

# FROM *LUJAN* TO *LAIDLAW*: A PRELIMINARY MODEL OF ENVIRONMENTAL STANDING

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## ABSTRACT

*In the short span of eight years, the Supreme Court has issued two seemingly opposite answers to the question of whether Congress has free reign to provide private citizens with standing to redress violations of federal environmental law, when those violations have not produced any discernible harm to the claimants. In his prior scholarship, Professor Maxwell Stearns has developed a model of standing based upon the theory of social choice, which focuses primarily upon constitutional standing rules. The recent doctrinal transformation from Lujan v. Defenders of Wildlife, to Friends of the Earth v. Laidlaw Environmental Services, Inc., has provided a valuable opportunity for Professor Stearns to expand his social choice model and to apply it in the context of statutory standing. In this article, which develops a preliminary model of environmental standing, Professor Stearns considers how bargaining over standing expands the issue spectrum for legislative bargaining as it affects the optimal compliance level under a proposed environmental statute. He then considers the differential signaling value of a citizen suit versus agency enforcement as a proxy for the optimal compliance level of the median member of the enacting Congress. The model of statutory standing, which grows out of this analysis, provides several valuable insights into recent environmental standing cases, and suggests a plausible means of reconciling Lujan and Laidlaw.*

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## INTRODUCTION: FRAMING THE INQUIRY

The Supreme Court's standing doctrine has undergone a sea change in the past three decades. Initially conceived in the New Deal as a presumptive set of rules that operated to limit federal judicial interference with progressive regulatory programs,<sup>1</sup> since the 1970s, standing has been transformed into a constitutional litmus test in virtually every civil federal court action.<sup>2</sup> The Supreme Court now demands as a precondition to litigating in federal court that each civil claimant allege a demonstrable injury in fact, caused by the defendant, that can meaningfully be redressed through judicial relief.<sup>3</sup> The Court has applied these rules to presume against standing in cases in which claimants seek to vindicate the claims of others; claims that are diffuse; and claims that seek to invalidate an unconstitutional or otherwise illegal market-distorting rule, which if corrected, will produce more favorable market conditions.<sup>4</sup>

The various standing rules have provoked sharp controversy within the legal academy. Legal historians have convincingly demonstrated that, as an historical matter, these relatively recent standing rules have little or no foundation in either the framing period or the earliest period of post-constitutional litigation.<sup>5</sup> Legal

1. See generally Steven L. Winter, *The Metaphor of Standing and Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1446-47 (1988).

2. See *id.* See also Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) [hereinafter Stearns, *Standing Back from the Forest*]; Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995) [hereinafter Stearns, *Standing and Social Choice*].

3. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984).

4. For a discussion that characterizes the Supreme Court's standing decisions according to the classifications set out in the text, see Stearns, *Standing Back from the Forest*, *supra* note 2; Stearns, *Standing and Social Choice*, *supra* note 2; MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING ch. 6 (2000). In the articles and in the book, I present the final category under the header "no right to an undistorted market."

5. Professor Gene Nichol has aptly summarized this literature, stating:

[i]n separate, major, and compelling efforts, Louis Jaffe in 1965, Raoul Berger in 1969, and Steven Winter in 1988 have demonstrated that injury was not a requisite for judicial authority in either the colonial, framing, or early constitutional periods. The Judiciary Act of 1789, like several contemporaneous state statutes, allowed "informer" actions. English practice included prerogative writs, mandamus, *certiorari*, and prohibition, all designed to "restrain unlawful or abusive action by lower courts or public agencies," and requiring only "neglect of justice," not individual injury. Stranger suits and relator practice countenanced the assertion of judicial power without the existence of a direct personal stake in the controversy.

Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1151-52 (1993) (citations omitted); see also Stearns, *Standing Back from the Forest*, *supra* note 2,

scholars have also argued that the various standing requirements (most notably injury in fact, but more recently including redressability)<sup>6</sup> have proved sufficiently malleable, indeed manipulable, as to justify seemingly inconsistent outcomes. As a result, scholars have argued that the standing rules appear to have been motivated largely by political concerns, including the desire to avoid deciding difficult cases, or the opposite, namely the desire to issue a preliminary and low cost signal of likely future rulings.<sup>7</sup>

I have previously used the theory of social choice to develop a model of standing, targeted primarily to the evolution of constitutional standing rules.<sup>8</sup> The social choice model explains the conditions under which the Supreme Court transformed standing from its New Deal roots into its present form. The model is positive, and is therefore not focused on providing a critique of present doctrine. Instead, it attempts to identify the dynamics of Supreme Court decision making that created the doctrine. In this article, I will extend the model to explore some of the recent developments in statutory standing. To do so, I will first explain the relationship between constitutional and statutory standing.

The model of constitutional standing, which is briefly summarized in the first part of this article, reveals that standing is inextricably linked to the doctrine of *stare decisis*. Within the framework of social choice, *stare decisis* can best be understood as a rule that limits reconsideration of defeated alternatives. Under

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at 1327-28 n.69 (collecting authorities).

6. As explained in Part III, both *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), and *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998), present important questions of redressability.

7. For a summary of this literature, see Stearns, *Standing Back from the Forest*, *supra* note 2, at 1326-27 n.66 and cites therein.

8. See *supra* notes 2 and 4, and cites therein. It is important to distinguish between constitutional and prudential standing rules, on the one hand, and constitutional and statutory standing, on the other. Constitutional and prudential standing rules come into play in virtually all standing cases, regardless of whether the cause of action arises under the Constitution or a statute. Congress has the power to override prudential, but not constitutional, constraints on standing. The term statutory standing is sometimes used to refer to Congress's effort to confer standing broadly by statute. This can involve a pure question of statutory interpretation, for example, whether the statute intended to confer standing upon the particular claimant on the facts of the case. In addition, in evaluating standing under a statute, the Court will look to whether the claimant has satisfied the constitutional standing requirements. In contrast, when a claimant relies upon the Constitution for standing, the Court applies both its constitutional and prudential standing rules. As explained below, while the Court distinguishes between constitutional and prudential standing rules, until recently it has employed a somewhat more relaxed set of standards in evaluating even the constitutional minimum for standing when Congress has clearly provided for standing by statute.

specified conditions, with *stare decisis* in place, the order in which cases are presented has the potential to affect not only on the timing of doctrine, but also its substantive development. This is prone to occur when the preferences of the Supreme Court justices are intransitive with respect to the dispositive issue and outcome resolutions over two or more cases, and thus when there is no available Condorcet winner.<sup>9</sup> Within the Supreme Court, *stare decisis* has the potential to render the evolution of constitutional doctrine dependent upon the order, or path, of cases presented. Under specified conditions, described below,<sup>10</sup> case A followed by case B has the potential to produce opposite results from case B followed by case A. *Stare decisis* thus provides a powerful incentive to ideological interest groups to try to manipulate the order of case decisions in the federal judiciary generally, and in the Supreme Court in particular.

