
NOTES

EXISTENCE-VALUE STANDING

That someone might have a real, quantifiable interest in an environmental good he will never see seems, at first, like quackery.¹ But questions such as, “What would I pay to know that the Grand Canyon will always be there? Or that African elephants will survive in the wild?” lead us to recognize that the mere fact that an environmental good exists may have real value. Economists call this interest “existence value.” While the methods used to calculate this value remain contested, many mainstream economists have come to accept the concept’s validity.²

Among those economists are the regulators at the Office of Information and Regulatory Affairs (OIRA), the division within the Office of Management and Budget (OMB) that coordinates and evaluates regulations from across the federal government.³ Beginning during the Reagan Administration and continuing through the Obama Administration, cost-benefit analysis (CBA) has played an increasingly prominent role in the analyses performed by OIRA — and, accordingly, by regulatory agencies themselves.⁴ As a result, CBA now informs or,

¹ To Justice Scalia, for example, an interest in an environmental good without a plan to visit that good is no interest at all. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (“Such ‘some day’ intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding of the ‘actual or imminent’ injury that our cases require.”).

² This Note’s argument is premised on the facts that existence value *is* incorporated into cost-benefit analyses and that cost-benefit analysis *does* guide agency decisionmaking. Whether this *ought* to be so is left to one side. For more discussion beyond the scope of this Note, see generally FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS* (2004); MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE* (2010); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY* (2008).

³ OIRA is not the only body within the Executive that participates in review, but “OIRA” is often used as convenient shorthand for this review process. See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1856 (2013).

⁴ Scholars are beginning to examine the dynamics of agency response to OIRA review. Agencies’ use of CBA may be an example of what Professor Jennifer Nou has called “agency self-insulation.” See Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1760–61 (2013). Nou argues that under an anti-regulatory President, agencies will submit CBAs of poor quality to increase the costs of review for OIRA, making it less likely that OIRA will reverse the agency. Under a pro-regulatory President, agencies will submit high-quality CBAs to reduce the costs of review for OIRA, making it more likely that OIRA will approve the agency’s rule. *Id.* at 1806–07. But the agency-OIRA interaction may in some cases be more complicated. The Obama Administration would surely be considered “pro-regulatory,” but the EPA, for instance, might still feel a need to insulate itself because of the magnitude of some of its rules and their high political saliency. See, for example, *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev’d in part sub nom.* *Michigan v. EPA*, 135 S. Ct. 2699

where legally permitted, dictates, much regulation.⁵ Because regulators often incorporate existence values into CBAs, the concept is now being accounted for in rulemakings across the executive branch.⁶

Existence value reflects the psychological benefits that accrue from the mere knowledge that a good exists and will continue to exist. The precise nature of these psychological benefits is difficult to ascertain, and remains contested,⁷ but perhaps the most enlightening framing is to consider existence-value harms as “psychic spillovers.”⁸ Like physical spillover effects, which cause harm beyond the immediate damage inflicted, a “psychic spillover” results where harm (or the threat of harm) damages the psychological welfare of someone not immediately present. Existence values are generally measured through “contingent valuation” surveys, which, despite considerable debate within the economic literature as to how best to design them,⁹ remain a well-

(2015), in which the EPA conducted an expansive CBA that included costs and benefits that were not statutorily relevant in what might be considered an attempt to insulate the agency from OIRA review, *see id.* at 1230, 1232.

⁵ Compare *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 219–20 (2009) (finding that section 316 of the Clean Water Act, mandating the usage of “best technology available,” allowed for the use of CBA), *with* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 465 (2001) (finding that section 109 of the Clean Air Act barred EPA’s use of CBA in setting National Ambient Air Quality Standards).

⁶ *See, e.g.*, Natural Resource Damages for Hazardous Substances, 73 Fed. Reg. 57,259 (Oct. 2, 2008) (codified at 43 C.F.R. pt. 11 (2014)); Endangered and Threatened Wildlife and Plants: Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 65 Fed. Reg. 69,624 (Nov. 17, 2000) (codified at 50 C.F.R. pt. 17 (2014)); Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796 (Jan. 15, 1992) (codified at 50 C.F.R. pt. 17). Existence value is also considered outside the environmental context. *See, e.g.*, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 36 (2015)). For a discussion of how the *Exxon Valdez* oil spill spurred the incorporation of existence values into federal agency decisionmaking, see Richard T. Carson et al., *Contingent Valuation and Lost Passive Use: Damages from the Exxon Valdez Oil Spill*, 25 ENVTL. & RESOURCE ECON. 257 (2003).

⁷ *See generally* David A. Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVTL. L. REV. 343, 349 n.16 (2004) (summarizing debates regarding the role of altruism in motivating existence values); *id.* at 349 (“We do not fully understand why people have existence values for natural resources, but neither do we fully understand why people have non-existence values for natural resources (or many other things). For example, although we can readily recognize that birdwatchers value wetlands so that they can view an array of birds, we have no theory as to why anyone values birdwatching in the first place.”).

⁸ *See id.* at 345 n.7 (citing Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1215–19 (1977)).

⁹ *See, e.g.*, Glenn C. Blomquist & John C. Whitehead, *Existence Value, Contingent Valuation, and Natural Resources Damages Assessment*, 26 GROWTH & CHANGE 573, 583 (1995); Nick Hanley et al., *Choice Modelling Approaches: A Superior Alternative for Environmental Valuation?*, in ISSUES IN ENVIRONMENTAL ECONOMICS 185 (Nick Hanley & Colin Roberts eds., 2002).

respected tool.¹⁰ Existence values might also be reflected in the political process: when Congress decides to protect endangered species or wetlands, public-choice theories about interest-group preferences cannot fully explain those decisions, the argument goes. Rather, interests in the existence values of environmental goods must play some role in motivating such aggressively protective statutes.¹¹

If the Executive has through its CBAs recognized existence value as a legitimate interest that an individual may have in an environmental good, should the judiciary also recognize such an interest?¹² That is, does the executive branch's acknowledgment of such an interest — and the corresponding risk of harm to that interest — provide a compelling reason for the courts to recognize an “injury in fact” for purposes of Article III standing?¹³

The reader familiar with standing doctrine might assume that precedent forecloses the Supreme Court from recognizing standing based on an injury to existence value.¹⁴ This Note argues this is not so: the Court's decisions contain two strands of doctrine that, when combined, make standing based on an existence-value interest possible. First, the Court repeatedly has accepted that “environmental well-being”¹⁵ and “esthetic” interests are “cognizable interest[s] for the purposes of standing.”¹⁶ Second, the Court has acknowledged both in

¹⁰ See Richard T. Carson et al., *Contingent Valuation: Controversies and Evidence*, 19 ENVTL. & RESOURCE ECON. 173, 196–97 (2001).

¹¹ See Dana, *supra* note 7, at 353 (arguing that “[t]hese programs are justified only in part by concerns regarding losses of use” and looking to existence value to explain support for the Endangered Species Act and Clean Water Act).

