The Problem with Particularized Injury: The Disjuncture Between Broad-Based Environmental Harm and Standing Jurisprudence

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THE PROBLEM WITH PARTICULARIZED INJURY:  
THE DISJUNCTURE BETWEEN BROAD-BASED 
ENVIRONMENTAL HARM AND STANDING 
JURISPRUDENCE

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I. INTRODUCTION

Several recent events harmonically converged into the topic for 
this article. The first was a posting on Georgetown Law’s enviromental 
law professors’ listserv by Professor John Bonine, which 
raised a number of questions about whether and how standing doctrine 
might be rethought in light of the Supreme Court’s opinion in 
Massachusetts v. EPA.1 That opinion relaxed the states’ standing 
burden because of the unique sovereign interests, finding that federalism bargaining earned states “special solicitude”2 when it came to meeting the Court’s standing requirements.

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* Professor of Law at Georgetown University Law Center and Director of the Institute for Public Representation. The author is grateful to the faculty at Florida State University College of Law for inviting me to present these ideas at their annual Journal of Land Use & Environmental Law Distinguished Lecturer Series and for their insightful comments on my lecture. I am also indebted to Jamie G. Pleune, a graduate teaching fellow and staff attorney at the Institute for Representation, for her wise comments on an earlier draft of this article and to Angela Navarro for her careful edits. The lecture has been revised slightly since it was delivered in February of this year to reflect the fact that it is now appearing in written, not spoken form. It has also been updated to incorporate the FSU faculty comments as well as the effect of a recent U.S. Supreme Court standing decision, Summers v. Earth Island Institute, 129 S.Ct. 1142 (2009).

2. Id. at 520 (“[M]assachusetts’ stake in protecting its quasi-sovereign interests . . . entitled [it] to special solicitude in our standing analysis.”).
The second was a complaint filed by a consortium of regional environmental organizations, Chesapeake Bay Foundation, Inc., and individuals against the Environmental Protection Agency (EPA) for failing to achieve the goals of the Chesapeake Bay Agreements.\(^3\) EPA is one of five signatories to the Agreements, which contains a variety of goals, deadlines, and recommended actions, and which has failed miserably to halt the Chesapeake Bay’s decline.\(^4\) This complaint led to a reflection on work done in the clinic several years ago, where bringing a lawsuit on behalf of a commercial fisherman challenging the practice of chumming on the Bay was thought about long and hard. Chumming involves depositing a slurry of decomposed fish parts, usually menhaden, over the side of a fishing boat to attract game fish like striped bass.\(^5\)

While chumming contributes to the Bay’s nutrification, by itself it has little discernible impact on the Bay’s overall health given the much larger sources of nutrients like sewage treatment plants, runoff from farm fields, and confined animal feeding operations.\(^6\) Ultimately it was determined, in part on standing grounds, that such a lawsuit could not succeed.

The last event was a recent conversation with a retired Washington attorney about his decision to start a new organization that would supply pro bono assistance to property owners concerned about relatively discrete, highly localized harms to the Bay such as leaking septic systems or permit violations by industrial dischargers. Collectively, these separate events congealed into a somewhat amorphous concern about the extent to which the Supreme Court’s standing jurisprudence and its insistence on a showing of a particularized injury-in-fact are ill-suited to the types of broad-based, generalized harms from which complex, constantly changing ecosystems suffer.

The new lawsuit against EPA mentioned above, as well as the contemplated, but never filed, chumming lawsuit, would likely fail to meet current standing requirements because plaintiffs would be unable to disaggregate the harm they suffered from the more generalized harms that the public suffers as a result of the Bay’s de-


\(^4\) See Jeff Day, Chesapeake Bay: Bay’s Health Remains Poor After 25 Years; Officials Say ‘Bolder’ Initiatives Under Way, 40 ENV’T REP. 707, 707 (Mar. 27, 2009) (reporting that 25 years after the creation of the Chesapeake Bay Program, the percentage of dissolved oxygen in the water, which is a key indicator of the health of the Bay, is virtually unchanged from what it was in 1985).

\(^5\) For more information on the practice of chumming and its adverse effects on water quality, see generally Hope M. Babcock, Administering the Clean Water Act: Do Regulators Have “Bigger Fish to Fry” When it Comes to Addressing the Practice of Chumming on the Chesapeake Bay?, 21 TUL. ENVTL. L.J. 1 (2007).

\(^6\) Id.
cline. While the approach of the well-meaning, retired Washington attorney is less problematic from a standing perspective, his ability to address the larger systemic problems facing the Bay is unclear. Collectively, the three events resulted in a new thought about how the Court’s standing jurisprudence has driven environmental litigation to a less effective piecemeal approach to protecting complex natural systems like estuaries.