The Supreme Court's articulated standing rules have the effect of significantly limiting the power of litigants to exert a disproportionate influence over doctrine by picking and choosing cases to affect the critical path of doctrinal development. While the resulting doctrine remains path dependent (meaning that the order of cases continues to influence the evolution of doctrine with standing in place), standing improves the overall fairness of constitutional law making by grounding that path in fortuitous factors presumptively beyond the control of the litigants themselves. The social choice model also explains that unlike the Supreme Court, Congress has the institutional wherewithal to avoid undue path manipulation by deflecting certain questions for which no adequate legislative consensus has yet formed. That is because Congress has superior mechanisms for avoiding the forced resolution of issues that give rise to intransitive preferences. These include both the power to remain inert and the power to commodify preferences through vote trading and logrolling. As a result, many potential intransitivities in Congress are of relatively little consequence. Within this framework, we can understand the Court's constitutional standing rules as facilitating the choice of forum for the resolution of certain issues, based upon the relative decision making competence of the federal judiciary, on the one hand, and Congress, on the other.

The Supreme Court's evolving doctrine of statutory standing, and especially environmental standing, at least as it has developed

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9. A Condorcet winner is a non-majority candidate that will defeat all other candidates in direct binary comparisons. For a more detailed discussion, see *infra* Part I.

10. See *infra* Part I.

since 1992, however, presents a considerable anomaly. In my prior work, I have joined the growing chorus of scholars, several of whom were involved with this symposium, who are highly critical of the Court's sudden departure from a more relaxed set of standards when plaintiffs have relied for standing upon a federal statute.<sup>11</sup> The social choice model of constitutional standing rests upon the intuition that the Court will be disinclined to allow ideological litigants to select cases as the vehicle for exerting a disproportionate influence over developing doctrine when the resulting law might be the product of path dependent, and thus arbitrary, decision making. By limiting judicial law making in this manner, standing preserves the power of Congress to resolve the underlying issues if and when it develops an appropriate consensus. The anomaly of modern statutory standing is that when litigants rely for standing upon a federal statute, they appear to be relying upon the product of the very legislative consensus that the constitutional standing doctrines are designed to facilitate. Thus, when Congress confers standing upon a private attorney general, but the Court denies that person standing, the Court is preserving Congress's power to achieve a legislative consensus in the future by thwarting its legislative consensus achieved in the past. And yet, that is precisely the direction in which the *Lujan* Court had moved statutory standing doctrine.

While the Court has long required that plaintiffs be among the injured,<sup>12</sup> the Court had generally applied a more relaxed conception of injury when the claimant relied for standing upon a federal statute than when she relied instead upon the Constitution.<sup>13</sup> The critical

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11. I must express a mild disagreement with one point raised in Professor Karl S. Coplan's excellent essay, *Direct Environmental Standing for Chartered Conservation Corporations*, in which he asserts that neither *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), nor *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), "represented a dramatic departure from previous environmental standing doctrine on their facts; after all the [*Sierra Club v. Morton*, 405 U.S. 727 (1972)] decision had long ago required that the environmental plaintiffs be 'among the injured.'" See Karl S. Coplan, *Direct Environmental Standing for Chartered Conservation Corporations*, 12 DUKE ENVTL. L. & POL'Y F. 183 (2001). While it is true that *Morton* specified the stated requirement, until *Lujan*, the Court appeared substantially more willing to allow Congress considerable latitude in defining the nature of a justiciable injury for purposes of satisfying its constitutional standing requirements. *Morton* itself recognized aesthetic, as well as pocketbook, injuries, when Congress provided redress of that injury by statute. But by limiting the power of Congress to define justiciable injuries in a novel manner, *Lujan* presented a dramatic departure from prior standing law, including *Morton*.

12. See *Morton*, 405 U.S. at 732-33; see also Coplan, *supra* note 11, at 10.

13. For examples in which the Supreme Court has allowed liberal standing based upon the Fair Housing Act, see *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109-15 (1979); *Village of Arlington Heights v.*

point of departure was the 1992 decision, *Lujan v. Defenders of Wildlife*.<sup>14</sup> In *Lujan*, the Court denied standing to claimants who sought to enforce the procedural requirements of the Endangered Species Act, and who relied for standing upon a provision that allowed for enforcement by private attorneys general. Until that case, the Court had generally adopted a deferential stance in allowing Congress to define novel injuries and even in allowing plaintiffs to advance claims that intuitively belonged to others. While the Court had distinguished its prudential and constitutional standing requirements, suggesting that Congress could avoid the former, but not the latter, until *Lujan*, the Court had provided Congress with the latitude to define the critical standing elements more broadly than when a claimant relied for standing solely upon the Constitution, or the Administrative Procedure Act (as opposed to a statute affording substantive rights).<sup>15</sup> In contrast, the *Lujan* Court insisted that when a claimant relies upon the broadly worded citizen standing provision of the Endangered Species Act, she must allege an injury that, if not identical, is closely analogous to one recognized at common law. In short, the *Lujan* Court suggested that with respect to the question of injury, Congress lacks the power to opt out of its literally enforced constitutional standing requirements.

Not only did *Lujan* meet with a flurry of academic criticism,<sup>16</sup> but also it provoked sharp criticism within the Court. While the Court has issued several interim decisions,<sup>17</sup> its most important statement on Congress's power to confer standing by statute was recently announced in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*<sup>18</sup> The *Laidlaw* Court afforded standing under the Clean Water Act for the failure of a polluter to comply with the

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*Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 (1977); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972).

14. 504 U.S. 555 (1992).

15. The point was perhaps most clearly made in Justice Marshall's well known assertion that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

16. See, e.g., Nichol, *supra* note 5; Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). I too have been critical of *Lujan*. See Stearns, *Standing and Social Choice*, *supra* note 2. For a contrary view, see Marshall J. Breger, *Defending Defenders: Remarks on Nichol and Pierce*, 42 DUKE L.J. 1201 (1993).

17. For a discussion of some of these decisions, see *infra* Part III.

18. 528 U.S. 167 (2000).

requirements of an emissions permit, and did so even though the individual claims of injury seemed no more concrete, and the prospect of meaningful redress seemed no less remote, than in *Lujan*.<sup>19</sup> In a short span of just eight years, the Court appears to have issued a major retrenchment upon *Lujan*'s logic, if not its holding.<sup>20</sup> As much as *Lujan* has been vilified, *Laidlaw* appears poised to be commended as a restoration of sound principles of standing. And yet, as with *Lujan*, one is hard pressed to predict whether *Laidlaw* represents a final and stable solution to the difficult questions that statutory standing cases have posed in recent years.

While the Supreme Court has recently addressed statutory standing in other contexts,<sup>21</sup> the most recent major skirmishes over statutory standing have been fought on the environmental battleground. This might not be surprising. As Justice Scalia, who authored the majority opinion in *Lujan*,<sup>22</sup> later observed (admittedly with some irony), the environment is "a matter in which it is common to think all persons have an interest."<sup>23</sup> Among the major questions that environmental standing cases present is the power of Congress to confer standing upon all persons to redress violations of federal environmental law, even when the claimants have suffered no injury distinct from the harm to the public at large as a result of those violations. That was among the central issues in both *Lujan* and *Laidlaw*. The doctrinal teeter-totter on statutory standing has likely occurred on the environmental playing field because such doctrinal elements as injury, causation, and redressability are most susceptible to competing intuitions in that context.