¹² See generally Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247 (1996) (noting the discrepancy between executive-branch recognition of nonuse values and the judiciary's refusal to base standing on such values).

¹³ This Note does not advocate a reexamination of “injury in fact” as an essential element of Article III standing, as some have done. See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) (“Properly understood, standing doctrine should not require that a plaintiff have suffered ‘injury in fact.’”). There is much merit in the arguments put forth by Judge Fletcher, *see id.*, and Professor Cass Sunstein, *see* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992), but this Note's contention is that an injury to an individual's interest in the existence value of an environmental good is “injury in fact” cognizable under current doctrine.

¹⁴ The Court's expected decision in *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015) (granting certiorari), is unlikely to change the analysis presented here. In that case, the Court has agreed to consider whether Congress may confer standing on a plaintiff who has suffered “no concrete harm.” See Petition for a Writ of Certiorari at i, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339) (emphasis added). But as the briefing in the case makes clear, that question is not actually presented by the case. See Brief for the United States as Amicus Curiae Supporting Respondents at i, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. Mar. 13, 2015) (stating the question presented as whether plaintiff suffered “an injury-in-fact” by defendant's publishing of inaccurate personal information about plaintiff).

¹⁵ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

¹⁶ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992).

persuasive concurrences and in an important majority opinion that an “injury in fact” may be *created* by Congress and that such an injury may extend beyond the confines of the common law.¹⁷ The claim advanced in this Note is that an interest in the existence value of an environmental good is an aesthetic interest cognizable for the purposes of standing, and that it could be created by statute. Moreover, existence-value standing passes doctrinal muster where other proposals to liberalize standing rules do not, thanks to three unique characteristics. First, the injury at issue in an existence-value claim is concrete. Second, the injury is particularized. Finally, the injury is of a kind recognized by both Congress and the Executive.

An example, drawing on the analogy to spillover effects, may be helpful. Those harmed by the spillover effects of air pollution caused by coal generation in the Midwest can sue to enforce the Clean Air Act because they suffer physical spillover injuries.¹⁸ But consider, instead, the victim of a psychic spillover resulting from the destruction of old-growth timber in the Pacific Northwest.¹⁹ In particular, consider victims who might never be able to visit those forests, either because of a lack of time or money or because the forests are on private property that visitors are barred from entering.²⁰ The far-away victim feels a real, monetizable harm resulting from the destruction of the old-growth forest.²¹ Under current doctrine, however, that harm is unrecognized and the victim lacks an opportunity to vindicate her interests — either in court or anywhere else.²² Recognizing that harm as a real “injury in fact” — as the economic literature and the executive branch do — would allow the victims of such harms to vindicate their interests in court.

This Note proceeds by addressing whether existence value might serve as the basis for standing in Article III courts in two hypothetical scenarios. The scenarios progress from that where standing based on existence value is most likely to withstand judicial scrutiny to that where it is least likely to.

Part I provides a brief overview of existence value and its use by federal regulatory agencies. This discussion of existence value is intentionally circumscribed; the goal is to provide the reader with a sufficient basis from which to assess the Note’s main claim, not to explore

¹⁷ See *FEC v. Akins*, 524 U.S. 11, 19 (1998); *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

¹⁸ See, e.g., *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

¹⁹ See generally Dana, *supra* note 7, at 358–67.

²⁰ This scenario is one in which *Lujan*’s just-buy-a-plane-ticket workaround, see *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring in part and concurring in the judgment), fails.

²¹ See *infra* pp. 779–80.

²² See Dana, *supra* note 7, at 358–67 (discussing the difficulty of unilateral action or negotiated resolution for victims of existence-value harms).

the wealth of scholarship on the technical and normative problems associated with existence value.²³

Part II proceeds to the heart of the argument: assessing the constitutionality of two possible claims to standing based on an interest in the existence value of an environmental good. Part II first considers a hypothetical statute in which Congress explicitly confers standing on individuals with an existence-value injury (Scenario I). It shows how congressional “creation” of an “injury in fact” has (at least some) support on the current Supreme Court, such that such a grant is at least a practical as well as a constitutional possibility.

Second, Part II considers a hypothetical already-existing statute that makes existence value a relevant factor under the statute, and that therefore would support a claim of injury in fact to that existence-value interest (Scenario II). Here, standing has fewer professed advocates on the current Court, but this Part argues that there is a colorable claim that such standing is constitutional.

Finally, Part III addresses a series of questions that may have struck the reader early on: Is any of this a good idea? Why would we want standing based on an existence-value injury in the first place? When should existence-value injuries to persons remote from an environmental good cede to the interests of individuals nearer in space and time to that good?²⁴ Here this Note offers conditional support for the recognition of existence-value-based standing. It argues that Congress or the courts could isolate circumstances in which standing based on an existence-value injury would generate social benefits. In particular, this Part argues that where local enforcement of environmental regulations is *systematically* repressed, standing based on an existence-value injury would allow “outsiders” to remedy what local actors are unable to.

I. EXISTENCE VALUE IN THE EXECUTIVE BRANCH

For the purposes of existence-value-based standing, it ought to be significant that existence value is recognized and accepted in the economics literature. Economists have established that existence value is “real” — individuals have demonstrable interests in the simple existence of environmental goods and are willing to pay to preserve

²³ For similar reasons, this Note provides a relatively limited account of general standing doctrine. See *supra* note 13. For a discussion of various problems with standing doctrine, see Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159 (2011).

²⁴ Of course, whether one party has the right to sue says nothing about the relative merits of any given party's claim. The point is rather that, in many cases, the question of *who* is litigating will go a long way in determining *what* is litigated and whether decisionmaking occurs in the courts or in legislatures.

them.²⁵ And we can measure injuries to those interests in dollar amounts. Properly understood, an injury to an existence-value interest is a financial injury that accrues directly to the individual.²⁶ This injury could be understood as derivative of — but distinct from — the injury to the environmental good *itself*. That is, the plaintiff claiming an injury to her interest in existence value is not (formally) claiming to represent the environmental good.²⁷ Rather, the plaintiff's injury is a financial loss equivalent to a dollar value that might be estimated in one of two ways. First, a plaintiff might give an estimate of her own willingness to pay to prevent the destruction of the environmental good at issue. There are obvious practical challenges associated with this approach. For example, a plaintiff has every incentive to overrepresent her willingness to pay. Alternatively, and more realistically, a plaintiff's injury could be a pro rata share of the total existence value of the environmental good, as estimated by the relevant regulatory agency. Note that, while existence values for CBA purposes are *aggregated* (and thus, arguably, not individualized) they are nevertheless based on the willingness to pay of *individuals*. As discussed further below, individualization of this kind should be sufficient to meet the Supreme Court's requirement that an injury be "particularized."²⁸

²⁵ The idea of nonuse value for environmental goods stems from early work on option values, see Burton A. Weisbrod, *Collective-Consumption Services of Individual-Consumption Goods*, 78 Q.J. ECON. 471 (1964), and has achieved widespread — although by no means unanimous — acceptance in the economics literature, see, e.g., Peter A. Diamond & Jerry A. Hausman, *On Contingent Valuation Measurement of Nonuse Values*, in *CONTINGENT VALUATION: A CRITICAL ASSESSMENT* 3 (Jerry A. Hausman ed., 1993).