Far from being an enabler of what leads to critically important environmental litigation, the Court’s requirement that litigants show a particularized injury can derail this litigation before the merits of such claims can even be considered. The requirement can drive both plaintiffs’ attorneys and judges into paroxysms of tangential work often with contradictory outcomes. And while there is much to praise about the Court’s standing analysis in Massachusetts, it did not eliminate the need for the Commonwealth to show it had suffered a particularized injury from both the government’s failure to attend to the potentially catastrophic harms and from the government’s failure to regulate greenhouse gas emissions from tailpipes. The Court’s failure to eliminate that need is a great disappointment in what is otherwise a glorious opinion.

This article will attempt to persuade the reader that the Court’s insistence that claimants demonstrate a particularized injury does not make sense, even in Massachusetts. This is evident considering the claims that arise from broad-based harms to complex, evolving natural systems like estuaries, where the level of understanding about how these systems behave is in as much flux as the systems themselves.

The first part of the article describes why it is especially difficult to particularize the harms to these systems, and why lawsuits attacking these problems in a particularized or localist way are not doing enough to solve them. The author discusses the Court’s current standing jurisprudence, especially the requirement that a plaintiff’s injury not only be concrete, but must also be particula-
rized, in Part II of the article. Part of that discussion includes a recitation of the reasons why the Court can, and should, relax the requirement to plead particularized injuries from harms for these critically important natural systems. The article ends with a description of some limiting principles to cabin the number and type of cases that might be brought under a more relaxed injury-in-fact standard. The application of these principles will likely leave the Court's overall standing doctrine intact.

II. WHY DEMONSTRATING PARTICULARIZED HARM TO COMPLEX, EVOLVING NATURAL SYSTEMS IS DIFFICULT AND RESULTS IN INEFFECTIVE LAWSUITS

The physically complex and constantly changing nature of ecosystems, like estuaries, and the breadth of the systemic harms afflicting them make it extremely difficult for environmental plaintiffs to articulate an injury-in-fact that meets the Court's particularization standard and, at the same time, addresses these problems. When plaintiffs can meet the particularization standard, their lawsuit will have little effect on broad systemic problems. The Chesapeake Bay is used as the platform for this argument because it is the estuary known best by the author.

The Chesapeake Bay is North America's largest estuary, consisting of 2,500 square miles. Its 64,000 square mile drainage area includes all or parts of six states and the District of Columbia. Approximately sixteen million people live in the Bay's watershed, many of whom rely on the Bay and its tributaries as a source of income and as a place to recreate and enjoy the natural environment. The Bay is home to more than 3,700 species of plants and animals, including nearly 300 species of fish. It offers unique commercial and recreational opportunities; prime among these is fishing.

9. The Chesapeake Bay Program calculates that the size of the drainage area creates "a watershed land to Bay water volume ratio seven times that of any other major estuary in the world." Chesapeake Bay Program, Chesapeake Bay 2005 Health and Restoration Assessment, Part One: Ecosystem Health 3 (2005), available at http://www.chesapeakebay.net/content/publications/cbp_12892.pdf. It is also the longest estuary in the country, with 4000 miles of shoreline; longer even than the "entire West Coast." CHRISTOPHER P. WHITE, CHESAPEAKE BAY: NATURE OF THE ESTUARY; A FIELD GUIDE 3 (1989).


12. White, supra note 9, at 24.
However, despite the investment of millions of dollars in improving the Bay's water quality, the Bay continues to suffer from severe environmental degradation. For example, blue crabs, an iconic symbol of the Chesapeake Bay, were once at the apex of the Bay's commercial fishery and supplied one-third of the nation's blue crab harvest. In slightly less than a decade, the total abundance of crabs in the Bay has declined nearly seventy percent. The Bay's equally important oyster population is at less than 1% of its historic numbers. Poor water quality from onshore sources of nutrients and sediments has been a major factor in the decline of these and other Bay fisheries, as well as in the loss of vital Bay underwater grasses. These grasses serve as critically important nursery and spawning areas for many of the Bay's aquatic species and help oxygenate the water so those and other species can survive.

The Bay offers a challenging environment for its resident species as well as for scientists and regulators charged with the task of predicting how the system will respond to pollutants and other stressors, including natural ones. The Bay's hydrology and hydrodynamic character are extremely complex and poorly understood. Although the Bay's wide mouth allows for vigorous tidal flushing, turnover of its water is slow; a parcel of water generally takes from two to three weeks to cycle along the Bay's 195-mile length.