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19. As explained in Part III, *Laidlaw* was initially conceived as a mootness case.

20. For an attempt at reconciling the case holdings, see *infra* Part III. Even if one were to accept the argument that the two cases can be technically reconciled, the fact remains that they are in great tension, and together do not create a likely stable resolution to the difficulties associated with statutory standing.

21. In *Raines v. Byrd*, 521 U.S. 811 (1997), for example, the Supreme Court denied standing to Senator Byrd and others to challenge the constitutionality of the Line-Item Veto Act, which it later held unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998). And in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), the Supreme Court allowed citizen standing to force the disclosure of the contribution list for the American Israel Public Affairs Committee (AIPAC), on the ground that it was a campaign organization, even though the claimed injury does not appear to have met the strict requirements of concreteness set out in some of the then-most recent statutory standing cases.

22. With the exception of Part III.B, which was for a plurality of four, the remainder of Justice Scalia's *Lujan* opinion was joined by a majority.

23. See *Bennett v. Spear*, 520 U.S. 124, 165 (1997).

If the Supreme Court has developed its constitutional standing doctrine in a manner that preserves the power of Congress, which is better suited to resolve intransitive preference orderings, to regulate if and when it achieves an appropriate level of consensus, the most recent standing cases demand a further extension of the model. This article will provide a preliminary sketch of such a model. The extended model begins with the intuitions developed from the social choice model of constitutional standing. It then identifies the conditions that likely generate broadly worded statutory standing provisions and the concerns that the resulting regime poses for judicial construction. My objective is not to provide a normative critique, or to argue that one or the other of *Lujan* and *Laidlaw* is necessarily wrong. Instead, my objective is to provide a positive model that exposes the tradeoffs that these and other environmental standing cases present, and to explain why neither of those cases necessarily presents a stable solution.

This article will develop three insights into the law of statutory standing. First, the model reveals that the Supreme Court is likely motivated in its analysis of statutory standing by two competing intuitions. On the one hand, the justices seek to defer to legislative consensus, at least inasmuch as that consensus signals the preferred resolution of such difficult questions as compliance obligations and optimal enforcement level. On the other hand, broad statutory standing provisions might evince avoidance, rather than resolution, of these very questions. So viewed, broad standing provisions are analogous to once-illicit delegations to administrative agencies of lawmaking powers, without the requisite “intelligible principle.”<sup>24</sup> The unusual feature of this form of delegation is that the object of the delegation is private citizens working through the federal judiciary, rather than a lawmaking agency. The Court’s rejection of citizen standing thus reflects a concern that the citizen suit might promote an unanticipated level of enforcement, even assuming no technical departure from the specified compliance requirements, if the benchmark for optimal enforcement is the probable preference of the median member of the enacting Congress. So viewed, the divergence between the level of regulatory enforcement and citizen-suit enforcement might signal a likely departure from the contemplated enforcement level of the median member of the enacting Congress. In response to these divergent signals, the Court imposes stricter

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24. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

standing limits as a means to hedge against overly zealous enforcement, while allowing for the future possibility of a legislative corrective in the form of a statutory amendment or of more ambitious regulatory agency enforcement under the existing statutory scheme.

Second, the model explains why a federal regulatory agency that itself would signal a less ambitious level of enforcement than would those bringing the citizen suits, might nonetheless support citizen standing. As citizen standing comes to be regarded by business interests as overly zealous relative to agency enforcement, the effect is to increase support for agency enforcement, not merely among pro-environmental interests who we might expect to see supporting agency enforcement, but also by interest groups who generally seek to limit the reach of environmental regulation.<sup>25</sup> The agency, which would often prefer more zealous enforcement, is able to encourage this result by endorsing citizen standing, while focusing on its own more moderate enforcement objectives.

Finally, the model provides insights with which to evaluate some historical arguments concerning the constitutional legitimacy of strict judicial limits upon statutory standing. The analysis reveals that the early equity actions that appear to have defied modern standing norms were likely the product of motivations that set them quite apart from many, and perhaps most, of the modern citizen standing suits. Early exceptions to these norms were likely the product of restrictive prosecutorial resources and information asymmetries with respect to local injuries resulting from violations of law. In contrast, modern statutory standing allows the private vindication of claims that the enforcement agency has chosen not to pursue for policy reasons, even after receiving the required notice by the would-be private attorney general and being afforded an opportunity to litigate in her place. As a result, early cases that defy modern justiciability norms might be of limited value in assessing the conditions under which the Court has recently developed its statutory standing rules.

In Part I, I will briefly summarize the social choice model of constitutional standing, which provides the starting point for analyzing statutory standing. In Part II, I will develop a preliminary model of statutory standing. Finally, in Part III, I will consider five

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25. The recent campaign by the National Rifle Association (NRA) to see that present gun laws get enforced is analogous. While the NRA has lobbied against many, if not most, of the very laws that it now claims are under-enforced, the campaign likely rests upon the premise that prosecutorial enforcement of existing laws holds greater promise for moderation than does the creation of new gun control laws.

recent statutory standing cases—four involving environmental standing, and one involving standing to challenge the Line-Item Veto Act—based upon the insights developed from these two models.

### I. THE SOCIAL CHOICE MODEL OF CONSTITUTIONAL STANDING

The social choice model of standing begins with the seminal insight that under specified conditions, groups of three or more persons each possessing fully transitive (rational) preference orderings, may possess intransitive (irrational) preferences by unlimited majority rule. While we generally assume transitivity of preferences (A preferred to B preferred to C implies A preferred to C) as a precondition to individual rationality, we cannot make the same assumption with respect to groups of three or more decision makers. If three persons are selecting among options ABC, and each ranks his preferences as follows: 1 (ABC); 2 (BCA); and 3 (CAB), an intransitivity exists, such that in a regime of unlimited binary comparisons in which we assume sincere voting, the group as a whole prefers A to B (persons 1 and 3 winning) and B to C (persons 1 and 2 winning), but not C to A (persons 2 and 3 winning). This phenomenon is not universal. Thus, if the preferences were instead: 1 (ABC); 2 (BCA); and 3 (CBA), such that only the second and third ordinal ranking of person 3 had been changed, then option B would represent a stable and dominant outcome that could defeat both A and C in direct comparisons. In the language of social choice, option B is known as a Condorcet winner.

Because the Supreme Court is a multimember institution, which presently has nine justices, one can posit conditions under which its members are susceptible of possessing collective intransitive preferences. While I have previously provided illustrations based upon actual cases,<sup>26</sup> I will now illustrate using a hypothetical and stylized pair of environmental standing cases.