²⁶ Sunstein has argued that a legal interest in a suit is really analogous (or equal to) a "property right in a certain state of affairs." Sunstein, *supra* note 13, at 191. One might then classify an interest in the existence value of an environmental good along similar lines: an existence-value interest could be understood as a personal property right, with an appraised dollar amount ascribed to that existence value. This approach would get a plaintiff over the line the Court drew when it wrote that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (emphasis added).

²⁷ Others have advocated such a "representative" approach. See, e.g., *Developments in the Law — Access to Courts*, 122 HARV. L. REV. 1151, 1212 (2009) (reconceptualizing a series of decisions from the 1990s and 2000s upholding standing for human plaintiffs as cases where humans served as "proxies" for animal suffering). More radical proposals (and cases) would recognize rights for animals or ecosystems themselves. See, e.g., *Palila v. Haw. Dep't of Land & Nat. Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988) ("As an endangered species under the Endangered Species Act . . . , the bird (*Loxioides bailleui*), a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right."); Jan G. Laitos & Catherine M.H. Keske, *The Right of Nonuse*, 25 J. ENVTL. L. & LITIG. 303 (2010) (arguing for a "right of nonuse" in the environmental good itself); Christopher D. Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). The argument put forward in this Note is intentionally more modest than those proposals.

²⁸ "Particularized" means "that the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992).

That the Executive also recognizes existence values in cost-benefit analyses lends further support to recognizing injuries to existence values as injuries sufficient for injury in fact.²⁹ This discussion is particularly relevant for the scenario in section II.B, below, which considers existence-value standing *without* an explicit statutory grant.

While OIRA was not created for the purpose of assessing the costs and benefits of agency decisionmaking,³⁰ cost-benefit analysis has taken a prominent role in OIRA review since the Reagan Administration.³¹ The agency's approach to CBA evolved in 2003, when the OMB (within which OIRA is housed) provided guidance to the federal regulatory agencies explaining how best to conduct CBA.³² OMB urged agencies to account for the costs and benefits of goods that "are not traded directly in markets," especially those that one "will not use . . . now or in the future" — that is, goods with "existence value[]." ³³ A dozen years later, the use of CBA and existence value — and the methods used to calculate existence value — remain contentious.³⁴ Part III considers a subset of the objections to existence value. More important for the purposes of this Note, however, is the fact that existence value *is* an element of the CBAs that guide decisionmaking across federal agencies.³⁵

²⁹ The claim advanced here is distinct from a possibly related argument that executive-branch recognition of a particular value — existence value, for example — ought to have some controlling effect on recognition of that value for purposes of Article III standing.

³⁰ See Sunstein, *supra* note 3, at 1878; see also Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended in scattered sections of the U.S. Code) (establishing OIRA).

³¹ See Exec. Order No. 12,291, § 2, 3 C.F.R. 127, 128 (1982) (revoked 1993) (establishing that, "to the extent permitted by law," "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society"); Exec. Order No. 12,866, § 1(a), 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88 (2012) ("[I]n choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.").

³² OMB, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-4 (2003), http://www.whitehouse.gov/omb/circulars_a004_a-4 [<http://perma.cc/B7TM-EUVK>].

³³ *Id.*

³⁴ See, e.g., Thomas H. Stevens et al., *Measuring the Existence Value of Wildlife: What Do CVM Estimates Really Show?*, 67 LAND ECON. 390, 398 (1991) (finding that "many respondents" in a contingent valuation survey "failed to make 'rational' trade-offs between money and wildlife"); see also sources cited *supra* note 2.

³⁵ See Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 102–03; Exec. Order No. 12,866, § 6(b), 3 C.F.R. at 646. The extent to which an agency is in fact guided by CBA depends in part on its statutory directives, the makeup of its career staff, and whether it is an "independent" agency. Independent agencies are not — formally — subject to OIRA review. See Sunstein, *supra* note 3, at 1839 n.3. Nevertheless, President Obama has called on independent agencies to "comply with" the provisions of Executive Order 13,563 as well. See Exec. Order No. 13,579, § 1, 3 C.F.R. 256, 257 (2012), *reprinted in* 5 U.S.C. § 601 app. at 103.

A 1989 D.C. Circuit decision, *Ohio v. U.S. Department of the Interior*,³⁶ marked the first step in the move toward accounting for existence (and other nonuse) values in CBAs.³⁷ In that case, the court considered the method the Department of the Interior (Interior) used to evaluate damages to natural resources under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.³⁸ The court rejected two different aspects of Interior's valuation method. First, the court found that Interior could not value environmental resources as the *lesser* of either the cost of restoration or the diminution of use value.³⁹ The court explained, "Congress' refusal to view use value and restoration cost as having equal presumptive legitimacy merely recognizes that natural resources have value that is not readily measured by traditional means."⁴⁰ The court thus recognized that nonuse values were legitimate values worthy of consideration, at least for the purposes of cost-benefit analysis. Moreover, the court went on to hold that Interior could not use market prices as the exclusive measure of a natural resource's value.⁴¹ The court explicitly admonished Interior for both undervaluing the use value of natural resources and for ignoring nonuse and existence values.⁴²

The *Exxon Valdez* oil spill, which occurred at nearly the same time as the *Ohio* decision, also spurred recognition within the Executive of the importance of existence values.⁴³ The spill prompted the passage of the Oil Pollution Act of 1990,⁴⁴ which the National Oceanic and Atmospheric Administration (NOAA) interpreted to include existence value as an element of natural resource damages.⁴⁵ NOAA convened

³⁶ 880 F.2d 432 (D.C. Cir. 1989).

³⁷ See Jonathan Cannon, *The Sounds of Silence: Cost-Benefit Canons in Entergy Corp. v. Riverkeeper, Inc.*, 34 HARV. ENVTL. L. REV. 425, 438–41 (2010) (tracing the development of presumptions regarding CBA in Supreme Court decisions from the 1970s to 2000s). An example of another nonuse value is "bequest value": the satisfaction one derives from knowing not just that a thing exists, but that it is preserved for future generations. See OFFICE OF MGMT. & BUDGET, *supra* note 32; *Non-use Value*, WIKIPEDIA, http://en.wikipedia.org/wiki/Non-use_value [<http://perma.cc/72MB-9PZC>].

³⁸ Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 and 26 U.S.C.).

³⁹ *Ohio*, 880 F.2d at 441–59.

⁴⁰ *Id.* at 457.

⁴¹ *Id.* at 462–63.

⁴² *Id.* at 464 ("Market valuation can of course serve as one factor to be considered, but by itself it will necessarily be incomplete. In this vein, we instruct DOI that its decision to limit the role of non-consumptive values, such as option and existence values, in the calculation of use values rests on an erroneous construction of the statute.")