One hundred and fifty tributaries from a wide array of geophysical provinces and states drain into the Bay, contributing not only freshwater, nutrients, and other important materials for plant growth, but also pollutants. The tributaries create a multiplicity of distinct ecological zones in the Bay, and the Bay's temperature fluctuations and sharp salinity gradient create barriers

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17. White, supra note 9, at 24 (explaining that “[l]ike a pyramid of stones, the animals at the top are dependent on the size of the plant base. Top carnivores such as crabs, bluefish, and osprey are very abundant in the Chesapeake only because of the enormous plant productivity in the Bay . . . . The Bay’s various plant communities . . . sustain the nations’ most prolific estuarine fisheries.”).
19. White, supra note 9, at 18.
20. Id. at 19-20.
many species cannot cross. The Bay’s freshwater tributaries, salinity structure, and tidal flow are additionally highly variable.

The process of trying to understand how stressors like pollutants behave in an estuarine system, like the Bay, is greatly complicated by the phenomenon of positive feedback loops. These “complex, circuitous paths” are common in fluctuating systems like estuaries. A positive feedback loop occurs when the consequences of an ongoing process become factors in modifying or changing that process by reinforcing and amplifying it. For example, the process of nutrification, which involves algal blooms that block sunlight from underwater grasses, causing the grasses and algae to die, sets off three positive feedback loops that reinforce and amplify the original process, leading to more die-off. The effects of positive feedback loops, which act to speed up the original process, are negative because they can destabilize a system; in some cases, they even cause the system’s collapse. Reversing the flow of a feedback loop will not allow the component parts of a complex, adaptive system like an estuary “simply to retrace their steps” and to return to where the process started. Rather when the process is reversed, “[n]ew feedback loops may emerge, the old ones may change strength or direction, and new possibilities for the system open up.”

Complex systems like estuaries also react to change in unpredictable ways. The smallest changes to such systems can have wide-ranging effects. This is especially true “in far-from-equilibrium conditions,” such as those found in the Bay, where even the smallest disturbances or changes “can become amplified into gigantic, structure-breaking waves.” In fact, “the more complex a system is, the more numerous are the types of fluctuations

21. Id. at 5.
22. Id. at 13.
24. Id. (stating “[s]uch feedback loops can become exponential in effect and thus dominate the system in which they operate.”).
25. See Babcock, supra note 5, at 10-12 (discussing this phenomenon).
27. Id.
28. This is best illustrated by the “butterfly effect,” in which the smallest change, like the wings of a butterfly “stirring the air today in a Chinese park can transform the storm systems appearing next month over a North American city.” DONALD WORSTER, NATURE’S ECONOMY: A HISTORY OF ECOCLOGICAL IDEAS 407 (Donald Worster & Alfred Crosby eds., Cambridge Univ. Press 2d ed. 1994) (1977) (explaining how “tiny differences in input might quickly become substantial differences in output.”).
that threaten its stability." Ecosystems contain constantly fluctuating subsystems. These fluctuations, either alone or in combination, may become sufficiently powerful as a result of positive feedback loops to shatter the system’s preexisting organization. This makes it impossible to predict the direction change will take, let alone whether the basic structure of the system will “disintegrate into ‘chaos’ or leap to a new, more differentiated, higher level of ‘order’ or organization.” It also makes it difficult to discern what the initial condition of the system was before the change occurred.

Additionally, our understanding of how complex systems, like estuaries, behave is in flux. The common view fifty years ago was all ecosystems were moving towards homeostasis: the point at which the system was in perfect balance. Nature was seen as a “manageable system of simple, linear, rational order.” Today, ecologists view ecosystems as anything but stable; instead they are seen as being composed of constantly “shifting patterns in endless flux.” There are too many variables in these systems for scientists “to plot all the lines of influence, of cause and effect[,]” because nature’s processes are “essentially non-linear.” Where ecologists once believed they could determine what level of disturbance was safe, today’s ecologists see “[e]ach organic system . . . [to be] so rich in feedbacks, homeostatic devices, and potential multiple pathways that a complete description is quite impossible.”

The current standing paradigm assumes a natural system that is stable and unchanging, where harms can be isolated and particularized to individual plaintiffs. However, this understanding is seriously out-dated. It is now understood that natural systems, like estuaries, are stochastic and unstable and subject to the laws of complexity or chaos theory, where change, which can be set off by the smallest disturbances to these systems, is one of the few immutable rules, and phenomena like positive feedback loops can both reinforce and alter outcomes.

