 2 S.C.R. 607, 631 (Can.) (summarizing "traditional judicial concerns about the expansion of public interest standing").

7. Schiemann, *supra* note 5, at 348.

8. *Australian Conservation Found v Commonwealth* (1980) 146 CLR 493, 531 (Austl.).

9. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 501–706 (2012).

10. *Id.* § 702.

11. U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties

constitutional standard, as interpreted by the U.S. Supreme Court, is very similar to the traditional common law understanding of “locus standi.”<sup>12</sup> Modern standing doctrine has three requirements: (1) the challenged action will cause actual or threatened injury-in-fact; (2) the injury is fairly traceable to the challenged action; and (3) the injury is redressable by a favorable outcome.<sup>13</sup> Further, an organization, such as an environmental NGO,<sup>14</sup> can have standing only if: (1) at least one of its members would have standing as an individual; (2) the interest the organization seeks to protect is relevant to the organization’s purpose or activities; and (3) neither the claim raised nor relief sought involves the participation of individual members.<sup>15</sup>

In the context of environmental NGOs, a case illustration shows how the standing doctrine functions in the United States. In *Lujan v. Defenders of Wildlife*, the applicants (“Defenders”) sought judicial review of the Secretary of the Interior’s interpretation of section 7(a)(2) of the Endangered Species Act—which requires federal agencies to insure their activities are not likely to jeopardize endangered or threatened wildlife—to apply only to actions within the United States and on the high seas.<sup>16</sup> For standing purposes, the Defenders’ claimed injury was that the lack of consultation on projects funded abroad would increase the rate of extinction of endangered species.<sup>17</sup> One of the Defenders’ primary objectives was the protection of wildlife—which is also one of the objectives of the Endangered Species Act.<sup>18</sup> Justice Scalia, writing for the

made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

12. Locus standi (Latin for “place of standing”) means “[t]he right to bring an action or to be heard in a given forum.” *Locus Standi*, BLACK’S LAW DICTIONARY (10th ed. 2014). Locus standi is commonly used as a reference to standing in the Commonwealth countries.

13. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

14. In Commonwealth jurisdictions, standing doctrine treats individuals and organizations the same; therefore, the Sections of this Note covering the Commonwealth jurisdictions will see courts treat individuals and organizations equally.

15. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

16. *Lujan*, 504 U.S. at 557–59.

17. *Id.* at 562.

18. *See id.* at 559; *see also* 16 U.S.C. § 1531(c)(1) (2012) (“It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve

majority in *Lujan*, noted that the desire to use or observe an animal species—even for purely aesthetic purposes—is a cognizable interest for standing.<sup>19</sup> However, the injury-in-fact requirement means that the plaintiff must be harmed directly by the agency action.<sup>20</sup> An agency action that harms biodiversity, which was the Defenders' prime complaint, would not count on its own.<sup>21</sup> The Court also held that the affidavits submitted by members who had an interest in viewing the threatened animals did not satisfy the injury-in-fact requirement because the members did not have concrete plans to return to the affected geographic areas.<sup>22</sup> The majority clarified that an individual who worked with the threatened species in the location affected by the funding projects would plausibly have standing.<sup>23</sup>

In the *Lujan* majority's view of the injury-in-fact requirement, only those most directly affected by an agency action should be granted standing. Consequentially, any other person affected to a lesser degree should not.<sup>24</sup> This view of the injury-in-fact requirement seems sensible. However, the question remains whether or not it is sensible if patently illegal administrative decisions can escape judicial review if no individual has a direct enough interest in the decision. Indeed, the Commonwealth countries have recognized the doctrine of public interest standing as necessary to adapt to the realities of the modern administrative state.

## B. England

### 1. Contemporary Law on Judicial Review and Standing

Judicial review standing law in England is governed by section 31 of the Senior Courts Act 1981.<sup>25</sup> The statute grants the High

endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.”).

19. *Lujan*, 504 U.S. at 562–63.

20. *Id.* at 563.

21. *Id.*

22. *Id.* at 563–64.

23. *Id.* at 566–67.

24. This concept is similar to part three of the Canadian three-part test for public interest standing, which asks whether or not there is a more suitable applicant for judicial review of the particular contested issue. *See infra* Section II.C.

25. Senior Courts Act 1981, c. 54, § 31 (Eng., Wales). The High Court serves both England and Wales, although this Note focuses on England for simplicity.

Court<sup>26</sup> discretion to hear an application for judicial review, and the court may not grant a hearing unless the applicant “has a sufficient interest in the matter to which the application relates.”<sup>27</sup> This right to review appears similar to the right to seek judicial review under the APA.<sup>28</sup> The contemporary doctrine of standing in England has withstood attempts to argue that an applicant must possess something akin to a narrow legal right before being accorded standing.<sup>29</sup>

One difficulty with public interest standing in England is that it is not a neatly structured inquiry, in contrast to the U.S. three-part test of injury, causation, and redressability.<sup>30</sup> Public interest standing in England is, however, broad enough to encompass NGOs litigating judicial review actions on behalf of the public generally. The following factors weigh heavily on a court’s decision to grant public interest standing to an NGO: (1) whether the applicant is raising issues of importance that affect a large number of people; (2) whether the applicant has the resources and ability to faithfully advocate the issue on behalf of the public generally; and (3) whether denying standing to the applicant would effectively foreclose any judicial review of the challenged statute.<sup>31</sup>

*R v. Inspectorate of Pollution, Ex parte Greenpeace Ltd.* illustrates how British courts look at standing questions for an environmental NGO.<sup>32</sup> The Queen’s Bench Division reasoned that Greenpeace,

26. The High Court is not to be confused with the actual highest court in England: the Supreme Court of the United Kingdom. The High Court serves various functions, including jurisdiction over judicial review applications in the first instance; judicial review cases may then be appealed to the Court of Appeal and then the Supreme Court. *Id.* § 16(1); Constitutional Reform Act 2005, c. 4, § 40(2) (UK).

27. Senior Courts Act 1981, c. 54, § 31(3).

28. Compare Administrative Procedure Act § 10, 5 U.S.C. § 702 (2012) (“A person . . . adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof.”), with Senior Courts Act 1981, c. 54, § 31 (Eng., Wales) (“No application for judicial review shall be made unless . . . the applicant has a sufficient interest in the matter to which the application relates.”).

29. PAUL CRAIG, ADMINISTRATIVE LAW 781 (7th ed. 2012).

30. See *supra* note 13 and accompanying text.

31. See *infra* Section II.B.3. As will be seen in the case law development of public interest standing in England and Canada, whether a restrictive notion of standing could effectively indemnify a statute from judicial review will be a deciding factor in the standing analysis. See *infra* Sections II.B–II.C. This is particularly relevant in the field of environmental law, where many issues often only indirectly affect individuals, thus creating a high chance that a restrictive notion of standing will effectively indemnify an action from review.

32. See *R v. Inspectorate of Pollution, Ex parte Greenpeace Ltd.* [1994] Env. L.R. 76 (QB) (Eng., Wales). The Queen’s Bench Division is part of the High Court.

the plaintiff, should be granted discretionary public interest standing to challenge nuclear regulations because: (1) Greenpeace was a well-respected international organization with members that lived in the area near the nuclear facility; (2) the issues raised were of a serious matter affecting the public interest for which Greenpeace had the technical expertise and experience to adequately litigate the case; and (3) if Greenpeace were not granted public interest standing, then there might be no other effective way to raise the matter.<sup>33</sup>

## 2. The *Boyce* Test and Public Interest Standing

To understand how the modern standing doctrine came about, a brief overview of its evolution in England is helpful. The historic split between public interest standing jurisprudence in the United States and Commonwealth countries has existed for over one hundred years. At the turn of the twentieth century, the common law standing requirements for judicial review in the Commonwealth countries mirrored the requirements of a public nuisance cause of action. *Boyce v. Paddington Borough Council*, decided in 1903, illustrates the pre-public interest standing requirements for judicial review proceedings in England.<sup>34</sup> In *Boyce*, the plaintiff was a landowner who had built an apartment block contiguous with an old churchyard, with windows facing the churchyard so that light could pass through.<sup>35</sup> The churchyard was considered a public space, or an “open space” within the meaning of the Metropolitan Open Spaces Acts and the Disused Burial Grounds Act.<sup>36</sup> The Disused Burial Grounds Act forbade construction of buildings on the churchyard, and the Metropolitan Open Spaces Acts provided that the churchyard was to be used for public recreation and exercise.<sup>37</sup> The Paddington Council (the “Council”) sought to construct a screen on the side of the churchyard that was contiguous with the apartment building. This screen—more like a large fence—was intended to block sunlight from entering the plaintiff’s apartment building. The Council

33. *See id.* at 99–102.

34. *Boyce v. Paddington Borough Council* [1903] 1 Ch. 109 (Eng.). This case was also the controlling law in Canada and Australia due to the legal relationship they shared as part of the British Empire.