⁴³ See Carson et al., *supra* note 6.

⁴⁴ Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of the U.S. Code).

⁴⁵ Natural Resource Damage Assessments, 59 Fed. Reg. 1062, 1143 (proposed Jan. 7, 1994) (codified at 15 C.F.R. pt. 990 (2015)) ("Based upon consideration of all comments received, NOAA believes that the trustee(s) should have the discretion to include passive use values as a component

an expert panel, chaired by economists Kenneth Arrow and Robert Solow, to assess the use of contingent valuation surveys in measuring nonuse values.⁴⁶ The panel's report recommended the use of contingent values and the inclusion of "passive-use values" — including existence values — "among the compensable losses for which trustees can make recovery under the Oil Pollution Act."⁴⁷

In the quarter century since, agencies have (cautiously) begun incorporating existence values into their CBAs. Over the course of several years of rulemaking, Interior responded to the D.C. Circuit's *Ohio* decision by incorporating nonuse values into its natural resource damage assessments.⁴⁸ In 2008, Interior codified its methodology for the valuation of "injured natural resources."⁴⁹ It established that a component of the "compensable value" of a natural resource — "the amount of money required to compensate the public for the loss in services provided by the injured resources" — should include existence values.⁵⁰ Similarly, NOAA has in its national standards⁵¹ advised fishery councils to "consider the net benefits to the Nation" of avoiding bycatch, specifically citing the "existence values" of bycatch species.⁵²

There is thus little doubt that existence values play some role in guiding decisionmaking within executive agencies. For the purposes of standing to vindicate existence-value interests, the foregoing provides support for two ideas: First, that existence value is a real interest, widely recognized by economists, and that injuries to that interest can be measured. Second, and perhaps more importantly, that the Executive's recognition of existence value is significant as an indicator of the kinds of values environmental law ought to vindicate. The importance of aligning standing doctrine with substantive environmental values is discussed further in Part III.

within the natural resource damage assessment determination of compensable values."); *see also* Carson et al., *supra* note 6, at 257–58.

⁴⁶ *See* Natural Resource Damage Assessments Under the Oil Pollution Act of 1990, 58 Fed. Reg. 4601 (comment period extended Jan. 15, 1993) (codified at 15 C.F.R. ch. IX) (including as an appendix the "Report of the NOAA Panel on Contingent Valuation," *id.* at 4602).

⁴⁷ *Id.* at 4602.

⁴⁸ *See* 43 C.F.R. pt. 11 (2014); *see also* Natural Resource Damages Assessments — Type B Procedures, 61 Fed. Reg. 37,031 (advance notice of proposed rulemaking July 16, 1996) (codified at 15 C.F.R. pt. 990).

⁴⁹ Natural Resources Damages for Hazardous Substances, 73 Fed. Reg. 57,259, 57,266 (Oct. 2, 2008) (codified at 43 C.F.R. § 11.83).

⁵⁰ 43 C.F.R. § 11.83.

⁵¹ *See* 16 U.S.C. § 1851 (2012) (setting ten national standards for fishery management plans).

⁵² 50 C.F.R. § 600.350(d) (2014).

II. EXISTENCE VALUE AS THE BASIS FOR STANDING: TWO SCENARIOS

Part I briefly described the recognition of existence value in the executive branch, which serves as a jumping off point for the main question of this Note: now what? How does the recognition of existence value in the executive branch implicate the validity of existence value as an injury in fact sufficient for Article III standing in courts? This Part proceeds in two sections, exploring different scenarios in which the courts might come to recognize injuries to existence value as sufficient for standing. The first envisions Congress explicitly embracing the concept of existence value as an injury. The second sees the courts finding the recognition of existence-value injury *implied* in statute.

A. A New Statute Explicitly Granting Standing

Let us imagine a world much like our own, but in which Congress passed comprehensive climate change legislation in 2010. And let us further imagine that such legislation explicitly defined “harm” for purposes of standing to sue under that statute.⁵³ In this imaginary legislation, “harm” is defined to include injuries to an individual’s interest in the existence value of an environmental good.

1. *The Statute.* — Such legislation would closely track language in an early draft of legislation proposed in 2009 to combat climate change,⁵⁴ known by the names of its primary cosponsors, Representatives Henry Waxman and Ed Markey. As part of a comprehensive effort to address climate change and greenhouse gas emissions, Waxman-Markey contemplated an economy-wide cap-and-trade system. As an ancillary provision, the early draft also created a citizen-suit provision, which, like citizen-suit provisions in other environmental statutes, would have allowed interested parties to sue to enforce the substantive terms of the bill. The bill would have conferred standing on “any person who has suffered, or reasonably expects to suffer, a harm attributable, in whole or in part, to a violation or failure to act referred to in” existing environmental legislation, and further defined “harm” as “any effect of air pollution (including climate change), currently occurring or at risk of occurring, and the incremental exacerbation of any such effect or risk that is

⁵³ This imaginary world is based on reality. See STAFF OF H. COMM. ON ENERGY & COMMERCE, 111TH CONG., DISCUSSION DRAFT OF AMERICAN CLEAN ENERGY & SECURITY ACT OF 2009 § 336(A), at 527–28 (2009), <http://www.kentlaw.edu/faculty/fbosselman/classes/energyspog/ACESA%20Discussion%20Draft.pdf> [<http://perma.cc/F25T-ACAK>].

⁵⁴ See *id.*

associated with a small incremental emission of any air pollutant . . . , whether or not the effect or risk is widely shared.”⁵⁵

The hypothetical statute at issue in this Note would similarly expand the definition of “harm,” but would do so by incorporating the concept of existence value.⁵⁶ This imaginary statute would define the “harm” for which an individual could claim standing to sue as:

Any effect of air pollution (including climate change) on the existence of an environmental good in which a person has a demonstrable, individualized, and monetizable interest.

This Note argues that such a law ought to be held constitutional — that is, that a plaintiff suing under the statute should get standing for showing an injury to her interest in the existence value of an environmental good.

The Supreme Court has long accepted that Congress may create rights the violation of which constitutes an “injury in fact” for purposes of Article III standing.⁵⁷ While some saw *Lujan v. Defenders of Wildlife*⁵⁸ as a rebuke to Congress’s prerogative,⁵⁹ post-*Lujan* cases nevertheless affirm that Congress may create injuries in fact.⁶⁰ Claims based on harms to existence values should find no trouble on this point: for Article III purposes, existence-value standing is no different from the standing that the Court has repeatedly recognized in the context of other statute-created aesthetic interests.⁶¹

⁵⁵ *Id.* at 528.

⁵⁶ For a discussion of the expanded definition of “harm” in this early draft of Waxman-Markey, see Elliott, *supra* note 23, at 184–85.

⁵⁷ See *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“The actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing’” (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (“Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”))); see also *FEC v. Akins*, 524 U.S. 11, 20 (1998); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (“Nothing in this contradicts the principle that ‘[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.’” (quoting *Warth*, 422 U.S. at 500)). The injury-in-fact requirement “is a hard floor of Article III jurisdiction that cannot be removed by statute.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

⁵⁸ 504 U.S. 555.