31. Toffler, supra note 29, at xv.
32. Id.
34. Worster, supra note 28, at 366-67 (stating “the principle goal of the theory of ecosystem management was to achieve a ’steady state,’ or equilibrium.”).
35. Id. at 406.
36. Id. at 412.
37. Id. at 407.
The complexity of the Bay’s structure also means a piecemeal approach to solving its problems, one discharge pipe or septic system at a time, will not work. The attack on these problems needs to be broad-based and systemic, like the environmentalists’ lawsuit against EPA for failing to meet the Chesapeake Bay Agreement’s water quality goals. Furthermore, unless the courts act, the multiplicity of political jurisdictions contribute to the Bay’s problems and are responsible for their solution, making it highly unlikely any one of these stakeholders will suddenly voluntarily step forward to rescue the Bay.\textsuperscript{39} They have not done so in over twenty years, and there is no reason to believe they will do so now.\textsuperscript{40}

The complexity of natural systems like estuaries thus creates a serious barrier to showing a particularized injury, which requires disaggregating isolated harms to the system. If individual harms cannot be isolated, then a prospective plaintiff cannot identify a discrete harm that has injured her. If, for example, scientists cannot untangle the relationship between nutrient loading and general water quality in the Bay, then how can a plaintiff show whether her injury from the Bay’s excess nutrient loadings is from the contribution of nutrients from upstream tributaries, the failure of the state to control leaking septic systems, the reluctance of dairy farmers to implement manure management controls, or from airborne deposition of nitrogen, let alone from a particular source? Yet, these are exactly the showings that are required under the Court’s current standing doctrine, which is discussed next.

III. THE SUPREME COURT’S CURRENT STANDING JURISPRUDENCE

Standing is the hurdle all plaintiffs must surmount before a federal court will hear the merits of their claims.\textsuperscript{41} The elements of the Court’s standing doctrine are sufficiently well known that most law students can recite them from memory: “[t]he plaintiff must

\begin{itemize}
  \item See William W. Buzbee, Recognizing the Regulatory Commons: A Theory of Regulatory Gaps, 89 IOWA L. REV. 1, 5-6 (2003) (stating that when there is a mismatch between the underlying “social ills” and the existing political-legal regime, it is highly unlikely that any regulator or other interested party will step forward and try to solve the problem).
  \item See Id. at 36 (explaining that regulators and “those benefiting from the status quo” have little incentive to change it because they “have sunk money and effort” into maintaining it and “are likely to become attached to it”).
\end{itemize}
have suffered an ‘injury-in-fact,’” defined as “an invasion of a legally protected interest, which is (a) concrete and particularized, [citations omitted]; and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’ [citations omitted].”42 The injury must also be fairly traceable to the defendant’s challenged action and not “th[e] result [of] the independent action of some third party not before the court[,]” and “be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”43 The doctrine is not set out in the Constitution; rather it is inferred from Article III’s cases and controversies limitation on judicial authority44 to assure plaintiffs have a genuine interest and personal stake in a controversy. Additional common justifications given for the standing doctrine are separation of powers, judicial economy, and fairness.45

The judicial requirement that a plaintiff must be able to demonstrate she has suffered an injury-in-fact is at the core of the standing doctrine. The additional adjectival requirements that the injury be “concrete” or reflect “a personal stake” in the underlying action and be actual or imminent exist to “assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination[.]”46 The other two prongs of the Court’s standing doctrine, traceability and redressability, flow from these requirements.

A. The Need to Show a Particularized Injury

Standing has been problematic for many environmental plaintiffs because often the harms complained about cannot easily be reduced to a judicially cognizable injury-in-fact, which can then be traced to illegal governmental conduct and be redressed by a fa-

43. Id.
44. U.S. CONST. art. III, § 2, cl. 1. (extends judicial review “to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . [and] to Controversies to which the United States shall be a Party[,]”)
45. Palmer, supra note 41, at 177.
46. Baker v. Carr, 369 U.S. 186, 204 (1962); See also Lujan, 504 U.S. at 581 (Kennedy, J., concurring) (“[The] requirement [of concrete injury] is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that ‘the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.’”); FEC v. Akins, 524 U.S. 11, 23-24 (1998) (theoretical harms should be addressed by the political process, not the judicial process, to “prevent[ ] a plaintiff from obtaining . . . an advisory opinion.”).
vorale court decision. Another confounding feature of the standing doctrine is that environmental harms frequently affect the commons, in which “few, if any, have distinct and particularized legal interests.”

This article focuses on the need for an injury to be particularized to an individual plaintiff, and thus distinguishable from injuries suffered by other members of the public, because in many ways it can be the most problematic of the adjectives adorning the Court’s modern standing jurisprudence for environmental plaintiffs. The need to particularize injuries to a discrete plaintiff leads to a scramble by plaintiffs’ lawyers to find individuals with a personal connection to the harm complained about, thus reducing the Court’s standing doctrine to what Chief Justice Roberts referred to in *Massachusetts* as a “lawyer’s game.” The absurdity of this situation, as Professor Daniel Farber notes, is that while the government’s “regulatory actions will often create the requisite injury in fact . . . in a given case an environmental organization may not be able to recruit the appropriate plaintiff” or the plaintiff’s burden will not be met because she has filed the wrong affidavits.