35. *Id.* at 113.

36. *Id.* at 112.

37. *Id.* at 115, 117.



wanted to use this obstruction to prevent Boyce from obtaining a prescriptive right to the light that entered onto his property via the churchyard.<sup>38</sup>

The plaintiff in *Boyce* sued the Council to enjoin the construction of the fence, alleging, among other things, that the Council's construction would contravene the Disused Burial Grounds Act's prohibition on constructing buildings in the churchyard. The Council challenged Boyce's standing to bring the case.<sup>39</sup> The Chancery Division provided a synopsis of the extant law:

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with . . . ; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.<sup>40</sup>

The court held that Boyce had standing to sue without the Attorney General because Boyce would suffer special harm by losing access to the sunlight, reasoning that Boyce suffered a special harm because only he would lose access to the light, even though the rights created by the Disused Burial Grounds Act and the Metropolitan Open Spaces Acts were for the general public.<sup>41</sup> The concept of standing in *Boyce* is similar to public nuisance standing, which allows an individual to sue when a nuisance causes a special harm to befall the plaintiff that is different from the harm affecting the public generally.<sup>42</sup>

### 3. Public Interest Standing Liberalization, 1981–Present

The modern doctrine of public interest standing for judicial review in England asks whether a plaintiff has “sufficient interest” in the subject matter for which he is requesting judicial review.<sup>43</sup> The first case to create the sufficiency of interest test was *R v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed &*

38. *Id.* at 113.

39. *Id.*

40. *Id.* at 114.

41. *Id.* at 113–15.

42. See RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. LAW INST. 1979).

43. Senior Courts Act 1981, c. 54, § 31, sch. 3.

*Small Businesses Ltd.* (the “IRC Case”) in 1981.<sup>44</sup> In the IRC Case, the National Federation of Self-Employed and Small Businesses (the “Federation”) sought judicial review of the Inland Revenue Commissioners’ (the “Commissioners”) settlement with a group of workers who used fake names on paystubs in order to avoid paying taxes. As part of the settlement, the Commissioners agreed not to require the workers to pay back the full amount of taxes that they had avoided. The plaintiffs in the IRC Case sought judicial review of the settlement, claiming that the agency action was unlawful, or “ultra vires.”<sup>45</sup> They sought an order that the Commissioners must collect the back taxes.<sup>46</sup>

The Commissioners, however, argued that the Federation had no standing to request review of their action. Although the House of Lords agreed with the Commissioners, the court’s analysis of the issue guided the subsequent liberalization of an applicant’s sufficient interest and standing. According to Lord Wilberforce, the plaintiffs lacked a sufficient interest in the matter because the Federation had no stake in the outcome of the proceeding.<sup>47</sup> The court noted that the Federation did not allege, “and it is impossible to see how, any success in these proceedings would in any tangible way profit, or affect, the [plaintiffs] or others like them.”<sup>48</sup>

A sufficient interest, according to the court, would have needed to be more than the “indignation of the [F]ederation and its members as regarding the” Commissioners’ settlement.<sup>49</sup> Lord Diplock agreed that the Federation had no standing.<sup>50</sup> However, when opining on the sufficiency of interest test for public interest standing, Lord Diplock said:

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the [F]ederation, or even a single-spirited taxpayer, were prevented by outdated technical rules of *locus standi*

44. R v. Inland Revenue Comm’rs, *Ex parte Nat’l Fed’n of Self-Employed & Small Businesses Ltd.* [1982] AC 617 (appeal taken from Eng.).

45. “Ultra vires” is commonly used in English, Canadian, and Australian law. An ultra vires action is one done in excess of an agency’s granted powers. It is the common law’s equivalent to the APA’s “in excess of statutory jurisdiction, authority” prohibition. See 5 U.S.C. § 706(2)(C) (2012).

46. See generally *Ex parte Nat’l Fed’n of Self-Employed & Small Businesses* [1982] AC at 629.

47. *Id.* at 633.

48. *Id.* at 634.

49. *Id.* at 633.

50. See *id.* at 637.

from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.<sup>51</sup>

This quote is, at its core, a separation of powers argument for why the judiciary should take cases where it appears unlawful conduct occurred, regardless of who has standing. Specifically, Lord Diplock's statement is driven by the notion that the judiciary may validly referee the actions of government agencies where cognizable claims are presented.

The IRC case also set the stage for the subsequent evolution of standing doctrine in *Ex parte Greenpeace*, where Greenpeace sued on behalf of itself—not by representing a member with standing—and the Queen's Bench Division still granted standing.<sup>52</sup> Greenpeace challenged the government's decision to grant a variation to British Nuclear Fuels ("BNFL"), which had constructed a thermal oxide reprocessing plant at a nuclear installation.<sup>53</sup> The plant reprocessed spent nuclear fuel. BNFL requested a variation to their permit. The permit variation was granted, and Greenpeace brought a judicial review action, arguing that the variance exceeded the granting agency's power.<sup>54</sup>

Greenpeace failed on the merits but succeeded in defending its standing to sue in the public interest. The court determined the sufficiency of interest through a four-factor inquiry: (1) the nature of the plaintiff; (2) the extent of the plaintiff's interest in the issues raised; (3) the remedy the plaintiff sought; and (4) the nature of the remedy sought.<sup>55</sup> In granting standing, the court noted that Greenpeace was a well-known environmental organization with over five million members, accredited with consultative status and observer status with multiple United Nations bodies, and had over 400,000 members in the United Kingdom alone, including over 2500 in the affected region.<sup>56</sup> Because Greenpeace's organizational focus was the environment, and the issue raised—a challenge to a variance concerning hazardous waste—was an environmental issue,

51. *Id.* at 644.

52. *R v. Inspectorate of Pollution, Ex parte Greenpeace Ltd.* [1994] Env. L.R. 76 (QB) 99–102 (Eng., Wales).

53. *Id.* at 79–80.

54. *Id.* at 87–88.

55. *Id.* at 100.

56. *Id.*

the court was satisfied that Greenpeace had a genuine interest in the outcome.<sup>57</sup>

The court in *Ex parte Greenpeace* acknowledged that if it were to “deny standing to Greenpeace, those they represent might not have an effective way to bring the issues before the court.”<sup>58</sup> Next, after surveying the technical expertise of Greenpeace, the court acknowledged that Greenpeace had the resources and expertise to adequately argue the case.<sup>59</sup> The court also took into account that, because Greenpeace was invited to consult on this variance, the government acknowledged Greenpeace’s interest on this particular issue.<sup>60</sup> *Ex parte Greenpeace* illustrates that the two most important inquiries in England are whether the petitioner has raised issues that may not effectively be brought by any other party and whether the petitioner has the ability and interest to adequately prosecute the case. These inquiries can inform U.S. courts that attempt to construct a public interest test.

Further, in *R v. Somerset City Council, Ex parte Dixon*, the Queen’s Bench Division held that an individual resident near a quarry had sufficient standing to challenge a planning committee’s granting of an extended mining license.<sup>61</sup> The court undertook a detailed survey of the previous case law surrounding public interest standing because it was alarmed at recent attempts to restrict standing.<sup>62</sup> The court stated that the role of the sufficiency of interest test was merely to exclude ill-motives and busybodies, but that well-pleaded complaints of illegal government action should not be excluded.<sup>63</sup>

57. *Id.*

58. *Id.* at 100–01. A common thread between the English, Australian, and Canadian issues of public interest standing is that the courts are hesitant to deny standing if it would mean that a justiciable question of administrative overreach would not be adjudicated due to restrictive judicial standing requirements. *See, e.g., id.*

59. *Id.* at 101. This acknowledgement is a determinative factor in Canadian public interest standing jurisprudence. The third part in the Canadian tri-part test for public interest standing is whether there is another reasonable and effective manner for the case to be brought forward. *See* MEINHARD DOELLE ET AL., ENVIRONMENTAL LAW: CASES AND MATERIALS 437 (2d ed. 2013).

60. *Ex parte Greenpeace*, [1994] Env. L.R. at 101–02. In Australian public interest jurisprudence, whether an applicant has been acknowledged by the government as having an interest in the issue will weigh in favor of granting standing. *See infra* Section II.D.

61. *R v. Somerset County Council, Ex parte Dixon* [1998] Env. L.R. 111 (QB) (U.K.). The applicant for review, Mr. Dixon, was a local resident of the area but had no land adjacent or near the quarrying site. *Id.* at 121.

62. *Id.* at 115–21.

63. *Id.* at 121.