⁵⁹ See Sunstein, *supra* note 13, at 165–66 (“The place of the citizen in environmental and regulatory law has now been drawn into sharp question.”); see also *infra* section II.A.2, pp. 786–90.

⁶⁰ See William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL’Y F. 247, 249 (2001) (arguing that “[l]egislative judgments about statutory goals and means . . . receive substantial deference by courts under this consistent line of standing analysis” post-*Lujan*). Professor William Buzbee catalogues *Bennet v. Spear*, 520 U.S. 154 (1997), *Akins*, 524 U.S. 11, and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), all discussed in this section, as post-*Lujan* examples of judicial deference to legislative standing judgments.

⁶¹ See, e.g., *Summers*, 555 U.S. at 494 (“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.”); *Ass’n of Data Processing Serv. Orgs., Inc. v.*

2. *Is Such an Injury Sufficient?* — The highest hurdle to statutorily conferred existence-value standing is the Court's decision in *Lujan*; a close reading of the case, however, suggests existence-value standing may clear that high bar. In an opinion written by Justice Scalia, the *Lujan* Court held that plaintiffs challenging a rule promulgated by the Secretary of the Interior pursuant to section 7 of the Endangered Species Act of 1973⁶² (ESA) lacked standing.⁶³ After reciting the three elements of the "irreducible constitutional minimum of standing" — injury, causation, and redressability⁶⁴ — Justice Scalia found that the plaintiffs had failed to show sufficient injury.⁶⁵ He acknowledged that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."⁶⁶ But, he explained, the plaintiffs' intentions to travel to visit the endangered species that they claimed were threatened by Interior's rulemaking were insufficient to establish "imminent" injury.⁶⁷ He continued: "Such 'some day' intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require."⁶⁸

The Court further held that the ESA's citizen-suit provision was unconstitutional as applied.⁶⁹ By conferring standing on "any person,"⁷⁰ the citizen-suit provision would have allowed a plaintiff to bring suit by "raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large."⁷¹ This type of suit, Justice Scalia explained, "does not state an Article III case or controversy."⁷²

Camp, 397 U.S. 150, 154 (1970) ("That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values." (quoting Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965))).

⁶² 16 U.S.C. § 1536 (2012).

⁶³ *Lujan*, 504 U.S. at 562.

⁶⁴ *Id.* at 560.

⁶⁵ *Id.* at 563–67.

⁶⁶ *Id.* at 562–63.

⁶⁷ *Id.* at 564.

⁶⁸ *Id.* Justice Scalia also rejected a trio of "nexus" theories as the basis for standing. *Id.* at 565–67. He was evidently unimpressed by both the logic and the language of the first of these theories — ecosystem nexus — calling it "inelegantly styled." *Id.* at 565. And he quickly dismissed the other two — "animal nexus" and "vocational nexus," *id.* at 566 — calling each "pure speculation and fantasy," *id.* at 567.

⁶⁹ *Id.* at 571–73. Justice Scalia, now writing for a plurality, also found that the plaintiffs could not establish redressability for their alleged injuries. *Id.* at 568–71 (plurality opinion).

⁷⁰ *Id.* at 572 (majority opinion).

⁷¹ *Id.* at 573–74.

⁷² *Id.* at 574.

Lujan, however, has been limited by Justice Kennedy's concurring opinion and later cases embracing his interpretation, at least when it comes to the scope of Congress's ability to create statutory grants of standing.⁷³ Justice Kennedy's concurrence explicitly affirmed Congress's "power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."⁷⁴ Justice Scalia's opinion for the Court did not, Justice Kennedy argued, "suggest a contrary view."⁷⁵ The ESA's citizen-suit provision fell short of Article III's requirements, Justice Kennedy explained, only because "it [did] not of its own force establish that there [was] an injury in 'any person' by virtue of any 'violation.'"⁷⁶ The *Lujan* concurrence thus leaves room for just the sort of statute envisioned in this section, one that would explicitly reference a particular injury — injury to an interest in existence value.⁷⁷

Justice Kennedy's limiting construction of *Lujan* has been borne out in subsequent cases.⁷⁸ As his opinion emphasized, Congress retains substantial leeway to define injuries within the "outer limit" of Article III's standing requirement.⁷⁹ Thus, after *Lujan*, the Court has found standing even where plaintiffs claimed potential injuries to themselves as direct or even incidental beneficiaries of a regulation.

⁷³ See Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 336 (2002) ("[I]t seems clear, and fortunate, that *Lujan* was a false start. . . . The injury standard is so thin, so obviously malleable, that it is surely embarrassing to most members of the Court to use it to strike down standing grants made by the Congress."); see also Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993) (offering a contemporary critique of *Lujan* as an attempt to circumscribe congressional policymaking power).

⁷⁴ *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

⁷⁵ *Id.*

⁷⁶ *Id.* (quoting 16 U.S.C. § 1540(g)(1)(A) (2012)).

⁷⁷ Note also that the Court's doctrine does not mandate that environmental injuries be suffered by individuals physically *near* the environmental good at issue. See *id.* at 594 (Blackmun, J., dissenting) ("In *National Wildlife Federation*, the Court required specific geographical proximity because of the particular type of harm alleged in that case: harm to the plaintiff's visual enjoyment of nature from mining activities. One cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined. Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action." (citation omitted) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990))).

⁷⁸ See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); see also John D. Echeverria, *Critiquing Laidlaw: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 DUKE ENVTL. L. & POL'Y F. 287, 295–96 (2001) ("[T]he [*Laidlaw*] Court repudiated Justice Scalia's view that there is 'absolutely no basis' for thinking the Article III standing inquiry turns on the source of the litigation right. In several different ways, the Court signaled that Congress' language and intentions are relevant in standing analysis." (citing *Laidlaw*, 528 U.S. at 181)); Pierce, *supra* note 73, at 1172 (noting that *Lujan* may be read in a number of ways and that, "[b]ecause of its multiple opinions . . . , the case raises more questions than it resolves").

⁷⁹ *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

The Court in *Bennett v. Spear*⁸⁰ upheld standing for irrigation districts who were “seeking to prevent application” of certain regulations that may have restricted their water supply.⁸¹ In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,⁸² the Court extended *Bennett*’s holding, granting standing to an environmental group whose members alleged “reasonable concerns” about the pollution being dumped into a river.⁸³ Showing actual injury to the river itself, the Court held, was unnecessary.⁸⁴

That an individual’s interest in the existence value of an environmental good is a cognizable “injury” for Article III follows from the Court’s reasoning in *Laidlaw* and *FEC v. Akins*.⁸⁵ That an individual is willing to pay to avoid an injury is not — by itself — sufficient to establish injury in fact. If willingness to pay were sufficient, little would be left of the limits the Court put on purely “ideological” injuries in *Sierra Club v. Morton*⁸⁶ and *Lujan*,⁸⁷ for anyone suffering an ideological injury could profess a willingness to pay to avoid that harm. An injury to an interest in the existence value of an environmental good is different, however, because it meets the “particularized” and “imminent” requirements developed in *Lujan* and subsequent cases.