The Court’s insistence that plaintiffs demonstrate a particularized injury makes it virtually impossible for plaintiffs to bring a legal action to address the Bay’s broad-based problems. The plaintiffs cannot show the requisite particularized injury because the cause of their injury cannot be neatly unraveled into discrete problems. The indeterminacy and nonlinear character of the natural system described earlier preclude the identification of particularized injuries. If these injuries cannot be particularized, then in the parlance of the standing doctrine this makes them generalized injuries, which are broadly felt by an undifferentiated regional or even national population and thus barred by the Court’s standing doctrine.

48. *Id.* at 182.
49. This is not to say that the other elements of injury-in-fact or the two other constitutionally mandated prongs, traceability and redressability, are problem-free. The need to demonstrate an injury is imminent drew Justice Scalia’s attention in *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1150 (2009), where he criticized the affidavit filed by one environmental plaintiff because it discussed “past injury rather than imminent future injury that is sought to be enjoined.”
51. Farber, *supra* note 41, at 1542.
52. There is a distinction between widespread harms, which do not defeat the standing of an individual experiencing the same harm (see United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687-88 (1973) (explaining that “standing is not to be denied simply because many people suffer the same injury” because that “would mean that the most injurious and widespread Government actions could be questioned by nobody[...')}
Lujan v. Defenders of Wildlife\(^{53}\) remains the Court’s strongest affirmation of the need to show a particularized injury.\(^{54}\) While Massachusetts rectified some of the more extreme elements of Justice Scalia’s standing analysis in Lujan, the opinion did not eliminate the need for the harm to be one that directly affects the particular plaintiff.\(^{55}\) Indeed, the Court went to great lengths to show Massachusetts suffered a specific injury from global climate change—the loss of its coastline.\(^{56}\)

In Lujan, Justice Scalia emphatically states a particularized injury-in-fact is part of the “irreducible constitutional minimum of standing” and, therefore, cannot be modified.\(^{57}\) Justice Scalia is wrong for two reasons. First, even if particularized injury is constitutionally mandated, the Court has relaxed other elements of its standing requirements, as shown below, and there is no reason not to loosen this one as well. Second, the particularized injury requirement is prudential, as is mootness, the political question doctrine, and the bar against third-party standing, and thus not constitutionally required.

B. Reasons to Relax the Particularized Injury Showing, Especially for Complex Evolving Ecosystems

First, if Justice Scalia is right, and particularized injury is constitutionally required, then it is hard to countenance the Court’s relaxed attitude toward the other elements of standing without including the need for an injury to be particularized. For
example, the Court has substantially lessened the plaintiff’s burden to demonstrate traceability and redressability when prosecuting some procedural right granted by Congress,58 like the right to require an agency to prepare an environmental impact statement under the National Environmental Policy Act. In Massachusetts, the Court relaxed the need that an injury be imminent until the next century or longer.59 In Bennett v. Spear,60 the Court displayed a similarly relaxed attitude toward the zone-of-interest test, which was engrafted onto the injury-in-fact requirement in the last quarter of the previous century,61 relaxing it in the context of a statutory citizen suit provision.

If the Constitution mandates these standing requirements, then the Court must apply them to all injuries under all circumstances. Any exception based on a procedural or some other right appears more like “a creature of practical necessity” than constitutional dogma and reveals the test’s “fundamental ineptitude . . . as a reasonable measure of constitutional standing in public law cases.”62 Like the Pillsbury dough boy, the contours of the standing doctrine, including its most hallowed injury-in-fact component, appear infinitely malleable. If the Court can loosen these standing elements, then surely it can treat the requirement that an injury be particularized the same way. Loosening the particularized injury test will hardly open the floodgates to litigation, considering that the concrete injury requirement adequately cabined the Court’s jurisdiction for years before the particularized requirement came into vogue.

The second reason for the belief that the Court can relax the particularized injury test is that the obverse of a particularized injury is a generalized one,63 and courts have long considered the bar against generalized injuries to be prudential.64 Because the bar