The expansive concept of standing in *Ex parte Dixon* has been endorsed by recent environmental cases in the U.K. Supreme Court. In *Walton v. Scottish Ministers*, for example, the U.K. Supreme Court upheld the expansive discretionary power of the courts to grant public interest standing.<sup>64</sup> Lord Reed opined that not every member of the public can complain of an illegal administrative action, but that “[t]he rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.”<sup>65</sup> Lord Hope followed up with an acknowledgement that the courts should take into account the unique nature of environmental law when adjudicating the standing of a plaintiff bringing an environmental action:

Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing lock will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual’s property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the very purpose of environmental law.<sup>66</sup>

As will be seen, Canada and Australia have devised other factors and judicial tests to discern public interest standing, but these two comments by the U.K. Supreme Court summarize the contemporary English doctrine, as first expressed in *Ex parte Greenpeace*. The test they created is not one of open standing, but it is one in which the importance of environmental protection is recognized.<sup>67</sup>

## C. Canada

### 1. Contemporary Law on Judicial Review and Standing

The Canadian statutory right to judicial review is provided in the Federal Courts Act of 1985 (“CFCA”).<sup>68</sup> The statute provides the

64. *Walton v. Scottish Ministers* [2012] UKSC 44 (appeal taken from Scot.).

65. *Id.* [94].

66. *Id.* [152].

67. ELIZABETH FISHER ET AL., ENVIRONMENTAL LAW: TEXT, CASES, AND MATERIALS 373 (8th ed. 2013).

68. Federal Courts Act, R.S.C. 1985, c F-7 (Can.).

Canadian federal court system<sup>69</sup> with exclusive jurisdiction to hear applications for judicial review made by the Attorney General of Canada, or by anyone directly affected by the matter with respect to the relief is sought.<sup>70</sup> “Directly affected” is the operative term surrounding issues of judicial review standing.

The grounds for judicial review petition under the CFCA are similar to those listed in the APA. Some grounds for review in the CFCA are that a federal board, commission, or other tribunal “acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction,”<sup>71</sup> “failed to observe a principle of natural justice, procedural fairness or other procedures that it was required by law to observe,”<sup>72</sup> or “based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.”<sup>73</sup>

Whether an individual or organization has public interest standing is determined by the *Finlay v. Canada (Minister of Finance)* three-part test: (1) Is there a justiciable and serious issue to be tried? (2) Does the applicant have a genuine interest in the subject matter? (3) Is there another reasonable and effective manner for the case to be brought forward?<sup>74</sup> In applying the *Finlay* test, federal courts have rejected arguments that give a restrictive meaning to the phrase “directly affected” in section 18.1 of the CFCA.<sup>75</sup>

Environmental organizations enjoy public interest standing in Canada.<sup>76</sup> In *MiningWatch v. Canada (Minister of Fisheries and*

69. Similar to the American context, in the Canadian federal court system, the trial court is referred to as the Federal Court, and the appellate-level court is referred to as the Federal Court of Appeal. *See id.* ss. 3–4.

70. *Id.* s. 18.1(1).

71. *Compare id.* s. 18.1(4)(a), with 5 U.S.C. § 706(2)(C) (2012) (“in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

72. *Compare* R.S.C. 1985, c F-7, s. 18.1(4)(b), with 5 U.S.C. § 706(2)(D) (“without observance of procedures required by law”).

73. *Compare* R.S.C. 1985, c F-7, s. 18.1(4)(d), with 5 U.S.C. § 706(2)(A) (“arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

74. *Finlay v. Canada (Minister of Fin.)*, [1986] 2 S.C.R. 607, 631.

75. *See* *MiningWatch Can. v. Canada (Minister of Fisheries & Oceans)*, 2007 FC 955, paras. 162–63 (Can.).

76. Additionally, the CFCA is the primary vehicle for judicially reviewing decisions falling under federal jurisdiction, including decisions taken and regulations enacted under the Canadian Environmental Protection Act, the Canadian Environmental Assessment Act, the Fisheries Act, and the Species at Risk Act, which are among the major statutes that make up Canada’s federal environmental law. DOELLE ET AL., *supra* note 59, at 437.

*Oceans*), an illustrative case, the Federal Court reasoned that a grant of standing was appropriate because the plaintiff (MiningWatch) was an environmental organization specifically focused on the mining industry; was well-known in Canada; had participated in numerous submissions to the parliamentary committee charged with amending the statute in question; and had published academic studies concerning failed mitigation plans in relation to mining development.<sup>77</sup> The court's holding in *MiningWatch* was not disturbed by the Canadian Supreme Court.<sup>78</sup>

The next Section will track how public interest standing and the *Finlay* three-part test first arose in Canada.

## 2. Public Interest Standing Liberalization, 1975–Present

There are three cases in Canada referred to as the “Standing Trilogy.” These cases created what is now the modern public interest standing doctrine, beginning with *Thorson v. Canada (Attorney General)*.<sup>79</sup> In *Thorson*, the plaintiff, suing solely as a taxpayer, challenged Canada's Official Languages Act as unconstitutional.<sup>80</sup> At the pleadings stage of litigation, the trial court had dismissed the plaintiff's suit for a lack of standing, which was later affirmed by the appellate court.<sup>81</sup> The trial judge stated that the expanded view of standing requested by the plaintiff would lead to opening up the court to any taxpayer to air his grievances: “If every taxpayer could bring an action to test the validity of a state that involved the expenditure of public money it would in my view lead to a grave inconvenience and public disorder.”<sup>82</sup>

The Supreme Court disagreed with the lower courts and reversed. The court held that the plaintiff had standing to challenge the Official Languages Act. Justice Laskin, writing for the majority, explicitly rejected the trial court's reasoning: “I do not think that anything is added to the reason for denying

77. See *MiningWatch*, 2007 FC 955, paras. 179–81, 185–86 (“In sum, MiningWatch represents a coalition of approximately 20 groups that express a communal concern *and seek to challenge a decision that might otherwise be essentially beyond review*. In my view, the applicant is the only one to demonstrate sufficient interest or the means to launch this judicial review. Therefore, standing is accorded to the applicant under the doctrine of public interest.” (emphasis added)).

78. See *MiningWatch Can. v. Can. (Minister of Fisheries & Oceans)*, 2010 SCC 2 (Can.).

79. *Thorson v. Canada (Att'y Gen.)*, [1975] 1 S.C.R. 138 (Can.).

80. *Id.* at 143.

81. *Id.* at 144.

82. *Id.* (quoting the trial court).

standing, if otherwise cogent, by reference to grave inconvenience and public disorder.”<sup>83</sup> After rejecting the prudential reasons for denying standing, the majority argued that if standing could be used to defeat litigation aimed at testing the constitutionality of an act of the Canadian Parliament, then the court would be deprived of its traditional duty to adjudicate the constitutional validity of parliamentary acts.<sup>84</sup>

The majority noted that the plaintiff, prior to litigation, requested that the Canadian Attorney General test the validity of the Act, and the Attorney General had declined to do so.<sup>85</sup> Refuting the argument that the taxpayer had redress through democracy and the polls, Justice Laskin wrote: “I am unable to appreciate how an argument of principle can be made that such a wrong, an illegality which is certainly *justiciable*, should go uncorrected at law, whatever may eventuate as political redress.”<sup>86</sup> In the view of the *Thorson* court, public interest standing is up to the discretion of the courts and justiciability should play the key role in public interest standing’s determination. The question of justiciability thus became a cornerstone of what would become the *Finlay* test.

*Thorson* did not grant blanket taxpayer standing to challenge any and all legislation, however. The holding was limited to cases that challenged acts of the Canadian Parliament for failing to respect the limits placed by the Canadian Constitution.<sup>87</sup> Regulatory legislation or administrative actions affecting the public generally were not, according to the *Thorson* court, issues where standing would be granted upon a person merely due to their status as a taxpayer.<sup>88</sup>

In the second case of the Standing Trilogy, *McNeil v. Nova Scotia (Board of Censors)*, the Supreme Court of Canada expanded upon its

83. *Id.* at 145.

84. *Id.* (“A more telling consideration for me, but on the other side of the issue [sic], is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute. That, in my view, is the consequence of the judgments below in the present case. The substantive issue raised by the plaintiff’s action is a justiciable one; and, *prima facie*, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.”).

85. *Id.* at 146.

86. *Id.* at 152.

87. *See id.* at 150.

88. *Id.* at 147–48.



holding in *Thorson* and granted standing to a member of the general public to challenge the Nova Scotia Board of Censors' decision to prohibit the release of a film.<sup>89</sup> McNeil argued that the provincial legislation that created the Board of Censors was an unconstitutional grant of power because the Board was given unfettered discretion in determining what the public could and could not see.<sup>90</sup> The Supreme Court ruled that the plaintiff had standing as a member of the general public directly affected by the powers of the Board of Censors.<sup>91</sup>

The court in *McNeil* noted three facts that related to the decision to grant standing to the plaintiff. First, the plaintiff had reasonably exhausted administrative and other remedies before litigating the case. In particular, the plaintiff had utilized the administrative procedures created in the provincial legislation that created the Board of Censors, which allowed the public to challenge the Board's decisions. Also, the plaintiff had requested that the Attorney General challenge the Board determination at issue, but the Attorney General had denied this request.<sup>92</sup> Second, the court noted that McNeil had made a justiciable argument that the challenged legislation was ultra vires.<sup>93</sup> Third, the litigation might have been the only method available to adjudicate the legislation's constitutionality.<sup>94</sup> The court held that, "in light of the fact that there appears to be no other way, practically speaking, to subject the challenged Act to judicial review," then standing should be granted to the applicant.<sup>95</sup>

The final case in the Standing Trilogy, *Borowski v. Canada (Minister of Justice)*, saw standing granted to an interested member of the public challenging the laws that permit abortion in Canada.<sup>96</sup> One argument against standing in *Borowski* was that the statute only regulated the conduct of doctors, and thus only doctors could have standing to challenge the law.<sup>97</sup>

89. *McNeil v. Nova Scotia (Bd. of Censors)*, [1976] 2 S.C.R. 265 (Can.).