In *Akins*, the Court upheld a novel form of congressionally conferred standing that is in crucial respects analogous to standing based on existence value.⁸⁸ At issue was a law allowing “[a]ny person who believes a violation of this Act . . . has occurred”⁸⁹ to file a petition

⁸⁰ 520 U.S. 154 (1997).

⁸¹ *Id.* at 166.

⁸² 528 U.S. 167.

⁸³ *Id.* at 183.

⁸⁴ *Id.* at 181–83; see also Echeverria, *supra* note 78, at 288 (arguing that *Laidlaw* “arguably represents movement” toward recognition that “Article III is no bar to the assertion of legal claims affirmatively authorized by Congress”).

⁸⁵ 524 U.S. 11 (1998). Existence-value injuries are nonuse harms and so would differ from the injuries at issue in *Laidlaw*, where plaintiffs “use[d] the affected areas.” *Laidlaw*, 528 U.S. at 183. Nevertheless, the Court has indicated that nonuse values can still suffice for standing purposes. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (“We do not question that [harm to scenery, natural and historic objects, and wildlife and attendant personal enjoyment] may amount to an ‘injury in fact’ sufficient to lay the basis for standing . . .”).

⁸⁶ 405 U.S. 727.

⁸⁷ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992); *Sierra Club*, 405 U.S. at 739 (“But a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the APA.”); cf. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

⁸⁸ See *Akins*, 524 U.S. at 21 (“The ‘injury in fact’ that respondents have suffered consists of their inability to obtain information . . .”).

⁸⁹ *Id.* at 19 (alteration and omission in original) (quoting 2 U.S.C. § 437g(a)(1) (2012) (transferred to 52 U.S.C.A. § 30109(a)(1) (West 2015))).

with the Federal Election Commission, and any person “aggrieved”⁹⁰ by the dismissal of a petition to then file suit in federal court. “Aggrieved,” the Court held, expanded the rights protected — and the injuries cognizable — “beyond the common-law interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested.”⁹¹ Failing to gain access to information nevertheless was injury in fact sufficient for Article III standing because the statute made it so: “[T]here is a statute which . . . does seek to protect individuals such as respondents from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities.”⁹² The Court went on to explain that even though the harm was widely shared, it was nevertheless “concrete” enough — not “abstract” — to suffice as injury in fact.⁹³ *Akins* thus shows the Court willing to grant standing where an injury is (a) widely shared; (b) outside the traditional common law; and (c) created by statute.

The harm at issue in a case predicated on existence-value standing would share the characteristics of the harm at issue in *Akins*. First, the harm at issue is widely shared, yet particularized. In *Akins*, the Court made clear that a harm may be widespread and yet may nevertheless be sufficiently “particular” to be cognizable; thus that a harm is merely widespread is not, by itself, reason to deny standing based on that harm.⁹⁴ Rather, when a harm is *not* “abstract,” but instead “concrete,” the Court will recognize standing, even if the harm is widely shared.⁹⁵ Thus, though “the fact that an interest is abstract and the fact that it is widely shared” often “go hand in hand,” this need not always be so.⁹⁶ The harm here is “particularized” because it can be traced to a particular individual’s interest. Though in theory any individual might assert an interest in the existence value of an environmental good, in any given case the interest asserted by a given indi-

⁹⁰ *Id.* (quoting 2 U.S.C. § 437(g)(8)(a) (transferred to 52 U.S.C.A. § 30109(a)(8)(A))).

⁹¹ *Id.*

⁹² *Id.* at 22.

⁹³ *Id.* at 24.

⁹⁴ *See id.* at 23 (noting that language denying standing based on the widespread nature of a harm “invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature — for example, harm to the ‘common concern for obedience to law’” (quoting *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940))).

⁹⁵ *See id.* at 23–24; *see also* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992) (distinguishing *Lujan* from “a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations”). Note, also, that existence-value standing does not suffer from a lack of imminence, the primary defect in the *Lujan* plaintiffs’ injury claim. Rather, an injury to an individual’s interest in the existence value of an environmental good may be just as imminent as any other traditional, common law injury. *See* Sunstein, *supra* note 13, at 202 (arguing that *Lujan*’s “definition of injury” was an “innovation” whose “chief importance lay in the insistence that the injury must be ‘imminent’”).

⁹⁶ *Akins*, 524 U.S. at 24.

vidual would be particular to that individual (that is, defined by the particular individual's asserted existence-value interest).

Second, the harm is outside the traditional common law, yet "concrete." To be concrete, the *Akins* Court explained, a harm must be more particularized than an undifferentiated interest in the law being carried out properly.⁹⁷ But concreteness does not require a common law injury, as *Akins* itself shows. There the Court found "sufficiently concrete and specific" the denial of information related to lobbying efforts by a group purportedly regulable under federal election law.⁹⁸

Third, though the injury supporting standing in our imaginary scenario is conferred by statute, the citizen-suit provision in our statute⁹⁹ does not confer standing on "any person." Rather, it confers standing on an individual who has suffered (or will imminently suffer) an injury to, in Justice Scalia's terms, "a separate concrete interest,"¹⁰⁰ wholly apart from the undifferentiated interest in the Executive properly enforcing the law. Thus, as in *Akins*, our congressional conferral of standing does not transgress the bounds of Article III.¹⁰¹

Doctrine alone, however, will not likely predict whether a future court will uphold existence-value-based standing. Rather, given that standing doctrine often serves as a tool for controlling access to the courts,¹⁰² political preferences may be a more reliable predictor.¹⁰³ But the purpose of the preceding discussion is simply to show that existence-value standing is doctrinally plausible under current law.

B. Standing Implied in an Existing Statute

Even absent new legislation explicitly conferring standing on individuals who suffer injury to an interest in the existence value of an environmental good, such litigants might still bring suit based on existence-value standing. A pre-existing statute that does not expressly confer standing based on an existence-value injury nevertheless might make existence value relevant to the purposes of the statute.¹⁰⁴ For in-

⁹⁷ See *id.*

⁹⁸ *Id.* at 25.

⁹⁹ See *supra* section II.A.1, pp. 784–85.

¹⁰⁰ *Lujan*, 504 U.S. at 572.

¹⁰¹ Cf. *Akins*, 524 U.S. at 24–25.

¹⁰² See Fletcher, *supra* note 13, at 231, 233; Nichol, *supra* note 73, at 326, 332; Sunstein, *supra* note 13, at 191.

¹⁰³ See Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758–63 (reporting results of a study of circuit court standing decisions and noting that the author could "reject the hypothesis that decisionmaking in standing cases is not influenced by a judge's political affiliation at the 99% confidence level," *id.* at 1760).