58. See Massachusetts, 549 U.S. at 517-18; cf. Summers v. Earth Island Inst., 129 S.Ct. 1142, 1151 (2009) (“Only a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. . . . Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”).
59. Massachusetts, 549 U.S. at 522-23.
60. Bennett v. Spear, 520 U.S. 154, 164-65 (1997) (saying that the “ESA’s citizen-suit provision . . . expands the zone of interests[].”).
61. Ass’n of Data Processing Serv. Orgs. Inc. v. Camp, 397 U.S. 150, 153 (1970) (a person has standing if her interest is “arguably within the zone of interests to be protected or regulated by the statute[,]”).
62. Brown, supra note 41, at 263-64.
63. A typical example of a generalized injury is a taxpayer suit where the injury suffered in the allegation is often minute and shared with millions of others, is indeterminable, and is a reflection of a public, not individual, concern. See, e.g., Commonwealth of Mass. v. Mellon, 262 U.S. 447, 486 (1923).
64. See, e.g., Warth v. Seldin, 422 U.S. 490, 498-99 (identifying the generalized grievance bar as a prudential barrier).
against pleading generalized injuries is prudential, courts can and have relaxed it. Jonathan R. Nash identifies two such instances. 65 The first involves the “[o]verbreadth doctrine,” which allows parties to object to overbroad speech regulations, even when the regulations do not infringe directly on their speech. 66 The second example Nash gives is a declaratory judgment where courts can declare broadly the rights and legal relations of any party seeking such relief regardless of whether the party has personally experienced the effect of the threatened action. 67 In each instance, plaintiffs are raising broad-based public concerns; in neither case is the injury particularized to the plaintiff, nor will the effects of a positive ruling from the court be limited to redressing just the injury to the particular plaintiff.

The reason for barring generalized grievances is the same reason for requiring particularized injuries— to prevent courts from breaching the barrier between the judicial branch and the other two branches of government. 68 However, in the situation which has given rise to this article, that reason does not make sense. Precisely because harms to complex natural systems like the Bay are widespread and shared by many, it is unlikely that the public will organize to pressure the government to abate them. 69 Moreover, neither the government nor the public responds well to “ex ante” catastrophic risks, where the benefits of expenditures before the catastrophic event occurs appear less tangible than the present day costs of taking action to avert it. 70 These social dynamics become barriers to action, a dynamic afflicting the Bay, and allow the political branches of government to avoid acting. Lastly, the political branches are not powerless to act before a court reaches the merits of a case and can thus preempt the lawsuit at any time before it must step in and resolve the dispute.

Unless courts are willing to set aside the requirement that plaintiffs plead a particularized injury in the case of harms to complex natural systems like estuaries, and fill the vacuum left by the elected branches, those harms will continue unabated and, in the case of the Bay, will potentially magnify and become worse. If

66. Id. at 518.
67. Id. at 518-19.
68. See FEC v. Akins, 524 U.S. 11, 33 (1998) (Scalia, J., dissenting) (explaining the bar against generalized grievances as preventing “something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts”).
69. See Buzbee, supra note 39, at 28-29 (discussing how people faced with harm to a common pool resource are unlikely to take any initiative to protect it).
70. Nash, supra note 65, at 520.
one agrees that the particularized injury requirement is prudential, or at least capable of modification like the other elements of standing, then it should be apparent that the Court can abandon or modify it in some situations. However, no court is likely to abandon or modify the requirement without some limiting principles to curb the number and type of potential plaintiffs who might otherwise flood the courts.

IV. SOME PROPOSED LIMITING PRINCIPLES TO CONSTRAIN THE NUMBER AND TYPES OF CASES UNDER A MORE RELAXED INJURY-IN-FACT STANDARD

In the final part of this article, four limiting principles are proposed for consideration.

The first principle limits the type of plaintiff who can qualify for a waiver of the need to show a particularized injury. This principle is similar to the Court’s prudential third party standing jurisprudence, where parties have sometimes been allowed to raise the concerns of others not before the court when the litigation would impact those other parties. One type of plaintiff who would qualify under this principle is someone who satisfies Daniel A. Farber’s place-based standing requirement. Place-based standing is the idea that plaintiffs with a special connection to the geographic area they are concerned about are uniquely qualified to prosecute matters affecting that area. Thus, the eponymous Chesapeake Bay Foundation, which is dedicated to the restoration and

71. But, unlike the Court in Massachusetts, the author sees no reason to limit this proposed relaxation of the Court’s standing doctrine to states. The unusual vehemence and breadth of the Chief Justice’s attack on the majority’s analysis, including noting that there was no basis in the Court’s standing jurisprudence to carve out states for “special solicitude” raises at least the possibility that the dissenters envision the effect of the majority’s standing analysis to have a much broader impact than just on state plaintiffs. Massachusetts v. EPA, 549 U.S. 497, 536-37 (2007). In a subsequent article, these and other reasons why the opinion should be applied more broadly will be developed.


73. See Craig v. Boren, 429 U.S. 190, 195 (1976) (stating that a bartender was “entitled to assert those concomitant rights of third parties that would be ‘diluted or adversely affected’ should her constitutional challenge fail and the statutes remain in force.”). But see Tileston v. Ulman, 318 U.S. 44 (1943) (denying standing to a doctor who challenged a statute on the ground that it would deprive plaintiffs of their lives without due process).