90. *Id.* at 267, 270.

91. *Id.* at 271.

92. *Id.* at 268.

93. *Id.* at 271.

94. *Id.*

95. *Id.*

96. *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (Can.).

97. *See id.* at 584-85 (Laskin, C.J., dissenting).

The Supreme Court disagreed and proffered three reasons why members of the general public had a right to challenge the legislation at issue. First, because those individuals directly targeted by the statute in *Borowski* benefitted from it, there was no practical reason why those classes would challenge the legislation. The court noted that individuals who benefit from a law are not likely to challenge it, and if the individual plaintiff in question were not granted standing, then conceivably there would be no person who could have standing to challenge the statute.<sup>98</sup> Second, the court believed the claim was justiciable because the constitutional question raised by the plaintiff concerned whether or not the abortion statute violated provisions of the Canadian Bill of Rights. Since this was justiciable, the court held that discretionary public interest standing should be granted.<sup>99</sup> Third, and similar to *McNeil*, the plaintiff in *Borowski* had sought assistance from Canadian officials prior to bringing suit.<sup>100</sup>

Chief Justice Laskin, dissenting in *Borowski*, believed that standing should not have been granted, which was a departure from his grants of standing in the previous two cases. In particular, Laskin compared how far removed the plaintiff was from the alleged constitutional harm. In *Thorson*, the plaintiff was a taxpayer of the region where the alleged invalid use of taxpayer funds had occurred, and therefore he had a relationship to the alleged harm. In *McNeil*, the plaintiff was a member of the public who was denied the ability to see a film banned by the Board of Censors, and therefore he had a relationship to the alleged harm. In *Borowski*, however, the plaintiff was a member of the public whose only interest in the alleged harm was that he was morally opposed to the legal practice of abortion. This interest was too far removed for the Chief Justice to concur with the majority's grant of discretionary public interest standing.<sup>101</sup>

98. *Id.* at 596–97 (“There is no reasonable way in which that issue can be brought into court unless proceedings are launched by some interested citizen.”).

99. *Id.* at 598 (“[I]f there is a serious issue as to [legislation’s] invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.”).

100. *Id.* at 590, 597.

101. *Id.* at 587 (Laskin, C.J., dissenting) (“The present case lacks concreteness despite the fact that it raises a highly charged issue. Moreover, it appears to me that to permit the issue to be litigated in as abstract a manner as would be the case in having the plaintiff alone carry it against two Ministers of the Crown would hardly do justice to it, absent even any

The Standing Trilogy only concerned public interest standing when the claim raised a constitutional question, but it was subsequently settled in *Finlay* that public interest standing is also available in judicial review of administrative agencies.<sup>102</sup> In *Finlay*, the court combined the Standing Trilogy's lessons into the contemporary three-part test: (1) Is there a justiciable and serious issue to be tried? (2) Does the applicant have a genuine interest in the subject matter? and (3) Is there another reasonable and effective manner for the case to be brought forward?<sup>103</sup> The third prong was elaborated upon in a recent Canadian Supreme Court case:

[T]he third factor in the public interest standing analysis should be expressed as: whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court. This factor, like the other two, must be assessed in a flexible and purposive manner and weighed in light of the other factors.<sup>104</sup>

These factors and judicial tests to discern public interest standing in Canadian courts can inform U.S. courts that attempt to construct their own public interest test.

#### D. Australia

##### 1. Statutory Provisions on Judicial Review and Standing for Environmental Plaintiffs

The statutory right to review of administrative decisions is provided in the Administrative Decisions (Judicial Review) Act of 1977 (“ADJR”).<sup>105</sup> The statute allows “[a] person who is aggrieved by [an administrative] decision” to apply to certain federal courts

interveners who might, with the same obsessiveness on the opposite side of the issue, argue for the valid operation of the challenged provisions. Even accepting, as is probable, that if standing was accorded to the plaintiff, other persons with an opposite point of view might seek to intervene and would be allowed to do so, the result would be to set up a battle between parties who do not have a direct interest, to wage it in a judicial arena.”)

102. *See* *Finlay v. Canada (Minister of Fin.)*, [1986] 2 S.C.R. 607 (Can.).

103. *See id.*

104. *Canada (Att’y Gen.) v. Downtown Eastside Sex Workers United Against Violence Soc’y*, 2012 SCC 45, para. 52 (Can.).

105. *Administrative Decisions (Judicial Review) Act 1977* (Cth) (Austl.).

for review of the decision.<sup>106</sup> The available grounds for appeal are similar to those granted in the United States by the APA. Some grounds for review in the ADJR are: “that procedures that were required by law to be observed in connection with the making of the decision were not observed;”<sup>107</sup> “that the person who purported to make the decision did not have jurisdiction to make the decision;”<sup>108</sup> and “that the decision was otherwise contrary to law.”<sup>109</sup>

The ADJR is not itself directly applicable to all administrative decisions, but rather it must be incorporated into legislation by reference, as it was incorporated into the Environment Protection and Biodiversity Conservation Act 1999 (“EPBCA”).<sup>110</sup> The EPBCA contains a section for judicial review, subtitled “Extended standing for judicial review.”<sup>111</sup> This section expands the definition of “person aggrieved” to encompass even more than the ADJR.<sup>112</sup>

The EPBCA grants the right of review to individuals and organizations if they are an Australian citizen or resident, and if they are—within two years immediately preceding the contested administrative action—engaged in activities in Australia for “protection or conservation of, or research into, the environment.”<sup>113</sup> The EPBCA makes clear that its definition of a person aggrieved is to be more expansive than under the ADJR, stating that the EPBCA judicial review section “extends (and does not limit) the meaning of the term *person aggrieved* in the [ADJR].”<sup>114</sup> This ensures that any action brought by an Australian

106. *Id.* s 5(1).

107. *Compare id.* s 5(1)(b), with 5 U.S.C. § 706(2)(D) (2012) (providing that a reviewing U.S. court shall invalidate agency actions or decisions found to be “without observance of procedures required by law”).

108. *Compare Administrative Decisions (Judicial Review) Act 1977*, s 5(1)(c), with 5 U.S.C. § 706(2)(C) (providing that a reviewing U.S. court shall invalidate agency actions or decisions found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

109. *Compare Administrative Decisions (Judicial Review) Act 1977*, s 5(1)(j), with 5 U.S.C. § 706(2)(A) (providing that a reviewing U.S. court shall invalidate agency actions or decisions found to be “otherwise not in accordance with law”).

110. *Environment Protection and Biodiversity Act 1999* (Cth) s 487 (Austl.).

111. *Id.*

112. *Id.* s 487(1).

113. *Id.* s 487(2)–(3).

114. *Id.* s 487(1). Subsection 4 of the EPBCA’s judicial review provision specifically states that “[a] term (except person aggrieved) used in this section and in the [ADJR] has the same meaning in this section as it has in the [ADJR].” *Id.* s 487(4).

citizen or resident who has been engaged in positive environmental activity in the last two years will not be denied locus standi.

## 2. Public Interest Standing Liberalization, 1980–Present

The method of determining whether a plaintiff is “aggrieved” under the ADJR is identical to the common law method that Australian courts use to discern whether or not a person has a “sufficient interest” to bring suit. The current law of what qualifies as such an interest under the common law in Australia began its evolution with the Australian High Court’s decision in *Australian Conservation Foundation v. Commonwealth* (“ACF No. 1”).<sup>115</sup> The common law requirement of a particular special interest for standing, as pronounced by the English judiciary in *Boyce*,<sup>116</sup> shifted to a more lenient requirement of “sufficient interest” in Australia.<sup>117</sup> The following cases are illustrative of the common law application of sufficient interest as it was expanded and incorporated into the ADJR. Though the first case—*ACF No. 1*—was ultimately decided against the environmental organization, its judicial commentary on the concept of public interest standing initiated two decades of doctrinal evolution.