¹⁰⁴ Again, this imaginary world is based in reality: section 316 of the Clean Water Act, 33 U.S.C. § 1326 (2012), serves as the model for this imaginary statute. In *Entergy Corp. v. Riverkeeper*, 556 U.S. 208 (2009), the Supreme Court held that the relevant language in section 316 ("best technology available for minimizing adverse environmental impact," *id.* § 1326(b))

stance, if this statute required (or allowed) cost-benefit analysis, then it might also require (or allow) the consideration of existence value, as discussed above; existence value would therefore be a relevant factor — and would thus underlie an impliedly cognizable injury — in any court’s analysis of agency action under the statute. Such a statute could make existence value statutorily relevant, for example, by requiring (or allowing) CBA, which would incorporate existence values.¹⁰⁵

While the above discussion about constitutional standing concerns would be no different for this hypothetical pre-existing statute, the Court’s “prudential” standing doctrine would pose special problems here. The prudential standing test asks whether an injury “is arguably within the zone of interests to be protected or regulated by the statute.”¹⁰⁶ The zone-of-interests test limits standing to cases where the “interest sought to be protected”¹⁰⁷ has a “plausible relationship to the policies underlying” the relevant statutory provision.¹⁰⁸ Because “the breadth of the zone of interests varies according to the provisions of law at issue,”¹⁰⁹ a statutory provision making existence value a relevant factor would likely suffice for zone-of-interests purposes.

III. EVALUATING EXISTENCE-VALUE STANDING

As the last Part demonstrated, existence-value standing is constitutionally and doctrinally possible either by an explicit grant of standing by a new statute or by an implicit grant in an existing statute. But like other proposals for expanding standing,¹¹⁰ existence-value standing might be thought to violate the separation of powers principles that justify standing doctrine in the first place. This Part argues that existence-value standing does not pose separation of powers issues. It then explains why existence-value standing would be beneficial for en-

could permissibly be interpreted to allow for cost-benefit analysis. *Id.* at 220. A full accounting of costs and benefits in the context of section 316 (which governs standards for cooling-water intake systems, a technology that tends to kill large numbers of fish and other marine life) would account for losses to existence value associated with any given technology.

¹⁰⁵ See generally *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (applying *State Farm* “relevant factor” test in the CBA context).

¹⁰⁶ *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Although previously styled as “prudential,” the zone-of-interests test is now understood by the Supreme Court to be a matter of substantive statutory interpretation. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014).

¹⁰⁷ *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 396 (1987) (quoting *Data Processing*, 397 U.S. at 153).

¹⁰⁸ *Id.* at 403.

¹⁰⁹ *Bennett v. Spear*, 520 U.S. 154, 163 (1997).

¹¹⁰ See, e.g., Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 *ECOLOGY L.Q.* 665, 737–41 (2009); Jonathan Remy Nash, Essay, *Standing and the Precautionary Principle*, 108 *COLUM. L. REV.* 494, 515–26 (2008).

environmental reasons. First, this approach would have a valuable discursive effect: it would help align the discourse in environmental case law with the discourse within federal agencies. As noted above, while it remains an open question whether cost-benefit analysis is the right tool for assessing environmental regulation, there is no doubt that CBA does *in fact* drive decisionmaking. Allowing existence-value standing would help align the language — and the values — of the judicial and the executive branches. Second, existence-value standing would let litigants who would otherwise be “outsiders” barred from court vindicate rights. This Part argues that, contrary to conventional wisdom,¹¹¹ there are circumstances in which such outsider plaintiffs would be valuable.

Existence-value standing ought to be cabined to two particular sets of scenarios: (1) where local interests in an environmental good are systematically outweighed by nonlocal interests or (2) where local environmental protection is systematically stifled. The first scenario might arise where nonlocal actors have some special interest in an environmental good that, for local actors, is relatively insignificant. Such a case might arise, for example, where a displaced native group has a historical or religious interest in an environmental good of relatively little significance to local actors.¹¹² The second scenario might arise where local actors lack the resources to bring suit or where local political pressure makes bringing suit unlikely or impossible.

A. *A Good Idea for Democratic Governance?*

Existence-value standing is distinct from standing based on an undifferentiated interest in the execution of the laws — clearly barred by Article III¹¹³ — but nevertheless shares some similar characteristics. By expanding what constitutes an “injury” and by relying on statute to do so, this Note’s proposal implicates the separation of powers rationales that justify the concrete injury requirement.¹¹⁴ But as Professor

¹¹¹ See, e.g., Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297 (1979) (emphasizing the values of judicial restraint, self-determination, and representation by individuals affected by the judgment as the touchstones of Article III standing).

¹¹² See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 156–57, 156 n.1 (1978) (noting the dam at issue threatened to destroy villages “sacred,” *id.* at 157, to members of the Cherokee nation, who had been forced to leave their lands in Tennessee during the nineteenth century). See generally ZYGMUNT J.B. PLATER, *THE SNAIL DARTER AND THE DAM* (2013).

¹¹³ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’” (quoting U.S. CONST. art. II, § 3)).

¹¹⁴ Separation of powers has long been assumed to underlie the concrete injury requirement. See *id.*

Heather Elliott has argued, the separation of powers function that standing doctrine is professed to serve is actually three distinct functions: (1) ensuring “concrete adversity”; (2) limiting the courts from interfering in political decisions; and (3) preventing Congress from “conscripting” the courts in a struggle for power with the Executive.¹¹⁵ Standing based on existence-value injury is quite clearly consistent with the first of these three separation of powers functions and likely consistent with the others.

First, properly understood, an injury to existence value is sufficiently concrete and particular to ensure adversity.¹¹⁶ As explained above, existence value is a “real” interest, despite its relative remove from conventional views on environmental value.¹¹⁷ Indeed, because CBAs use existence value to put a *dollar* value on environmental goods, an interest in the existence value of an environmental good is *more* concrete than most other aesthetic environmental injuries.

Second, while existence-value interests may be widely shared, they are nevertheless also individual. And the Court has repeatedly allowed plaintiffs with standing premised on individual but widely shared injuries to bring suit.¹¹⁸ An interest in the existence value of an environmental good is not an “undifferentiated interest” in the execution of the laws.¹¹⁹ Rather, it is a widely shared interest, much like those the Court has recognized.

Finally, existence-value-based standing would seem unlikely to allow Congress to “conscript” the courts in a struggle for power with the Executive.¹²⁰ This seems unlikely for two reasons: First, as detailed in

¹¹⁵ Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 468 (2008).

¹¹⁶ Whether a concrete injury is really a necessary condition for adversity is left unaddressed here. For some thoughts on that question, see David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 813–14 (2004) (noting that the Supreme Court “often relies upon abstract formalist reasoning to resolve cases on the merits, thereby gaining no benefit from the concrete context,” *id.* at 814).

¹¹⁷ See *supra* section II.A.2, pp. 786–90.

¹¹⁸ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) (“That these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.”); *FEC v. Akins*, 524 U.S. 11, 24 (1998) (upholding standing based on widely shared injury, and noting that “where a harm is concrete, though widely shared, the Court has found ‘injury in fact’”).