74. See generally Farber, supra note 41. While Farber proposes replacing the injury-in-fact test with a place-based theory of standing, it is merely suggested here as a limiting principle for allowing some generalized claims of injury.

75. Id. at 1549 (stating that place-based standing recognizes that “humans are intimately and deeply connected with their geographic surroundings, and therefore have legitimate cause for complaint about environmental violations that impact those surroundings.”).
protection of the Chesapeake Bay and devotes all of its resources and energies to that end, should be able to establish a concrete physical connection to the Bay. Even though the broader public in the Bay’s watershed may share the Foundation’s interest in a healthy Bay, the Foundation’s concrete connection to the Bay makes its harm from the Bay’s decline “more than the abstract injury to ideology that the Court has consistently rejected as nonjusticiable.”76

Another type of plaintiff who would not need to make a showing of particularized injury would be an organization that possesses the commitment, expertise, agenda, and resources to prosecute the matter. For example, the National Audubon Society qualifies by each of these metrics to protect critically important bird habitats like the Rainwater Basin in Nebraska or the Prairie Pothole region of North Dakota, even though the organization may not be physically proximate to the resource. The principle recognizes that only such groups have the expertise and resources necessary to contribute meaningfully to such litigation. This plaintiff finds its origins in Justice Blackmun’s dissent in *Sierra Club v. Morton*, where he argued for an “imaginative expansion of our traditional concepts of standing in order to enable an organization . . . [with] pertinent, bona fide, and well-recognized attributes and purposes in the area of the environment” to have standing to litigate environmental issues.77 It is narrower, however, than Justice Douglas’ proposal, which would grant standing to speak for a natural resource, like a river, to anyone if she enjoyed some attribute of it.78

The second limiting principle focuses on the nature and importance of the resource that is the subject of litigation and on the failure of the elected branches of government to protect it. The elimination of the particularized injury requirement would only extend to litigation involving large, nationally or regionally important ecosystems, like the Bay, the Everglades, or a migratory bird flyway, where the effect of government inaction risks catastrophic and/or irreversible harm.79 Thus, not every lawsuit would justify elimination of the particularized injury test, but only those invol-

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78. See *id.* at 743 (Douglas, J., dissenting) (suggesting that “people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.”).
79. See *Toffler*, supra note 29, at xvii (describing how sometimes the smallest of disturbances can lead to wide systemic changes and even their collapse or complete restructuring).
ing resources of “unusual importance,” where the impacts are “diffuse, with effects that are insidious and imperceptible but dangerously irreversible[,]” and where the elected branches of government have failed to act, as in the case of the Bay, or acted improperly.

The third principle addresses the type of harm the litigation is trying to arrest or abate. Relief from the need to demonstrate a particularized injury would only be allowed when the lawsuit addresses broad-based systemic harms to those resources, from which discrete harms cannot be isolated. Lawsuits to protect severable parts of these areas, like a specific wetland, would continue to be subject to a particularized injury standard, in part because the showing could be made. The same would go for suits filed against individual violators of various environmental laws, even if the violation involves a much larger resource, so long as the claim did not rest on disaggregating an individual injury from a much larger systemic harm.

Both the second and third principles address situations in which, consistent with the concept of separation of powers, the judicial branch is expected to step in and correct a situation where the executive branch has failed to implement a directive from the legislative branch to the detriment of the people. In neither case are courts being asked to develop programs to protect these systems, as they clearly lack the competence to do this. Rather, courts are being asked to interpret whether existing law requires some form of government action—”a question eminently suitable to resolution in federal court.”

80. Massachusetts v. EPA, 549 U.S. 497, 506 (2007). This principle elicited the most comments from Florida State University College of Law faculty after my lecture, illustrating a justifiable level of concern about the vagueness of the proposal and its capacity for abuse. Several of these comments suggested ways in which the proposal could become less vague, such as proposing that resources of importance be identified through a process similar to the listing of wetlands of international significance under Ramsar or by having plaintiffs demonstrate the significance of the resource and the failure of the government to protect it. Either of these might work, so long as they do not add to the burden plaintiffs already bear to meet the remaining standing prongs. A possible way to identify important resources that would avoid increasing plaintiffs’ burden is to include in the principle only those resources the importance of which Congress has recognized directly, such as through the Great Lakes Program in section 118 of the Clean Water Act, 33 U.S.C. § 126, or through the National Estuary Program under section 320 of the Clean Water Act, 33 U.S.C. § 1330. Developing any of these ideas further, however, is beyond the scope of this article and must be saved for another day.


82. The author is not arguing here that these more confined lawsuits, such as suits to stop the filling of a wetland or to stop an unpermitted discharger, should not be brought. The author is only asserting that, by themselves, they cannot address the systemic problems of larger resources.