In *ACF No. 1*, the Australian Conservation Foundation (“ACF”) brought suit challenging a decision by the Australian government to approve a plan to build and operate a resort complex at Farnborough in central Queensland.<sup>118</sup> ACF was an organization well-known for its involvement in public discussions of environmental issues in Australia.<sup>119</sup> ACF alleged that the government failed to comply with required procedures of the Environment Protection (Impact of Proposals) Act of 1974 (“EPIPA”).<sup>120</sup> EPIPA did not contain a section incorporating the judicial review provisions of the ADJR.

The question presented on appeal to the High Court of Australia in *ACF No. 1* was whether ACF had locus standi to challenge the

115. See *Australian Conservation Found v Commonwealth* (1980) 146 CLR 493 (Austl.).

116. See *supra* notes 34–42 and accompanying text (discussing *Boyce*).

117. The first case that shifted from the special interest inquiry to the sufficient interest inquiry was *Onus v Alcoa of Austl Ltd* (1981) 149 CLR 27 (Austl.).

118. *Australian Conservation Found*, (1980) 146 CLR at 518.

119. *Id.* at 519.

120. *Environment Protection (Impact of Proposals) Act 1974* (Cth) (repealed and replaced by EPBCA) (Austl.).

Australian government's actions.<sup>121</sup> The court held that ACF did not have standing because EPIPA and its accompanying procedures did not create rights of review enforceable by private individuals.<sup>122</sup> The court reasoned that EPIPA had no statutory provisions granting a right to review upon the public, and therefore "in the absence of clear words it [was] impossible to impute to the Parliament an intention to confer on any private citizen the right to enforce the observance of the proper procedures."<sup>123</sup> To put the reasoning into terms similar to those used in the United States, this is an example of a court's unwillingness to contravene traditional common law without an express congressional intent to do so.<sup>124</sup>

Counsel for ACF also argued that the organization's interest in environmental conservation satisfied the *Boyce* requirement of a "special interest" above the public generally.<sup>125</sup> The Australian High Court disagreed.<sup>126</sup> At the time *ACF No. 1* was decided, the common law of locus standi for public interest litigants as stated in *Boyce* was controlling absent clear parliamentary intent to override.<sup>127</sup> *Boyce* stated that a private litigant bringing a public interest claim must demonstrate a special interest above that of the public generally.<sup>128</sup> In *ACF No. 1*, the Australian High Court addressed the issue of "special damage" in the *Boyce* test and concluded that the test only required a special interest in the subject matter—not a special damage in the common law sense.<sup>129</sup> Nevertheless, the court did not accept ACF's argument that its environmental concern was a sufficient special interest.<sup>130</sup> Therefore, ACF's professional and intellectual interest was insufficient to accord standing.

121. *Australian Conservation Found.*, (1980) 146 CLR at 518.

122. *Id.* at 524–25.

123. *Id.*

124. *Cf.* *Allen v. McCurry*, 449 U.S. 90, 97 (1980) ("[N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common law rules.").

125. *Australian Conservation Found.*, (1980) 146 CLR at 528–30.

126. *Id.* at 530–31.

127. The ADJR, *see supra* Section II.D.1, was not incorporated into EPIPA. The ADJR was passed three years after the enactment of EPIPA. EPIPA was repealed and replaced by the EPBCA, *see supra* note 110, which references the ADJR and grants broad standing to environmentalist plaintiffs, even more liberally than does the ADJR.

128. *See Boyce v. Paddington Borough Council* [1903] 1 Ch. 109, 114 (Eng.).

129. *Australian Conservation Found.*, (1980) 146 CLR at 527 ("[T]he expression 'special damage peculiar to himself' in my opinion should be regarded as equivalent in meaning to 'having a special interest in the subject matter of the action.'").

130. *Id.* at 531.

The following case, *Onus v. Alcoa of Australia Ltd.*, relied on the shift from “special damage” to “special interest” to establish expanded standing, which would not have been granted under a “special damage” analysis.<sup>131</sup> In *Onus*, the plaintiffs brought suit to challenge Victoria’s lease agreement with a private company to operate an aluminum smelter on public land.<sup>132</sup> The land in question contained aboriginal relics.<sup>133</sup> The plaintiffs argued that the agreement was illegal because the smelter construction would violate prohibitions on destroying aboriginal relics on public land.<sup>134</sup> The plaintiffs were descendants of the Gournditch-jmara people, acting as custodians of the relics with a primary responsibility to preserve them.<sup>135</sup> The land where the relics were located—land now owned by Alcoa—had been used by the plaintiffs for camping, fishing, hunting, and as an educational site for their children to learn about the land and the Gournditch-jmara culture.<sup>136</sup> The suit was dismissed for lack of standing by the trial court and affirmed by the Supreme Court of Victoria. Following statements made in *ACF No. 1*, the Supreme Court of Victoria held that the plaintiffs did not have a special interest above that of all other Gournditch-jmara.<sup>137</sup> The court denied standing because it perceived the plaintiffs’ interest as entirely emotional and intellectual, and therefore not enough to be considered a special interest.<sup>138</sup>

The plaintiffs appealed to the High Court of Australia.<sup>139</sup> The High Court unanimously reversed the denial below, finding a sufficient interest to accord standing.<sup>140</sup> In granting standing to the plaintiffs, the Chief Justice, restating the rule laid out in *ACF No. 1*, noted: “[I]f no private right of [a plaintiff’s] is interfered with he has standing to sue only if he has a special interest in the subject

131. See *Onus v Alcoa of Austl Ltd* (1981) 149 CLR 27 (Austl.).

132. *Id.* at 30–31.

133. *Id.* at 31.

134. *Id.*; see also *Archaeological and Aboriginal Relics Preservation Act 1972* (Vict) s 21 (Austl.).

135. *Onus*, (1981) 149 CLR at 32.

136. *Id.*

137. *Id.* at 36–37. The Supreme Court of Victoria relied on the statement of then Justice Gibbs concerning “mere intellectual or emotional” interest. *Id.* at 53.

138. *Id.* at 36–37.

139. *Id.* at 31.

140. *Id.* at 39.

matter of the action.”<sup>141</sup> Chief Justice Gibbs next expanded the meaning of a special interest: “The rule is obviously a flexible one since, as was pointed out in [*ACF No. 1*], the question what is a sufficient interest will vary according to the nature of the subject matter of the litigation.”<sup>142</sup> The Chief Justice held that the plaintiffs had alleged a sufficient interest due to the special “cultural and spiritual importance” and educational uses the relics held for them, vis-à-vis the public at large; it was therefore improper to dismiss for lack of standing at the pleading stage.<sup>143</sup>

In *Australian Conservation Foundation v. Minister for Resources* (“*ACF No. 2*”), the public interest standing doctrine was applied by the Federal Court of Australia to grant standing to an environmental NGO.<sup>144</sup> ACF requested a review of a government decision to grant a seventeen-year license for the export of woodchips.<sup>145</sup> The woodchips were a product of logging activities occurring in the forests of South East Australia.<sup>146</sup> Two of the forests, the Coolangubra and Tantawangalo, were protected under the Australian Heritage Commission Act as possible additions to Australia’s National Estate.<sup>147</sup> ACF sought review under the ADJR rather than under the common law.<sup>148</sup> In the court’s opinion, the language used to discern whether ACF was a person “aggrieved” under the ADJR was the same language used to describe whether or not a plaintiff has a “special interest” under the common law.<sup>149</sup> When deciding whether ACF had a special interest, the court noted

141. *Id.* at 36. Chief Justice Gibbs (then Justice Gibbs) had authored the first opinion that denied standing to ACF in *ACF No. 1*. See generally *Australian Conservation Found v Commonwealth* (1980) 146 CLR 493 (Austl.).

142. *Onus*, (1981) 149 CLR at 36.

143. *Id.*

144. *Australian Conservation Found v Minister for Res* [1989] FCA 520 (Austl.)

145. *Id.* ¶ 1.

146. *Id.* ¶ 13.

147. *Id.*; see also *Australian Heritage Commission Act 1975* (Cth) s 4(1) (Austl.) (“[T]he national estate consists of those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific, or social significance or other special value for future generations as well as for the present community.”).

148. Recall that in *ACF No. 1*, ACF sought common law remedies to enforce EPIPA procedures because EPIPA did not incorporate the ADJR. See *supra* note 127.

149. *Australian Conservation Found*, [1989] FCA 520 ¶ 8; see also *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1) (Austl.) (granting judicial review to “[a] person who is aggrieved by a decision to which this Act applies”).



that ACF's concern was of national environmental significance.<sup>150</sup> It held that ACF did have public interest standing to maintain its judicial review action against the Australian Commonwealth.<sup>151</sup>

The *ACF No. 2* court provided four reasons why ACF should be accorded public interest standing to challenge the licenses at issue: (1) ACF was a major national conservation organization in Australia with annual income and expenditures over \$2.7 million; (2) it was established with the goal of reconciling the exploitation of resources with conservation of the natural environment; (3) it received a substantial amount of money from the Commonwealth and state governments; and (4) it had played a leading role in the protection of the environment, especially concerning the logging activities affecting the forests in question.<sup>152</sup> To limit the extension of the public interest standing doctrine, the court emphasized that ACF did not have a right of standing to challenge any decision that affects the environment, but only to challenge the activity within the specific area.<sup>153</sup>

ACF is a large national organization concerned with environmental protection and conservation, but an organization's size may not be a determinative factor. The following case, which involved another logging license by the Australian government for the export of woodchips, expanded public interest standing to small environmental organizations.