Imagine that the Court faces two cases presenting difficult questions of statutory standing, *Citizens for Clean Water v. Polluters, Co.* and *Citizens for Clean Air v. Emissions, Inc.* Assume that at the district court level, both cases were dismissed on the ground that the plaintiffs had failed to demonstrate any direct injury resulting from

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26. See Stearns, *Standing and Social Choice*, *supra* note 2, at 323-27 (illustrating with *Crawford v. Board. of Educ.*, 458 U.S. 527 (1982) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982)).

the defendants' stipulated permit violations. As a result, the lower courts denied the plaintiffs standing, and the respective courts of appeals affirmed. The first case, *Clean Water*, involves a statutory standing provision that is slightly broader than that at issue in the second, *Clean Air*. The former confers standing to "all persons," while the latter provides it to "injured persons." Further assume that the two cases are sufficiently close on the facts and on the law that only a minority of three justices, group A, believes that they should be distinguished. Imagine that another group of three justices, group B, believes that the two cases are indistinguishable and that both should be reversed, thus allowing standing. And a final group of three justices, group C, agrees that the cases are indistinguishable, but concludes that both should be affirmed, thus continuing to deny standing.

Based upon these assumptions, any two of the three groups of justices contain the requisite number of votes to form a majority. Assume that the two cases arrive at the Supreme Court at the same time. Further assume that group A concludes that because the statute at issue in *Clean Water* confers standing more broadly than that at issue in *Clean Air*, standing should have been granted in *Clean Air*, resulting in a reversal, but not in *Clean Water*, resulting in an affirmance. Group B believes that standing is sufficiently strong under either statute, and that the pervasive interest in the environment renders any concerned citizen "affected" when federal environmental law is violated. Thus, group B concludes that both dismissals should be reversed. Finally, group C reaches conclusions opposite group B in both cases. Group C believes that because the stipulated permit violations produced no actual harm to the plaintiffs in either case, any hypothesized "affect," psychological or otherwise, is inadequate to justify standing. Group C would affirm in both cases. Because these two cases arise simultaneously, assume that the justices vote consistently with their preferred resolution in each case, and thus without regard to how the other case is resolved. In other words, because the two cases are decided simultaneously, none of the justices is assumed to treat one case as a precedent in the other. In this situation, the result will be to reverse the dismissal in *Clean Air*, with groups A and B forming a majority, and to affirm the dismissal in *Clean Water*, with groups A and C forming a majority. This holds, even though groups B and C form a thwarted majority that believes that there is no distinction between the two cases.

Now assume that the cases come up one year apart, rather than at the same time. If *Clean Air* is decided first, the dismissal of standing will again be reversed, with groups A and B forming a majority. When *Clean Water* comes up the following year, those justices who thought the cases indistinguishable (the members of groups B and C), will not inquire how they might rule on the merits of the case in the absence of a governing precedent. Instead, they will inquire as to whether *Clean Air* is controlling. Assuming that the justices vote sincerely,<sup>27</sup> then based upon their resolution of this limited and potentially controlling question,<sup>28</sup> they will then form a majority to reverse the dismissal in *Clean Water*.

Finally, assume that the cases arise in opposite order. If *Clean Water* is decided first, the standing dismissal will be affirmed, with groups A and C forming a majority. Subject to the same assumptions, when *Clean Air* arises the following year, groups B and C, which determine that *Clean Water* is a controlling precedent in *Clean Air*, will affirm that case as well.

In these two variations on the initial hypothetical, the outcomes of both cases depended fully upon the order in which they were presented. In social choice, this phenomenon arises when, as here, a group of decision makers possesses intransitive preferences and the rules disallow the requisite number of comparisons to formally codify a cycle.<sup>29</sup> The intransitivity is highlighted when we identify the three overlapping majorities across these two cases that cannot simultaneously be satisfied:

Groups A and B: reverse *Clean Air*

Groups A and C: affirm *Clean Water*

Groups B and C: (affirm *Clean Water* and *Clean Air*) or  
(reverse *Clean Water* and *Clean Air*)

Because only two of the three majorities can be satisfied at any

27. In the language of social choice, the justices are presumed to adhere to independence of irrelevant alternatives, which is one of the Arrow's Theorem fairness conditions. See STEARNS, *supra* note 4, at ch. 2. Independence demands that the participants vote strictly according to the merits of available alternatives, without regard to such extrinsic matters as the voting path. It was also a condition that Condorcet assumed in his writing on the paradox of voting. See Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994) (describing the significance of principled voting for both Arrow and Condorcet).

28. If resolved affirmatively, then it is controlling. If resolved negatively, then it is not controlling because the justices must decide *Clean Water* on its merits.

29. To ensure that the selected outcome is a Condorcet winner, or to discover the existence of a cycle, the decision-making body must allow at least the same number of binary comparisons as options. Otherwise, the selected outcome might be the arbitrary product of a voting path. See STEARNS, *supra* note 4, at ch. 2.

one time, the combination of preferences allows us to infer intransitive preferences, such that for any resolution, there exists a dissatisfied majority that would prefer to substitute that resolution with another. In this case, the intransitivity arises because it is not possible to satisfy the first two majorities, which would decide the cases in opposite fashion, while also satisfying the third majority, which would decide them the same way.

While the written opinions and the votes cast in such paired comparisons allow us to make assumptions from which we can reasonably infer lurking intransitive preferences, when the cases arise separately, *stare decisis* prevents the formal codification of a doctrinal cycle, in which for any chosen outcome or set of outcomes, another has majority support.<sup>30</sup> Thus, if the cases were decided one after the other and if we assume principled voting and adherence to precedent, then those deciding the second case would limit their inquiry to the narrow question whether the first case governs the second. If the answer is yes, that answer will be controlling in the second case, without regard to how this group would have decided the second case on its merits. In effect, *stare decisis* limits one of the options from consideration once a governing precedent has been decided. The *stare decisis* regime produces the benign effect of improving the stability of legal doctrine. At the same time, however, it produces the unintended consequence of rendering the substantive evolution of doctrine in the two cases dependent upon the order in which they are presented. In a legal system that adheres to precedent, the phenomenon of path dependency is inevitable, at least when the judges possess intransitive preferences as in this hypothetical. Even though the Court might have decided the second case differently absent a controlling precedent, those who view the two cases as indistinguishable will eschew a formal and controlling inquiry into the merits of the second case.<sup>31</sup> It is only by allowing a formal and controlling consideration of the now foreclosed merits determination in the second case that the Court would risk codifying a voting cycle.

While this example involved only two cases, I have previously provided several examples of important bodies of substantive constitutional law that have evolved in path dependent fashion

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30. Over a large enough number of cases, it is possible for doctrinal cycles to emerge, even with *stare decisis* in place. See *id.* at ch. 4.