83. Massachusetts, 549 U.S. at 516.
The final limiting principle derives from the means by which a plaintiff seeks relief from a court. Under this principle, waivers of the particularized injury test would be restricted to claims brought under statutory citizen suit authority. This proposal piggybacks on the majority's reasoning in *Massachusetts* that when Congress has authorized the filing of a legal action to protect some right or entitlement, some elements of injury-in-fact can be relaxed. That reasoning is simply extended to the need to show a particularized injury. One reason for this approach is that citizen suit provisions contain their own limiting principles, offering additional constraints on the number and type of suits that can be brought. For example, plaintiffs can only sue a federal agency for some failure to perform a mandatory duty when their claim has not been preempted by subsequent agency action, where the plaintiffs have complied with various jurisdictional prerequisites, and where the violation is ongoing.

There is a risk that the factual burden of meeting these limiting principles, especially the first one, could be as onerous as what plaintiffs currently face under the particularized injury requirement; however a simple declaration will be all that is necessary to establish either the specific place-based connection or the organizational qualifications to prosecute the matter. There is also a risk that the nature of the litigation, compelling agency action unreasonably withheld, invites the courts into micromanaging agency behavior. But courts do this every time they put an agency on a compliance schedule for failing to meet some mandatory duty, or, as the Court did in *Massachusetts*, demand that an agency give a reasoned explanation for its inaction.

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84. This limitation means that place-based or otherwise qualified groups suing to protect some resource from harm under the many natural resources and public land laws, such as the Wilderness Act, 16 U.S.C. § 1131 et. seq., or the Federal Land Policy & Management Act 43 U.S.C. §1701 et. seq., which contain no citizen suit provisions, would still have to show particularized injury.

85. There seems to be some disagreement among the Justices in *Summers* over the extent to which Congress can loosen the constitutionally mandated standing prongs. See *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1151 (2009) (stating that Congress “can loosen the strictures of the redressability prong[,]” but not the requirement to show a concrete injury); *Id.* at 1153 (Kennedy, J., concurring) (asserting that the “case would present different considerations if Congress had sought to provide redress for a concrete injury” and had identified or conferred “some interest separate and apart from a procedural right,” where no case or controversy had existed before); *Id.* at 1154-55 (Breyer, J., dissenting) (discussing a hypothetical statute which expressly permits environmental groups to bring cases like the one before the court, and saying that since “[t]he majority cannot, and does not, claim that such a statute would be unconstitutional[,] . . . [h]ow then can it find the present case constitutionally unauthorized?”).

86. *See, e.g.*, 33 U.S.C. § 1365(b) (2008) (precluding citizen suits where plaintiffs have failed to file a 60-day notice letter or where the government has already initiated an enforcement action against the alleged violator).
There is another risk, however, that is more serious. By continuing to demand “particularized proof” of a plaintiff’s injury, the Court guarantees the judicial branch will not fill the gap left by the other two branches when it comes to protecting fragile and complex ecosystems from broad-based systemic harms. Private litigation to stem the loss of biodiversity at a regional, let alone national or global, level, such as the disappearance of Neotropical birds from North American flyways and the plunge in stocks of straddling fish, will fail. Instead, environmental plaintiffs will be restricted to discrete, less effective challenges to individual permit violations or to government actions that affect some small part of a larger ecosystem.

V. CONCLUSION

Despite the Massachusetts’s Court’s sophisticated understanding of how complex natural systems work and how human interactions with them can have diffuse, often delayed, impacts, Massachusetts illustrates the tenacity of the particularized injury test. The lengths to which the majority went to find a particularized harm to Massachusetts from global climate change underscores the poverty of the requirement, making the Court’s effort seem like a return to what Blackmun feared in Lujan—“code-pleading formalism.”

It seems that the Court needs a way out of the box in which Justice Scalia has placed it. This article has tried to respond to this need by suggesting why the particularized injury requirement should be loosened in certain limited situations. In support of this idea, the features of large, complex natural systems, like the Chesapeake Bay, that make it impossible for plaintiffs to show a particularized injury have been identified. The author has argued that the Court has had a relaxed attitude towards various elements of the standing doctrine, and therefore the need to show a particularized injury could as well be relaxed because it is more akin to the prudential standing doctrine than to a strict constitutional requirement. The author recognizes that this proposal, should it be taken up by any litigant, has an extremely low chance of success on the current Court. Nonetheless, the risk of trying and failing are more than offset by the environmental harm of continuing the status quo.

88. The continuing divisiveness on the Court over the contours of the standing doctrine and its use to block consideration of the merits of certain controversies, as illustrated most recently by Summers, seems proof positive of this conclusion.