AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era—Judicial Power/Constitutional Litigation

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Summers v. Earth Island Institute, 555 U.S. 488 (2009)

In 1992, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act, which required the Forest Service to establish a notice-and-comment process for proposed resource management plans. The Forest Service adopted regulations specifying that small fire-rehabilitation activities that did not have a significant environmental impact were exempt from the notice-and-comment requirement. After a fire in the Sequoia National Forest, the Forest Service approved a salvage sale of timber on 238 acres of forest land, which fell within its exemption from the Appeals Reform Act requirements.

The Earth Island Institute is a California environmental activist group. Along with some other large environmental groups, it filed suit in federal district court seeking an injunction preventing the salvage sale without compliance with the notice-and-comment requirements of the Appeals Reform Act. The government and the institute settled their dispute on the timber sale, but the district court nonetheless issued a nationwide injunction on the Forest Service's regulatory exemptions from the statutory requirements. On appeal, the circuit court upheld the injunction. The Supreme Court reversed in part, concluding that the Earth Island Institute did not have standing to bring the suit. At stake in the case was a disagreement over the implications of the Court's earlier cases regarding the standing in environmental cases, with the majority preferring to adhere to a stricter standard of imminent injury to the parties bringing suits and the minority preferring a looser standard of realistic likelihood of future injury.

JUSTICE SCALIA delivered the opinion of the Court.

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In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. *Lujan v. Defenders of Wildlife* (1992). This limitation "is founded in concern about the proper--and properly limited--role of the courts in a democratic society." . . .

The doctrine of standing is one of several doctrines that reflect this fundamental limitation. It requires federal courts to satisfy themselves that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin* (1975). . . . To seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. *Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc*. (2000). This requirement assures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." Where that need does

not exist, allowing courts to oversee legislative or executive action "would significantly alter the allocation of power . . . away from a democratic form of government."

The regulations under challenge here neither require nor forbid any action on the part of respondents. The standards and procedures that they prescribe for Forest Service appeals govern only the conduct of Forest Service officials engaged in project planning. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Here, respondents can demonstrate standing only if application of the regulations by the Government will affect them in the manner described above.

It is common ground that the respondent organizations can assert the standing of their members. To establish the concrete and particularized injury that standing requires, respondents point to their members' recreational interests in the national forests. While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice. *Sierra Club v. Morton* (1972).

. . . We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III's injury-in-fact requirement.

Respondents have identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members. The only other affidavit relied on was that of Jim Bensman. . . . Bensman's affidavit further asserts that he has visited many national forests and plans to visit several unnamed national forests in the future. . . . The national forests occupy more than 190 million acres, an area larger than Texas. There may be a chance, but is hardly a likelihood, that Bensman's wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations. Indeed, without further specification it is impossible to tell which projects are (in respondents' view) unlawfully subject to the regulations. . . . Here we are asked to assume not only that Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation. Accepting an intention to visit the national forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.

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Respondents argue that they have standing to bring their challenge because they have suffered procedural injury, namely, that they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied. But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. 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." Respondents alleged such injury in their challenge to the Burnt Ridge Project, claiming that but for the allegedly unlawful abridged procedures they would have been able to oppose the project that threatened to impinge on their concrete plans to observe nature in that specific area. But Burnt Ridge is now off the table.

. . . [T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute. . . .

The dissent proposes a hitherto unheard-of test for organizational standing: whether, accepting the organization's self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury. . . . This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-

organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm. . . .

. . . "Standing," we have said, "is not 'an ingenious academic exercise in the conceivable' . . . [but] requires . . . a factual showing of perceptible harm." In part because of the difficulty of verifying the facts upon which such probabilistic standing depends, the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm—surely not a difficult task here, when so many thousands are alleged to have been harmed.

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JUSTICE KENNEDY, concurring.