31. That is not to suggest that the justices will decline to express noncontrolling views on the merits of the second case in the form of dictum. But by definition dictum is not the product of a formal and controlling inquiry.

through a series of discrete distinctions over a larger set of cases and over a longer period of years.<sup>32</sup> Introducing additional variables, including changes in Court personnel, changes in political conditions, and more complicated background precedent, increases the difficulty of formalizing any presentation of path dependency.<sup>33</sup> Nonetheless, the presence of multiple factors does not undermine the main point: Even if we assume these other factors away, and imagine a regime in which the Court has stable personnel and confronts minimal background precedent, *stare decisis* creates a strong incentive among ideological interest groups to try to manipulate the critical path of case decisions as a means to exert a disproportionate impact on the substantive evolution of doctrine. Adding variables that improve the likelihood of success in producing this result serves to enhance, rather than to undermine, this already powerful incentive.<sup>34</sup>

While *stare decisis* introduces an arbitrary element into the evolution of legal doctrine, the real problem with *stare decisis* is not path dependence.<sup>35</sup> Path dependence is an inevitable byproduct in a regime that seeks to use precedent as a means with which to produce stable legal doctrine. The greater difficulty is that *stare decisis* creates a strong incentive among interest groups to try to favorably manipulate the order of case decisions as a vehicle for exerting a disproportionate influence over the evolution of substantive doctrine. Thus, revisiting the prior hypothetical, if a pro-environmental group had complete control of the order of cases, it would present *Clean Air* first, on the ground that its more restrictive standing provision is

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32. See Stearns, *Standing Back from the Forest*, *supra* note 2; STEARNS, *supra* note 4, ch. 4. Intransitivities can also be disclosed through dictum both within individual cases and in groups of cases over time. For some individual case illustrations, see Maxwell L. Stearns, *Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87 (1999).

33. For a discussion of the role of case distinctions in affecting the path dependence and manipulation of legal doctrine, see STEARNS, *supra* note 4, at ch. 4.

34. As I have previously explained, the Supreme Court's power to control its docket through certiorari jurisdiction does not limit the need for standing doctrine. See STEARNS, *supra* note 4, at ch. 4 (developing social choice model of certiorari, standing, and issue percolation). Instead, the Court must have both certiorari and standing to limit the most egregious manifestations of path manipulation. Absent standing, ideological interest groups could manipulate circuit splits as a means to effectively force the grant of certiorari, rendering docket control illusory. Absent certiorari, the Court would have to devise some rule that would force it to take cases whenever some predetermined benchmark has been met, for example, a circuit split. If we assume that the legal doctrine develops in a path dependent manner in the circuit courts, as well as in the Supreme Court, then this would prevent the Court from awaiting a sufficient number of arbitrary, path dependent options from which to choose.

35. See Stearns, *Standing Back from the Forest*, *supra* note 2.

easier to defend than is the completely open-ended provision at issue in *Clean Water*. A pro-industry group seeking to limit the application of citizen standing, in contrast, would take the opposite approach, with opposite results.

It will now be helpful to consider the nature of the Supreme Court's articulated standing rules, which combine to raise the cost of path manipulation. As stated in the introduction, the Court's standing cases can be divided into three general groupings: 1) no right to enforce the rights of others; 2) no right to prevent diffuse harms; and 3) no right to an undistorted market. The first two categories are most important in considering the question of statutory standing. These two rules limit path manipulation by presumptively preventing the easiest vehicles for favorably ordering cases. The third category proves helpful in assessing the Court's recent analyses of redressability.

A. *No Right to Enforce the Rights of Others or to Prevent Diffuse Harms*

The easiest way to manipulate the order of presently live claims, as opposed to claims that are not yet ripe or that are moot,<sup>36</sup> is to identify available claims that affect other people, and then raise them on their behalf.<sup>37</sup> This would allow ideological interest groups to litigate the most favorable live claims first, and then to use the resulting precedents in an effort to work toward preferred resolutions of cases with increasingly difficult facts or law. If the judiciary presumes against allowing such claims on the ground that the affected individual should pursue his or her own claim, the ideological litigant can then take a second mode of attack. He or she can instead allege that the suit does not seek to vindicate the claim of another person. Rather, by knowing the law has been violated, he or she is suffering a harm, albeit one that is diffuse.<sup>38</sup> This analytical play on words, which

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36. Thus viewed, ripeness and mootness doctrines prevent even lower cost mechanisms for favorably ordering cases. Litigating nonripe or moot claims would not even require identifying a live dispute. See STEARNS, *supra* note 4, at ch. 4 & 6.

37. This was the articulated defect in *Sierra Club v. Morton*, 405 U.S. 727 (1972), namely that none of the club's members were actually affected by the alleged violations of federal environmental laws, because none had used the parks in question. In contrast, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), a group of claimants was able to raise a seemingly similar claim merely by alleging that the failure to suspend a railroad rate increase adversely affected the air that they breathed in and around Washington, D.C.

38. Indeed, this might appear to provide an apt characterization of the facts of both *Lujan* and *Laidlaw*.

transforms a third party harm into a first party injury, would suffice to create standing but for the presumptive rule that proscribes standing to litigate diffuse harms.<sup>39</sup> Together, these two rules operate fairly well in directing courts to hear cases that are presumptively motivated by the desire to resolve concrete disputes even if doing so requires the courts to make new law, rather than by the desire to create law in spite of the absence of a concrete dispute adversely affecting the claimant.

The analysis thus far helps to explain two features of modern standing doctrine. First, while many commentators have observed that the various standing elements are sometimes applied in an inconsistent manner, we can now intuit the essential logic of including such elements as injury in fact, causation, and redressability as constitutional prerequisites to standing. Each serves as a proxy for the conditions under which courts are ordinarily called upon to resolve disputes, and in the course of doing so, to occasionally make new law. In contrast, the Supreme Court intuitively feels that suits that fail to possess these characteristic features are more likely the product of an ideological litigant's desire to favorably manipulate the order of case decisions as a vehicle for exerting a disproportionate influence over the evolution of legal doctrine, even if there is no concrete dispute in immediate need of judicial resolution. In other words, while the Court presumes it proper to resolve concrete disputes in spite of the need to make law, it presumes it improper to resolve created disputes as a purposeful vehicle to make new law.

### 1. The Zealous Advocacy Anomaly

The analysis further explains why the law presumes against allowing interest groups to have standing on their own, rather than as conduits for the interests of specific members.<sup>40</sup> For critics of

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39. The rule is presumptive, rather than absolute, because under certain conditions, Congress has succeeded in conferring the power to present claims of others and claims that are diffuse. See *supra* note 13 and cites therein (collecting Fair Housing Act cases).

40. In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), the Court articulated the following three-part test for organizational standing:

[An] association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Thus, the Washington Apple Advertising Commission was afforded standing to represent the interests of its member producers who were allegedly harmed by the North Carolina law under review, which prevented posting non-USDA grading, thus precluding superior Washington grading to be posted on apple imports, because the members would have independently

standing, this presents the following anomaly: While the Court, and some commentators, have linked the constitutional standing requirements to the desire for zealous advocacy,<sup>41</sup> the interest groups themselves would generally present the claims at least as zealously as an adversely affected individual. And yet, unless an individual member would have standing, the organization cannot present the claim. The social choice model of standing readily explains this anomaly. If the function of standing is to limit the judicial creation of law to those instances in which the resolution of a legal dispute demands it, rather than in response to well timed litigation, then the Court will prefer an actual litigant to an organizational litigant, without regard to the relative litigational competence of the potential claimants. Otherwise, organizations like the Sierra Club Legal Defense Fund, which have the resources with which to monitor violations of the federal environmental laws, would be able to pick and choose which cases to bring, and in what order, with the ultimate goal of providing the maximum environmental protection under those laws. Under such a regime, the federal judiciary, including the Supreme Court, might unwittingly expand the reach of federal environmental statutes well beyond that which a majority of the enacting Congress would have preferred had Congress addressed and resolved the issue of the optimal level of enforcement, rather than avoiding this question in part through the mechanism of liberalized standing.<sup>42</sup>

Among the benefits of a regime that imposes barriers to third party or diffuse harm standing is that it does not prevent the enforcement agency from pursuing a more ambitious level of enforcement in the future. Nor does it preclude Congress from tightening enforcement relative to that presently undertaken by the agency. If, at some future time, Congress possesses the requisite consensus with which to require a stricter level of enforcement, or

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satisfied the Court's standing requirements. Yet, five years earlier, in *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Court denied Sierra Club standing to challenge a development, where it claimed no members who had been or would be harmed as a result of the challenged project.

41. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 413-14 (1991); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *Craig v. Boren*, 429 U.S. 190, 194 (1976); see also Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1071 (1994) (arguing that the only constitutional basis for standing is the need to ensure zealous advocacy); cf. Arthur H. Abel, Note, *The Burger Court's Unified Approach to Standing and Its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187, 1189 (1985) (observing that in the Warren Court, the standing doctrine was largely grounded in the desire to promote vigorous advocacy).

42. This argument is more fully developed *infra* Part II.

with which to impose stricter compliance obligations, a prior standing denial will not prevent it from doing so.

One of the benefits of decision making in Congress, relative to the federal courts, is that Congress need not resolve issues over which opinions are sharply divided and for which there is no consensus in the form of a Condorcet winner. Congress has the power to remain inert. Social choice thus reveals a critical distinction between the Supreme Court, or appellate courts generally, and Congress, when those institutions are confronted with certain controversial issues.<sup>43</sup> Setting aside the possibility of a rare dismissal on the ground that certiorari was improvidently granted, and assuming that a case is properly on the Court's docket, the Court is presumed obligated to resolve the case by a collective judgment. As a result, it has developed a set of decision making rules that are consistent with that obligation. The Court thus lacks the institutional power with which to employ rules that would formalize cyclical preferences and thus provide a foundation for failing to issue a collective judgment.<sup>44</sup>

In contrast, if Congress is confronted with a variety of proposed solutions to an identified problem in the form of competing bills or of competing amendments to a pending bill, and if none of those is a Condorcet winner, then Congress retains the power to identify the cycle and then to decline to act.<sup>45</sup> Unlike appellate courts, Congress possesses the institutional power to remain inert. Perhaps more importantly, even if members of Congress reveal the presence of cyclical preferences, Congress retains one additional means of

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43. For a more detailed comparison of Congress and the Supreme Court from a social choice perspective, see Stearns, *supra* note 27; STEARNS, *supra* note 4, at ch. 2.

44. In the language of social choice, this means that the Court lacks the power to employ rules that can ensure that a Condorcet winner, if available, will prevail. For a more detailed exposition and analysis of this point, see STEARNS, *supra* note 4, at ch. 2. This does not mean, of course, that the Court is bound to issue a holding on an issue of the litigants' choosing. It merely means that appellate courts in general, including the Supreme Court, cannot decline to resolve by judgment disputes for which it lacks a preferred, Condorcet winning outcome over issue and outcome combinations within or across cases.

45. Even if Congress has rules that promote structure-induced equilibria—for example restrictions on the number of amendments to pending bills—members of Congress have the means with which to identify potential intransitivities informally through agreements to trade votes. See William H. Riker, *The Paradox of Voting and Congressional Rules for Voting Amendments*, 52 AM. POL. SCI. REV. 349 (1958) (describing potential effect of limited number of permissible amendments to motions in Congress as masking cyclical preferences); see also MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY ch. 2:1 (1997). As a result, members can avoid reaching collective decisions by agreeing on strategies to limit disfavored voting paths. For a discussion of structure-induced equilibria, see Kenneth Shepsle & Barry Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503 (1981).

arriving at a rational outcome. Unlike appellate courts, Congress condones vote trading, or logrolling. This practice allows Congress to relegate many potential intransitivities to an inconsequential status. Provided that the members possess disparate intensities of preference, they have the wherewithal to reach a collective resolution by expanding the issue space to include a larger package of issues, even when preferences regarding one or more of these issues are cyclical. In contrast, in the Supreme Court vote trading is widely understood to be an improper mechanism for case resolution.<sup>46</sup> Moreover, various institutional rules within the Supreme Court, including most notably the practice of written opinions, inhibit vote trading, by encouraging statements of justification for a given vote, which would be contradicted if justices were then to vote differently based solely upon strategic considerations.<sup>47</sup>

These institutional distinctions between the Supreme Court and Congress prove significant in assessing standing. The effect of a regime in which the justices are presumed obligated to resolve individual disputes properly before them and to adhere to precedent when a new case falls within the ambit of a previously announced holding, is sometimes to thwart the preferences of an existing majority on the Court. Thwarted majorities can arise within a single case,<sup>48</sup> or through path dependence, over groups of cases over time.<sup>49</sup> The two standing rules described thus far—no right to enforce the rights of others and no right to prevent diffuse harms—have the beneficial effect of encouraging the resolution of divisive issues in Congress, a branch that has a comparative advantage in the resolution of issues even when its members possess intransitive preferences.<sup>50</sup>

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46. See, e.g., Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 88 (1986) (“[W]e . . . strongly lean toward a view of adjudication as an exercise in judgment aggregation; indeed, we understand most plausible schools of jurisprudence to embrace this view.”).

47. See STEARNS, *supra* note 4, at ch. 4.

48. See Stearns, *Standing Back From the Forest*, *supra* note 2 (collecting and classifying individual voting anomaly cases).

49. See STEARNS, *supra* note 4, at ch. 4 (collecting cases).

50. This does not necessarily mean that all controversial issues will be—or should be—resolved in the legislature. Indeed, in virtually all difficult criminal appeals resting upon a claimed constitutional defect, the appellate courts are called upon to create new law in a manner that risks thwarting majoritarian legislative preferences. In this context, however, while the courts might be disadvantaged by collective preference aggregation problems, they have a comparative advantage relative to the legislature, in that they have the wherewithal to issue a decision even if they possess cyclical preferences. If appellate courts were not obligated to resolve disputes in this manner, it would be possible for a convicted criminal to remain in prison

### B. *No Right to an Undistorted Market*

Before concluding this part, it will be helpful to briefly consider the final constitutional standing rule, no right to an undistorted market. The analysis will be helpful in assessing the Supreme Court's recent standing decisions, *Steel Company v. Citizens for a Better Environment*, and *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* I will first describe the general posture of the standing cases in this category, and then summarize two such cases in which the Court achieved opposite outcomes on standing.