In *North Coast Environment Council v. Minister of Resources*, the question presented to the Federal Court of Australia was whether the North Coast Environment Council ("North Coast") was a

150. "It is thus worth remarking that the controversy underlying the present dispute, logging, including logging for the purpose of the export of woodchips, which is occurring in the forests of South East Australia, is one of the major environmental issues of the present time. . . . Thus, the present issue is not a local issue such as may have been involved in [*ACF No. 1*]. And, in the decade that has passed since the A.C.F. was denied standing to protect the wetlands at Farnbrough in Central Queensland, public perception of the need for the protection and conservation of the natural environment and for the need of bodies such as the A.C.F. to act in the public interest has noticeably increased, as is demonstrated by the growth of the A.C.F. itself since the time of [*ACF No. 1*]." *Australian Conservation Found.*, [1989] FCA 520 ¶ 13.

151. *Id.* ¶ 20.

152. *Id.* ¶¶ 14–17.

153. *Id.* ¶ 17. Judge Davies emphasized the close relationship between ACF and the South East forests: "The A.C.F. is not just a busybody in this area. It was created and functions with government financial support to concern itself with such an issue. It is preeminently the body concerned with that issue. If the A.C.F. does not have a special interest in the South East forests, there is no reason for its existence." *Id.*

“person aggrieved” by the government’s licensing decision.<sup>154</sup> The court held that North Coast had a sufficient interest in the licensing decision, and therefore North Coast had standing to maintain its action.<sup>155</sup> Whereas ACF was a large national organization, North Coast was a much smaller regional organization concerned with the protection of the northeastern region of New South Wales.<sup>156</sup> That did not sway the court: “[A] regional organization may well be able to demonstrate a closer concern with a particular decision affecting or potentially affecting the environment than a national organization.”<sup>157</sup>

Apart from extending *ACF No. 2* standing to smaller, regional organizations, the court in *North Coast* also provided five factors to discern whether an interest is sufficient to confer public interest standing. First, an organization “must demonstrate a ‘special interest’ in the subject matter of the action.”<sup>158</sup> Second, an organization may be able “to demonstrate a ‘special interest’ in the preservation of a particular environment”—“an intellectual or emotional concern is no disqualification.”<sup>159</sup> Third, merely alleging noncompliance with a procedural or environmental statute will not confer private rights enforceable by organizations.<sup>160</sup> Fourth, prior participation in the process “does not itself confer standing.”<sup>161</sup> Last, “an organization does not demonstrate a special interest in the environment sufficient to establish standing” by merely alleging that it is concerned with the protection of a particular environment. Rather, the organization must demonstrate its environmental protection or conservation values.<sup>162</sup>

The Australian cases provide multiple relevant factors that U.S. courts can utilize when attempting to construct a public interest test for standing. The factors include the size of the organization, whether the organization has members who utilize the specific environment affected by a governmental decision, whether the organization has a history of advocacy concerning the specific

154. *N Coast Env't Council v Minister of Res* [1994] FCA 1556 ¶ 5 (Austl.).

155. *Id.* ¶ 86.

156. *Id.* ¶ 18.

157. *Id.* ¶ 88.

158. *Id.* ¶ 82.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

environment, and whether the organization is recognized by government entities as an expert on a particular environmental issue or geographic area.<sup>163</sup>

### III. PUBLIC INTEREST STANDING AND ADOPTION IN THE UNITED STATES

#### A. The Merits of Public Interest Standing

In the United States, the lack of a public interest standing doctrine is particularly burdensome upon beneficiaries of regulatory programs who wish to complain that agency enforcement of the law is too lax.<sup>164</sup> If there is a concrete injury, a court will hold that a petitioner has standing, even if the alleged conduct is a grievance of general applicability.<sup>165</sup> However, concrete injuries are not always readily identifiable in many environmental law contexts. This is why petitions seeking judicial review of environmental decision-making face particularly difficult Article III standing requirements.

This Note posits that advocates and critics of public interest standing can learn from its evolution in the Commonwealth countries. In the United Kingdom, “it is now widely accepted that it is right for the courts in certain circumstances . . . to entertain challenges to public decisions in the name of the public interest.”<sup>166</sup> The same is true in Australia:

[D]eserving entities (mainly in the arena of environmental litigation) are being granted injunctions to prevent irremediable damage. . . . [T]he application of [public interest standing] rules has become

163. *Id.* ¶ 84.

164. STRAUSS ET AL., *supra* note 3, at 1235.

165. *See, e.g.*, *FEC v. Aikins*, 524 U.S. 11 (1998). In *FEC v. Aikins*, the petitioners sought information that they believed they were entitled to under the Federal Elections Campaign Act of 1971. *Id.* at 14. The court held that the petitioners suffered a cognizable injury, even though it was an injury widely shared and general. *Id.* at 24. “Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an ‘injury in fact.’” *Id.*

166. Peter Cane, *Standing Up for the Public*, PUB. L. 276, 278 (1995).

more amenable to life in times which recognize interest groups and even their importance in societal affairs.<sup>167</sup>

Another important lesson is how the Commonwealth countries have approached three common arguments critical of liberal standing, which are echoed by American critics of liberalized standing. The Sections below respond to three central arguments that public interest standing faces in the United States and has faced in the Commonwealth countries.

### 1. Public Interest Standing Would Not Overburden the U.S. Judicial System

The first major argument against liberal standing is that it will burden scarce judicial resources with frivolous lawsuits. In an already overwhelmed federal judiciary, the possibility of even more judicial review suits being brought—especially frivolous suits—militates against adopting public interest standing. This threat of increased judicial costs did not prevent the adoption of public interest standing in the Commonwealth countries. However, in the Commonwealth countries, there is a difference in how costs are shared that provides a disincentive for frivolous judicial review suits.

A component of the Commonwealth judicial systems is that courts utilize a “loser-pays” system, wherein an applicant for judicial review is liable for the government’s costs if the suit fails. The lack of a loser-pays system in the United States might lead to more judicial review suits because the loser-pays system provides a guard against frivolous suits, because the losing applicant will be financially liable. However, this argument loses some efficacy, because the Commonwealth countries provide a public interest exemption to the loser-pays system. If the courts find that the applicant brought a claim that was within the public interest criteria, then costs will not be ordered against a losing applicant.

For instance, the law for exempting public interest suits from the loser-pays system in Australia is firmly established.<sup>168</sup> The High Court of Australia has held that, like public interest standing, public interest exemptions to cost sharing are at the discretion of

167. JOSHUA D. WILSON & MICHAEL MCKITERICK, *LOCUS STANDI IN AUSTRALIA – A REVIEW OF THE PRINCIPAL AUTHORITIES AND WHERE IT IS ALL GOING* 5 (2010).

168. GERRY BATES, *ENVIRONMENTAL LAW IN AUSTRALIA* 856 (8th ed. 2013).

the court.<sup>169</sup> The High Court stated that judges look at whether the applicant has raised an issue of real importance to the administration or interpretation of the statute under which review was sought, and whether the applicant raises an issue that has an effect upon a large number of individuals.<sup>170</sup> Both of these factors will almost always be satisfied in public interest standing suits, because the nature of the suit (effect upon the community generally) and the suit's importance (ensuring proper administration of an environmental state) are both characteristics of public interest judicial review in environmental law. Thus, the public interest exemption to the loser-pays system means that costs operate the same as they would in the United States, and therefore the existence of a loser-pays system in the Commonwealth countries does not necessarily mean that the comparison between the different legal systems is weak.<sup>171</sup>

In addition, the Canadian Supreme Court in *Finlay* addressed and rejected the argument that public interest standing would overburden the courts.<sup>172</sup> The court reasoned that the second part of its test for public interest standing, which requires that the plaintiff have a genuine interest in the subject matter, overrides prudential arguments concerning judicial resources.<sup>173</sup> The court elaborated that if the plaintiff has a genuine interest, the court's consideration is warranted.<sup>174</sup>

Lastly, U.K. data show that the expansion of standing in the 1990s has not led to an appreciably large increase in judicial review suits. This outcome would likely result in the United States. The U.K. data show the number of judicial review actions over various years. One study found that between 1995 and 2001 (after *Ex parte Greenpeace*), the estimated number of public interest court cases brought by environmental organizations, citizen groups, and

169. *See Forest Def Found v Exec Dir, Dep't of Conservation & Land Mgmt* (1998) 101 LGERA 114, 115 (Austl.).