¹¹⁹ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992); see also Elliott, *supra* note 115, at 485 (“Even if environmental harm is widely shared, each individual suffers a harm concrete and particularized to herself.”).

¹²⁰ This idea is generally traced to a divide between Judge J. Skelly Wright and Justice Scalia. Judge Skelly Wright, writing for the D.C. Circuit, noted that the importance of citizen suits was to ensure “that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.” *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971). Then-Judge Scalia saw the loss or misdirection of statutory law as “a good thing.” Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983) (“Where no peculiar harm to particular individuals or minorities is in question,

Part I, executive agencies by their own accord have recognized existence value as an interest worth considering. Judicial accounting for such values would not set up a collision between Congress and the Executive, but would instead show the judiciary taking seriously a set of values embraced by both Congress (in creating a cause of action for existence value) and the Executive (in accounting for existence value in CBA calculations).¹²¹ And second, courts could impose prudential restrictions on existence-value standing, limiting it to plaintiffs particularly well suited to represent existence-value-based claims.¹²²

One might also reasonably object to existence-value standing on the related but slightly different ground that it improperly privileges the individual over the collective.¹²³ If we accept that, generally, public rights should be vindicated by public suits and private rights by private suits,¹²⁴ we might not like a private actor bringing suit to vindicate an interest that, while individualized, is also so widely shared that it is essentially public. But history shows that, where a private actor can show a private injury, he has always been able to “bring a claim that ha[s] aspects of a public right.”¹²⁵

B. *A Good Idea for the Environment?*

Existence-value standing would have clear benefits for environmental law and for the *discourse* about the environment. Its benefits for the *environment* (or for human experience of the environment) warrant closer consideration. This Note argues that there are discrete instances where existence-value standing would be beneficial.

lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere.”). Of course, defining the “peculiar harm” is the entire game of injury-in-fact analysis.

¹²¹ See *supra* Part I, pp. 779–83.

¹²² Cf. Nash, *supra* note 110, at 513–14 (proposing prudential limits on precautionary standing). “Prudential standing,” however, has recently been called into question by the Court. See *supra* note 106.

¹²³ See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1381–82 (1988) (arguing that standing doctrine is convoluted in part because of a modern focus on individual vindication of rights, which was not the (only) conception of rights at the time of the founding); *id.* at 1387–88 (“The metaphor of ‘standing’ is thus the lens through which we view the question of who has rights and who may assert them. Through this lens we see only the disconnected individual in a fragmented society. But this perspective obscures the fact that individuals exist only as part of groups and larger communities of interest. And it obscures our ability to think about how best to protect and effectuate those interests in an interdependent world. In the metaphorically structured reality of the law of standing, there are no forests and no ecosystems. There are only trees; and only the trees have ‘standing.’”).

¹²⁴ See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695 (2004).

¹²⁵ *Id.* at 701 n.49. Professors Ann Woolhandler and Caleb Nelson make an effective comparison to public nuisance doctrine, which has long allowed a private actor to vindicate a public right as long as the private actor could show a special injury to himself. See *id.* at 701–04.

Existence-value standing would help unite environmental law as practiced in federal agencies with environmental law as practiced in federal courts. As Professor Richard Lazarus has documented, most Supreme Court environmental cases are decided with little reference to environmental ends or values.¹²⁶ There is a similar incoherence in regulatory agencies concerning themselves with a certain set of values — including existence value — while federal courts refuse to entertain suits seeking to vindicate those values. Just as there is importance in appreciating what is “environmental” about “environmental law,”¹²⁷ there is also value in aligning the *kinds* of environmental values at stake in the courts and the Executive. By incorporating nonuse values into CBAs, regulatory agencies have acknowledged that the beneficiaries of environmental goods are not limited to those immediately proximate; the benefits of a natural resource accrue not only to those who use it, but also to those who never will. Recognizing injury to an existence-value interest as the basis for standing would give courts occasion to acknowledge and engage with the executive branch as to the extent to which environmental benefits extend beyond the “local.”¹²⁸

There is a second, somewhat related discursive benefit to existence-value standing. Existence-value standing would expand the realm of cognizable harms without losing focus on the *human* costs of environmental damage.¹²⁹ Existence-value standing necessarily would require framing environmental injuries in terms of the damage that harms to the environment do to *humans*. Of course, litigants (and environmental groups) may disagree about whether such a focus is appropriate as a litigation strategy. But at a time when environmental issues are of great importance and political will for action seems lacking, a focus on the *human* consequences of environmental harms seems likely to have important discursive benefits beyond any particular case.¹³⁰

But where would existence-value standing provide beneficial, practical outcomes in the real world? It would seem most relevant where an individual proximate to the environmental good (and therefore suffering an injury more readily cognizable) was unable to bring suit, but

¹²⁶ See Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 706 (2000).

¹²⁷ Cf. *id.* at 744–48 (discussing the aspects of environmental injury that make adjudication of environmental claims difficult).

¹²⁸ See Farber, *supra* note 12, at 1270–72.

¹²⁹ Cf. Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 935 (1998) (“In requiring environmental organization plaintiffs to find members who can describe their own interaction with the environmental resource at issue in a case, and how harm to that resource will affect them aesthetically, recreationally, or economically, the injury-in-fact standard requires environmental plaintiffs to demonstrate why an environmental resource matters to real people.”).

¹³⁰ See *id.* at 958–59 (arguing that environmental groups have made a strategic mistake by underplaying the injury to humans at issue in environmental cases).

where an individual distant from the environmental good — but nevertheless interested in its existence — was able to do so.

The danger here is in pushing too far. As a matter of pure theory, we might agree with Justice Blackmun and John Donne that “[n]o man is an Iland,” and that environmental concerns transcend boundaries.¹³¹ But recognizing that environmental costs and benefits transcend local and national boundaries does *not* imply that local concerns are irrelevant, or even that they should not sometimes *trump* nonlocal concerns.¹³² In most environmental cases there is every reason to think that local actors will bear the greatest costs and enjoy the greatest benefits associated with an environmental good.¹³³ In such cases, existence-value standing, particularly where a litigant advances a position at odds with local interests, might unduly burden those interests.

CONCLUSION

The argument offered here is intended to explain why, as a matter of current doctrine, standing based on an injury to an interest in the existence value in an environmental good is constitutional. As the foregoing illustrates, however, standing law is ultimately a reflection of normative judgments about whose and which rights should be vindicated in the courts. Whether existence value makes its way out of the “vast hallways of the federal bureaucracy”¹³⁴ and into the halls of the federal courts may depend on creative litigants and sympathetic judges interested in allowing the courts to recognize as legitimate the values that now guide some executive-branch decisionmaking.

¹³¹ *Sierra Club v. Morton*, 405 U.S. 727, 760 n.2 (1972) (Blackmun, J., dissenting) (quoting JOHN DONNE, DEVOTIONS XVII (“No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man’s death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee.”)); *see also* Farber, *supra* note 12, at 1272.

¹³² *See supra* note 24.

¹³³ *See* Farber, *supra* note 12, at 1273.

¹³⁴ *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).