In each case in this category, the claimant identifies a law or regulatory policy, which she alleges violates either a statute or a constitutional provision. The most notable examples involve alleged violations of equal protection. The allegedly illegal rule can take, for example, the form of an IRS operating policy, as in *Allen v. Wright*,<sup>51</sup> or an affirmative action program, as in *Board of Regents v. Bakke*.<sup>52</sup> The claimant alleges that if the illegal rule were struck down, then through a series of causal linkages, she would ultimately benefit. In *Allen*, for example, a nationwide group of parents of African-American school children challenged an IRS policy that, among other things, afforded private schools tax exempt status based upon that of any umbrella organization of which they were a part. The claimants alleged that in some instances, the schools receiving tax exempt status based upon this policy were engaging in racially discriminatory admissions policies. As a result, they alleged, if these schools were assessed on their own merits, they would have been denied tax exempt status. The claimants thus sought to have the tax policy struck down as a means to remove an unconstitutional subsidy to white flight, and thus to improve the possibility of racial integration at the public schools that their children attended. The *Allen* majority denied standing, concluding that the plaintiffs had failed to articulate a constitutionally adequate injury. The *Allen* Court observed first that the claimants' children had not applied for admission into, and were not attending, the private discriminatory schools in question, and second that multiple links in the chain of causation made speculative

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without a resolution of a claimed constitutional defect simply because the members of the Court identified the presence of cyclical preferences. In contrast, a legislature can routinely allow constitutional violations, or other societal problems, to persist without issuing any corrective unless and until it achieves an appropriate level of consensus. In fact, as Justice O'Connor recognized, albeit in the context of a state legislature, the power to remain inert is among the legislature's inherent powers. *See generally* *New York v. United States*, 505 U.S. 144 (1992).

51. 468 U.S. 737 (1984).

52. 438 U.S. 265 (1978).

whether a decision to strike down the policy would lead to the actual integration of the public schools.<sup>53</sup>

In contrast, in *Bakke*, a nonminority applicant alleged that a race-based quota system for affirmative action violated equal protection. As in *Allen*, his ultimate relief—admission to medical school—was dependent upon a host of causal linkages involving decisions by private actors who were not party to the suit.<sup>54</sup> Thus even without the affirmative action program in place, Bakke could not have known that he would have been among the next group of nonminority admittees. But unlike in *Allen*, the *Bakke* Court granted standing on the theory that Bakke was injured in his inability to compete for all seats.

These two cases illustrate an inevitable tension in the application of the Court's constitutional standing elements. As a conceptual matter, one could translate the *Allen* claim into opportunity-injury

53. Thus, Justice O'Connor explained:

It is, first, uncertain how many racially discriminatory private schools are in fact receiving tax exemptions. Moreover, it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.

*Allen v. Wright*, 468 U.S. at 758 (citations omitted).

54. If the *Bakke* Court had focused upon the ultimate goal of admission, rather than the opportunity to compete, then it would have been possible for the Court to identify at least the same number of causal links in that case that Justice O'Connor later identified in *Allen*. I have recently described the analysis as follows:

At a minimum, Bakke's ultimate admission into the Davis medical school turned on: (1) whether having struck down the Davis affirmative action program, the medical school would substitute some other, constitutionally permissible, affirmative action program; (2) whether the absence of an affirmative action program or the presence of a newly devised plan would reduce the applications or admissions of minority candidates, relative to nonminority candidates, as compared with the struck Davis program; (3) whether the absence of an affirmative action program or the presence of a newly devised plan would encourage applications by additional and more qualified nonminority students who might have been deterred from applying based upon the impact upon their admissions prospects of the struck affirmative action program; and (4) whether the altered pool of both minority and nonminority applicants that would result from striking the Davis plan would have had a significant enough impact on Bakke's relative qualifications to the others in both pools to change the outcome of his application. One can, of course, go further: (5) whether or not having struck down the Davis program, other medical schools would follow suit, in turn, affecting the composition of their own applicant pools with spillover effects upon that at Davis; and (6) whether the changed admissions regimes at other medical schools would make those schools more attractive for Bakke to apply to and to matriculate, if offered a seat.

STEARNS, *supra* note 4, at ch. 1.

terms, thus justifying a grant of standing. At the same time, one could translate the *Bakke* claim into ultimate-relief terms, thus justifying a denial of standing. As William Fletcher has shown, if we set aside the largely irrelevant case of the lying plaintiff, we cannot resolve difficult questions of standing by asking whether or not a plaintiff is injured.<sup>55</sup> Instead, determining which among a broad potential class of injuries provide the basis for justiciable claims is the difficult policy question that lurks behind the Supreme Court's standing doctrine. The analysis is particularly important in the context of these two cases because both sets of facts can be presented according to the Supreme Court's announced standing criteria in a manner that is consistent with identifying either a justiciable opportunity injury or a nonjusticiable claim to ultimate relief. These cases are not distinguishable in kind. Both cases involve an identified law or policy, which is allegedly illegal, and which if struck down would produce more favorable market conditions for the claimants.<sup>56</sup> But if one focuses on the underlying function of the Court's constitutional standing criteria, which is to limit judicial law making to those cases in which the obligation to make law grows out of the need to resolve actual and concrete disputes, rather than out of the desire to affect favorable doctrine, then much of the apparent inconsistency dissipates. In each case, the Court has implicitly identified those characteristic features that correlate more or less strongly with either the likelihood of using the case as a vehicle to make law, on the one hand, or the desire for concrete relief, on the other.<sup>57</sup>

While this final standing category is important in illustrating the inevitable malleability of the Court's standing elements and in assessing some recent innovations in redressability doctrine, it is generally less significant than third party and diffuse harm standing in the statutory context. When a claimant relies for standing upon a federal statute, he or she is generally trying to enforce the very statute for which standing has been conferred.<sup>58</sup> As a result, such claimants will rarely invoke a statutory conferral of standing to challenge a statute as unconstitutional or to challenge a regulation as violating a federal statute. Stated differently, when a plaintiff relies upon a

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55. See generally William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

56. This explains why I have labeled the cases that fall into this category "no right to an undistorted market."

57. For a discussion of more cases in this category, and how they fit within the larger social choice analysis of standing, see STEARNS, *supra* note 4, at ch. 6.

58. For an apparent exception, see *Bennett v. Spear*, 520 U.S. 154 (1997).

federal statute for standing, she generally seeks to have enforced the apparent desire of Congress to remove whatever distortion she agrees does not belong in the market place. As a result, most statutory standing claims will fall into the third party and diffuse harms categories. The question then arises: To what extent can Congress vest individuals with the power to raise claims that intuitively belong to others or that are diffuse? As explained in the introduction, the Court has recently provided two seemingly opposite answers. In the next part, I will expand upon the model developed above to explain the tradeoffs involved with broad or restrictive rules of statutory standing. In the part that follows, I will review some of the more recent statutory standing cases in light of the model developed below.

## II. A PRELIMINARY MODEL OF ENVIRONMENTAL STANDING

In virtually every statute in which Congress confers standing broadly, it is either affording individuals the power to litigate the claims that under traditional analysis would be better understood as residing with others, or to litigate claims that will redress a diffuse harm. Cases that fall into these two categories present fairly low cost mechanisms for manipulating the order of precedents. By further developing the social choice model to account for the conditions under which Congress might be motivated to confer broad standing by statute, and the conditions under which the Court might be resistant to such broad standing conferrals, we can better understand the apparent inconsistency in the Court's most prominent recent statutory standing decisions, *Lujan* and *Laidlaw*.