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This case would present different considerations if Congress had sought to provide redress for a concrete injury "giv[ing] rise to a case or controversy where none existed before." Nothing in the statute at issue here, however, indicates Congress intended to identify or confer some interest separate and apart from a procedural right.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG, dissenting.

The Court holds that the Sierra Club and its members (along with other environmental organizations) do not suffer any "'concrete injury'" when the Forest Service sells timber for logging on "many thousands" of small (250-acre or less) woodland parcels without following legally required procedures—procedures which, if followed, could lead the Service to cancel or to modify the sales. Nothing in the record or the law justifies this counterintuitive conclusion.

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To understand the constitutional issue that the majority decides, it may prove helpful to imagine that Congress enacted a statutory provision that expressly permitted environmental groups like respondents here to bring cases just like the present one, provided (1) that the group has members who have used salvage-timber parcels in the past and are likely to do so in the future, and (2) that the group's members have opposed Forest Service timber sales in the past (using notice, comment, and appeal procedures to do so) and will likely use those procedures to oppose salvage-timber sales in the future. The majority cannot, and does not, claim that such a statute would be unconstitutional. How then can it find the present case constitutionally unauthorized?

I believe the majority answers this question as follows: It recognizes, as this Court has held, that a plaintiff has constitutional standing if the plaintiff demonstrates (1) an "'injury in fact,'" (2) that is "fairly traceable" to the defendant's "challenged action," and which (3) a "favorable [judicial] decision" will likely prevent or redress. The majority does not deny that the plaintiffs meet the latter two requirements. It focuses only upon the first, the presence of "actual," as opposed to "conjectural or hypothetical," injury.

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How can the majority credibly claim that salvage-timber sales, and similar projects, are unlikely to harm the asserted interests of the members of these environmental groups? The majority apparently does so in part by arguing that the Forest Service actions are not "imminent"—a requirement more appropriately considered in the context of ripeness or the necessity of injunctive relief. I concede that the Court has sometimes used the word "imminent" in the context of constitutional standing. But it has done so primarily to emphasize that the harm in question--the harm that was not "imminent"—was merely "conjectural" or "hypothetical" or otherwise speculative. Where the Court has directly focused upon the matter, i.e., where, as here, a plaintiff has already been subject to the injury it wishes to challenge, the Court has asked whether there is a realistic likelihood that the challenged future conduct will, in fact, recur and harm the plaintiff. That is what the Court said in *Los Angeles v. Lyons* (1983), a case involving a

plaintiff's attempt to enjoin police use of chokeholds. The Court wrote that the plaintiff, who had been subject to the unlawful chokehold in the past, would have had standing had he shown "a realistic threat" that reoccurrence of the challenged activity would cause him harm "in the reasonably near future." . . .

How could the Court impose a stricter criterion? Would courts deny standing to a holder of a future interest in property who complains that a life tenant's waste of the land will almost inevitably hurt the value of his interest—though he will have no personal interest for several years into the future? Would courts deny standing to a landowner who complains that a neighbor's upstream dam constitutes a nuisance--even if the harm to his downstream property (while bound to occur) will not occur for several years? Would courts deny standing to an injured person seeking a protection order from future realistic (but nongeographically specific) threats of further attacks?

To the contrary, a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates. Thus, we recently held that Massachusetts has standing to complain of a procedural failing, namely, the Environmental Protection Agency's failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur) might not occur for several decades. *EPA v. Massachusetts* (2007).

The Forest Service admits that it intends to conduct thousands of further salvage-timber sales and other projects exempted under the challenged regulations "in the reasonably near future." How then can the Court deny that the plaintiffs have shown a "realistic" threat that the Forest Service will continue to authorize (without the procedures claimed necessary) salvage-timber sales, and other Forest Service projects, that adversely affect the recreational, aesthetic, and environmental interests of the plaintiffs' members?

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. . . Many years ago the Ninth Circuit warned that a court should not "be blind to what must be necessarily known to every intelligent person." Applying that standard, I would find standing here.

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