170. *Wilderness Soc'y v Turnbull* [2007] FCAFC 175 (Austl.).

171. Canada and the United Kingdom have similar public interest exemptions. *See* DOELLE ET AL., *supra* note 59, at 492–94. In 2015, the U.K. Parliament passed a bill that restricts the public interest exemption to the loser-pays cost system. *See* Criminal Justice and Courts Act 2015, c. 2 (U.K.).

172. *See Finlay v. Canada (Minister of Fin.)*, [1986] 2 S.C.R. 607, 631 (Can.).

173. *Id.*

174. *Id.*

individuals was only 111—about sixteen cases per year.<sup>175</sup> More recent data on judicial review applications from 2007 to 2011 show that the total number of all civil judicial review applications—not including immigration and asylum—stayed around 2000 per year.<sup>176</sup> However, a further breakdown of the data between 2007 and 2012 shows that the number of environmental cases is still low. In particular, between 2007 and 2012, both the U.K. Department for Environment, Food, and Rural Affairs and the U.K. Department of Energy and Climate Change had 151 judicial review applications filed against them.<sup>177</sup> This averages to about twenty-six judicial review suits filed per year between 2007 and 2012. These numbers, when compared to the total of 2000 civil judicial review applications per year in the same time period, show that public interest standing has not contributed to a massive increase in environmental judicial review.

In the United States, the years 2007 to 2012 show a similar trend in the number of environmental judicial cases. The surveyed cases come from the D.C. Circuit, chosen because it is the venue for the majority of judicial review applications against executive agencies.<sup>178</sup> Between 2007 and 2012, a total of seventy-nine suits occurred in the D.C. Circuit with the United States named as a defendant and categorized by the court as involving environmental matters.<sup>179</sup> This averages to fewer than sixteen environmental judicial review cases per year, which is lower than the United Kingdom, a country that already enjoys a latent disincentive due to the applicability of the loser-pays system. Overall, the trends in the United Kingdom reflect that there was a marginal increase—and it is possible that the increases were due to other factors such as

175. STUART BELL ET AL., ENVIRONMENTAL LAW 339 (8th ed. 2013). By 1995, public interest standing had been fully adopted in the United Kingdom.

176. U.K. MINISTRY OF JUSTICE, JUDICIAL REVIEW STATISTICS 2007–2011 7 (2013).

177. Ruth Dixon, *How Many Judicial Review Cases Are Received by UK Government Departments?*, LONDON SCH. ECON. BRIT. POL. & POL'Y BLOG (Dec. 12, 2014), <http://blogs.lse.ac.uk/politicsandpolicy/how-many-judicial-review-cases-are-received-by-uk-government-departments> [<https://perma.cc/8PSW-C3KZ>].

178. Eric Frasier et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131 (2013).

179. See *Federal Judicial Caseload Statistics*, U.S. COURTS, [http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics\\_Archive.aspx](http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics_Archive.aspx) [<https://perma.cc/CW5W-ZXCR>] (last visited May 18, 2016) (containing analyses, charts, and tables presenting data on the workload of the U.S. courts of appeals, district courts, and bankruptcy courts and of the federal probation and pretrial services system each year for the twelve-month period ending March 31).

political regime change and population growth—suggesting that the likelihood of a rush of environmental judicial review cases in the U.S. is unlikely.

## 2. Public Interest Standing Would Not Abridge the Separation of Powers Doctrine

A second major argument against liberal standing is that the separation of powers doctrine requires restrictive standing. This argument has been used in the United States to maintain a restrictive locus standi status quo. The separation of powers doctrines in the United States and Commonwealth countries are complex, and therefore this Note only touches upon the subject in general terms.<sup>180</sup> The U.K. and Canadian courts have both spoken extensively on the separation of powers implications of public interest standing. Before turning to those countries, an overview of the separation of powers doctrine and Article III standing in the United States provides a comparative background.

In environmental lawsuits brought by environmental organizations in U.S. courts, it is often the case that the organization itself is not the object of challenged government action or inaction. In these cases, the plaintiff has a much harder time establishing the three requirements of standing.<sup>181</sup> Furthermore, if the challenge is based upon the harm to the organization's interest in the proper execution of laws and the remedy sought is of generally applicable benefit, then standing does not exist.<sup>182</sup> It is a fundamental tenant of American separation of powers doctrine that it is solely the judicial branch that determines the Article III standing requirements.<sup>183</sup>

Current U.S. Supreme Court separation of powers jurisprudence weighs against adopting public interest standing. In modern standing doctrine, public interest standing would likely be construed as an individual right to challenge the executive branch for failing to properly administer the laws, since instances of affirmative agency action would then almost always have an

180. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–77 (1992) (arguing that separation of powers doctrine forbids Congress from defining injuries in a way that shifts from the executive to the judiciary the power to “take Care that the Laws be faithfully executed”).

181. *Id.* at 560–61.

182. *Id.* at 573–74.

183. *Id.* at 576.

individual who would have standing. Allowing a citizen with no injury to question executive action in the courts would effectively transfer the discretion of administering the laws from the executive branch to the judiciary. In other words, it would enable the courts “to assume a position of authority over the governmental acts of another and co-equal department, and to become ‘virtually continuing monitors of the wisdom and soundness of Executive action.’”<sup>184</sup> The U.S. Supreme Court’s current separation of powers doctrine places each branch as equal with individualized duties, and standing doctrine guards against the courts from stepping into the realm of the executive by becoming a continuous monitor of the “wisdom and soundness of Executive action.”<sup>185</sup> But does expanded standing really impede upon the executive’s sole discretion, and is this invasion somehow different than where standing is found under the current test? Either way, the court discerns the law and judges when an executive action has transgressed that law.

In the United Kingdom and Canada, the judiciary views itself primarily as an adjudicator of justiciable issues. This role comes with the duty to rule when the legislature has exceeded constitutional limitations or when the executive has exceeded statutory or constitutional limitations. The case law reviewed in Part II arguably indicates that the British and Canadian courts believe that the judiciary should not skirt its duty to adjudicate justiciable issues, if it is alleged by a petitioner with demonstrated genuine or sufficient interest that applicable limits have been abridged by the government.<sup>186</sup> In Australia, the separation of powers argument never came about during the liberalization cases, but the Australian High Court commented that restrictive standing did not conform to the role envisioned for the courts within the separation of powers doctrine.<sup>187</sup>

In Canada, the judiciary addressed and ultimately rejected the contention that public interest standing abridges the separation of

184. *Id.* at 577 (quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)).

185. *Id.*

186. *See supra* Sections II.B–C.

187. Justice Brennan of the Australian High Court, in discussing the role of judicial review standing and the courts, stated that when an organization properly has a genuine interest, then “to deny standing would deny to an important category of modern public statutory duties an effective procedure for curial enforcement.” *Onus v Alcoa of Austl Ltd* (1981) 149 CLR 27, 73 (Austl.).



powers. The Canadian Supreme Court has held that a justiciable issue should not be foregone solely because it may be better redressed by the legislative or executive branches.<sup>188</sup> The court did not want standing to stop the judiciary from exercising its authority—adjudicating and interpreting the Canadian Constitution.<sup>189</sup> In *Finlay*, when the court expanded public interest standing to non-constitutional cases, it reasoned that a citizen's genuine interest in illegal government action is just as important as the interest in unconstitutional government action. The Canadian Supreme Court explained that the proper role of the judiciary is to adjudicate justiciable questions, not to dodge them with restrictive standing.<sup>190</sup>

The separation of powers argument was rejected in the United Kingdom, because the courts view their role within that doctrine to be adjudicators of law, which makes them capable of granting standing when the issue is serious and warranting adjudication.<sup>191</sup> As in Canada, the English courts had a similar fear that justiciable questions of constitutionality or illegality would have been foregone due to restrictive standing. The IRC Case stated definitively that the rule of law would not be respected if, due to judicially-imposed restrictive standing requirements, the judiciary failed to adjudicate serious issues of government conduct.<sup>192</sup> In granting public interest standing to Greenpeace, the court in *Ex*

188. *Finlay v. Canada (Minister of Fin.)*, [1986] 2 S.C.R. 607, 632 (Can.).

189. See *Thorson v. Canada (Att'y Gen.)*, [1975] 1 S.C.R. 138, 145 (Can.) (“[I]t would be strange and, indeed alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.”).

190. *Finlay*, [1986] 2 S.C.R. at 632 (“Justiciability was held in this Court in *Thorson* to be a central consideration in the exercise of the judicial discretion to recognize public interest standing in certain cases.”).

191. “Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of power. If an arguable case of such misuse can be made out on an application for [judicial review], the court's only concern is to ensure that it is not being done for an ill motive.” *R v. Somerset County Council, Ex parte Dixon* [1998] Env. L.R. 111 (QB) 121 (U.K.).

192. “It would, in my view, be a grave lacuna in our system of public law if a pressure group . . . , or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.” *R v. Inland Revenue Comm'rs, Ex parte Nat'l Fed'n of Self-Employed & Small Buss. Ltd.* [1982] A.C. 617 (HL) 644 (U.K.).

*parte Greenpeace* remarked that the organization revolved around environmental protection and that it was an internationally-recognized expert and advocate on environmental issues.<sup>193</sup> The court held that it would be against all reason to rule that Greenpeace did not have a genuine interest in the harm that may result from the alleged misconduct of the government.<sup>194</sup>

Article III of the U.S. Constitution provides the judiciary with the power to adjudicate cases and controversies as they arise between an individual and the federal government. Justice Scalia's characterization of liberal standing as impeding the executive's discretion may not be absolutely fair, because the entire role of the judiciary, arguably, is to impede upon the executive's discretion, with the caveat that the judiciary only does so when that executive discretion transgresses laws duly established by the third branch of government—the legislature. After all, one main goal of judicial review is to ensure that the executive follows the law as set by either the Constitution or the legislature, and this places the judiciary as the protector of both the rights of individuals and the wishes of Congress.<sup>195</sup>

No one would argue that Congress does not have the right to create the laws, nor would anyone argue that the judiciary does not have the right to have the final say on what these laws mean. Therefore, it frustrates both these roles to hold that the judiciary should abdicate from adjudicating instances where the executive has allegedly failed to follow the law. That was the impetus for creating public interest standing in the Commonwealth countries, after all. The separation of powers doctrine is a Constitutional obstacle, but it is not any more so than the ideological makeup of the judiciary is an obstacle. In the end, the future of public interest

193. *R v. Inspectorate of Pollution, Ex parte Greenpeace Ltd.* [1994] Env. L.R. 76 (QB) (Eng., Wales).

194. *Id.* at 102 (“I regard the applicants as eminently respectable and responsible and their genuine interest in the issues raised is sufficient for them to be granted *locus standi*.”).

195. See *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (holding that it is the province of the judiciary to interpret the law and state whether it conforms with the Constitution). The judicial function of review espoused in *Marbury* is the same practiced in judicial review of administrative action. In particular, instead of interpreting a law's conformity with the Constitution, the court interprets and determines whether an action of the executive is in conformity with the relevant enabling statute.

standing could become a reality if the Supreme Court's composition shifts in a more liberal direction.<sup>196</sup>

### 3. Determining an Applicant's "Genuine Interest" Would Not Involve Policy Judgments by the Judiciary

A third argument against public interest standing is that it would be impossible for the judiciary to create any sort of test to discern whether an applicant for judicial review has a genuine enough interest in the subject matter to warrant a challenge. With only prudential and ideological reasons to discern a genuine interest, a court may shift from adjudicator to policymaker.<sup>197</sup> However, the Commonwealth courts mostly rejected the fear that there is no cognizable way to discern a genuine interest from a frivolous one.

In developing the public interest standing doctrine in Australia, the courts were interested in whether the question raised by the plaintiff was justiciable, and they were equally interested in whether the plaintiff could adequately litigate the issue and represent the public interest. The judiciary recognized that it should resolve justiciable issues. Public interest standing should ensure that the plaintiff has a genuine interest in the action, which ensures that they adequately prosecute the application for judicial review.<sup>198</sup> To illustrate, an animal rights organization recently sought judicial review of the Australian Department of Agriculture's decision to waive an approved animal export program's requirements, on the grounds that the waiver was in excess of the agency's authority. The Australian Federal Court held that the organization had standing because it had a large presence representing animal welfare issues in Australia, because it spent the majority of its resources on the issues of animal welfare, and because the issue was raised under an Australian federal statute that is concerned with animal welfare, thus overlapping with the organization's purpose.<sup>199</sup>

196. At the time of this Note's drafting, there is currently a vacant seat on the court following the death of Supreme Court Justice Antonin Scalia.

197. U.S. courts avoid policymaking through various doctrines, such as deference to administrative agencies in statutory interpretation. *See Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

198. *See generally supra* Section II.D.

199. *Animals' Angels e.V. v Sec'y, Dep't of Agric* [2014] FCAFC 173 ¶¶ 119–21 (Austl.) ("In our opinion the objects of the appellant and its activities in Australia . . . considered in relation to the effect of the statutory decision or decisions and the grounds of judicial review, show that the appellant does have standing to seek the relief set out in its application to the Court. This is supported by the fact that relevant Australian government department has

In determining the requisite interest required for environmental public interest standing, the Australian courts focus on the activities of environmental organizations. If the organization has a relationship to the alleged environmental issue, and issue is justiciable, then public interest standing will be granted.<sup>200</sup> *North Coast* is another instance of an Australian court granting public interest standing with a focus on the organization's relationship to the issue and ability to adequately represent the public interest at stake: the court focused on the organization's purpose and commitment to the forests in dispute, the fact that the organization had been called upon by the government to comment on logging activities similar to the subject matter of the dispute, and the fact that the organization was the premier environmental organization representing many smaller organizations' environmental concerns in that region.<sup>201</sup> U.S. courts should look to the numerous factors proffered by Australian courts when fashioning objective criteria to determine whether an applicant for judicial review has a genuine interest in the subject matter. In fact, U.S. courts already do this when determining whether or not an applicant for judicial review falls within the "zone-of-interests" of the statute under which review is sought.<sup>202</sup>

recognised the appellant's particular status in the area of live animal export. . . . [The organization] has been recognised in Australia by the relevant department of the Commonwealth; it has devoted financial resources to animal welfare in Australia sufficient to fund the activities to which we have referred; . . . the appellant's Australian activities do intersect with the appellant's objects or purposes; and the nature of the decision sought to be reviewed directly impacts on animal welfare, which is at the centre of the appellant's objects or purposes.").

200. See *Australian Conservation Found v Minister for Res* [1989] FCA 520 ¶ 17 (Austl.) ("While the A.C.F. does not have standing to challenge any decision which might affect the environment, the evidence thus establishes that the A.C.F. has a special interest in relation to the South East forests and certainly in those areas of the South East forests that are National Estate. The A.C.F. is not just a busybody in this area. It was established and functions with governmental financial support to concern itself with such an issue. It is preeminently the body concerned with that issue. If the A.C.F. does not have a special interest in the South East forests, there is no reason for its existence.").

201. See *N Coast Env't Council v Minister of Res* [1994] FCR 1556 (Austl.).

202. The zone-of-interest test ensures that industry groups do not use environmental statutes to their detriment, thus contravening the purpose of those statutes. See ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 1139-40 (7th ed. 2013).

## IV. CONCLUSION

Environmental issues pose unique problems for the purposes of Article III standing. This Note posits that the most serious issues can be overcome if the judicial branch decides to expand standing to include public interest standing. In order to guard against public interest standing being abused, the U.S. judiciary should adopt the following rules inspired by the lessons from the Commonwealth countries' ongoing experiment on public interest standing. First, public interest standing should be discretionary, which allows courts to maintain the status quo but also have an additional tool at their disposal. Second, courts could consider using public interest standing only in environmental suits, where harm is widespread and shared, thus keeping public interest standing from being abused in other areas of jurisprudence. Third, the public interest standing analysis should mirror the three-part test from Canada, which asks: (1) Is there a justiciable and serious issue to be tried?; (2) Does the applicant have a genuine interest in the subject matter?; and (3) Is there another reasonable and effective manner for the case to be brought forward?<sup>203</sup>

In determining how to evaluate the second prong, courts should look to the example set in Australia and analyze objective factors such as: (1) the size and expertise of the applicant in relation to the legal subject matter of the review; (2) whether the applicant has a history of challenging executive decisions of a similar subject matter; (3) whether the executive and legislative branches have called upon the applicant in prior occasions to comment upon pending legislation or rulemaking procedures; and (4) whether the applicant was involved in the particular legal issue in previous instances.

In the end, the judiciary could certainly carve out details that would allow public interest standing to exist in the environmental context, and thus the remaining obstacle is the political ideology of individual justices. However, advocating for a public interest standing is not new in the Supreme Court. Justice Douglas's dissent in *Sierra Club v. Morton* called for a robust doctrine of standing that did not restrict courts from adjudicating the law.<sup>204</sup> More recently, Justice Kennedy's concurrence in *Lujan* proposed

203. See *Finlay v. Canada (Minister of Fin.)*, [1986] 2 S.C.R. 607 (Can.).

204. *Sierra Club v. Morton*, 405 U.S. 727, 741–52 (1972) (Douglas, J., dissenting).

that the Court should grant standing to procedural injuries expressly created by statute.<sup>205</sup> There has always been a contingent willing to expand standing outside of the current doctrine, and it is possible that future Supreme Court compositions may decide to do just that. Hopefully, the Supreme Court takes heed of lessons learned and formulates a test based upon the Commonwealth countries' successes.

205. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 579–81 (1992) (Kennedy, J., concurring).