In the prior part, I explained that modern standing doctrine is consistent with certain intuitions, revealed by social choice, about the relative institutional competence of the Supreme Court and Congress to resolve disputes. The critical difference is that in contrast with the Supreme Court, which is presumed obligated to issue a collective judgment in cases properly before it, Congress can remain inert when it is faced with collective intransitive preferences. One implication of this analysis is that Congress's power to remain inert systematically favors the status quo relative to other options when majority dissatisfaction with the status quo is split among many potential options, none of which is persistently favored by a majority in a series of direct comparisons with all others.<sup>59</sup> Thus, if in the course of

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59. Another way to express this intuition is that when the majority disfavoring the status quo has single-peaked preferences, then the majority can coalesce around a single favored alternative to the status quo. When the majority disfavoring the status quo instead had multi-

construing a statute the Court produces a change in the law that a majority of Congress disfavors, that result might well remain stable, if Congress lacks Condorcet-minority support for a particular change from the judicially created status quo. The risk of entrenching the new status quo might well explain why under certain conditions, the Court is disinclined to confer standing as broadly as federal statutes allow. In this analysis, the Court's disinclination to allow Congress to define the outermost limits of standing is a function of the mixed signals it receives concerning intended compliance obligations. These mixed signals arise from differential enforcement between the private attorneys general on the one hand, and the regulatory agency on the other. Simply put, the Supreme Court has hesitated in its willingness to allow the federal judiciary to become the vehicle for resolving certain important, and only partially resolved, questions of environmental policy.<sup>60</sup>

When confronted with intransitive preferences, Congress not only has the options to remain inert or to commodify preferences, but also it has the option to delegate decision making authority to another institution. When Congress exercises the latter option, it avoids (quite likely intentionally) resolving some of the most contentious features of the underlying issue. Most commonly, Congress delegates lawmaking power to regulatory agencies. But in recent decades, Congress has also effectively delegated difficult questions of regulatory enforcement to the federal judiciary through the liberalization of standing. Setting aside a brief flirtation with the nondelegation doctrine in the New Deal, the Supreme Court has generally allowed extremely broad agency delegations.<sup>61</sup> And until *Lujan*, the Court appeared to treat private attorneys general

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peaked preferences, it might not be able to coalesce around a single alternative to the status quo, absent commodification of preferences.

60. One could respond that Congress simply means what it says in whatever statute combines specified compliance requirements with broad standing. The difficulty is that this treats Congress as a single being, rather than as a collection of independent decision makers. Cf. Kenneth Shepsle, *Congress is a "They," Not an "It": Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). Because Congress is an institution in which collective preferences are aggregated, there is no reason to assume all of Congress agrees to the content of each provision in a bill that becomes law. A more sophisticated understanding of Congress recognizes that some provisions within a bill are included to appease specific members whose support is necessary to ensure passage of the larger legislation, even though the resulting provisions would not have garnered independent majority support. For a more detailed discussion consistent with this analysis, see Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385 (1992).

61. For an informative analysis of the nondelegation doctrine, see Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

delegations in much the same manner. Two questions then arise. First, why has the Court recently retrenched upon the latter form of delegation? And second, why has it vacillated in doing so? The model of statutory standing, which focuses upon the disparate signals between agency enforcement and private attorney general enforcement with respect to the preferred enforcement level of the median member of the enacting Congress of an environmental statute, will help to resolve these questions.<sup>62</sup>

#### A. *Modeling the Creation of Broad Statutory Standing*

I will now provide an illustration of legislative bargaining that will allow us to develop a model of statutory standing. In the model, I will present three forms of bargaining in sequence: (1) substantive bargaining; (2) nonsubstantive bargaining; and (3) bargaining over standing.<sup>63</sup> By substantive bargaining, I mean bargaining over the compliance provisions of the relevant environmental law bill. By nonsubstantive bargaining, I mean bargaining that involves matters unrelated to the substance of the bill in question, which can include adding special interest items to the same bill, negotiating special interest items into other bills, or negotiating over the substance of other bills. Finally, bargaining over standing involves negotiating the extent to which parties other than the relevant federal agency can seek redress for statutory violations in federal court. These three modes of bargaining can occur in any sequence, and not every mode of bargaining need accompany every bill. The sequence of bargaining presented below is intended solely for expositional purposes.

Assume that a pro-environmental congressman introduces a bill calling for a significant and costly reduction in the emissions of

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62. As Professors Barnett and Terrell correctly observe, my approach is focused upon the manner in which the Court employs standing to calibrate decision-making between the federal judiciary, on the one hand, and Congress, on the other, rather than upon the relationship between standing and efficient application of environmental statutes (or the reduction of rent seeking). That is why the text focuses upon the anticipated level of enforcement, rather than the efficient level of enforcement. Either level could be viewed as optimal, depending upon whether one chooses a majoritarian norm, or reduction of rent seeking, as the preferred baseline. In any event, I agree with Professors Barnett and Terrell that several of the insights developed in their article complement the social choice analysis of standing. See A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen-Suit Provisions of Environmental Legislation*, 12 DUKE ENVTL. L. & POL'Y F. 1 (2001).

63. Certain features of this model grow out of the analysis of legislative bargaining developed in Stearns, *supra* note 60 (developing model that combines substantive and length bargaining, where the latter involves the inclusion of unrelated special interest legislation that would fall subject to the item veto).

specified chemicals into all waterways. In an effort to gain the necessary support for the bill, the congressman will be called upon to engage in some substantive compromises, for example, by extending the compliance time frame or by softening the ultimate compliance requirements. Assume that the bill, as initially proposed, represents the sponsor's preferred resolution of the underlying policy issues, and thus her ideal point. The process of substantive bargaining will move the bill from that ideal point closer toward the preferred position of the median member of the enacting Congress. Figure 1 depicts the relevant issue spectrum.

| Liberal                                      | Median | Conservative                   |
|----------------------------------------------|--------|--------------------------------|
| Strict compliance<br>(sponsor's ideal point) |        | Lax compliance<br>(status quo) |

Figure 1: Statutory Compliance Spectrum

Along this issue spectrum, it is assumed that liberals generally favor strict compliance and conservatives generally favor lax compliance.<sup>64</sup> The median voter theorem predicts that to the extent that support will be determined by substantive compromise along a single issue dimension, the dominant position necessary to gain majority support will be at or near the median voter.<sup>65</sup> As the substantive compliance provisions move toward the preferred position of the median legislator, those members whose preferences are closer to the sponsor's ideal point, and who thus favor the initial bill, will still prefer the relatively stricter timing offered in the watered down bill and compliance requirements to the status quo. At the same time, the substantive compromise will gain the support of those marginal legislators who are positioned closer to the median, and who would not have supported the bill in the sponsor's ideal form.<sup>66</sup>

64. The text uses "generally" because it is possible to have a predominantly liberal or a predominantly conservative Congress, and since liberals and conservatives can sometimes embrace specific policy positions, it adds with their general ideological views.

65. For a discussion of the median voter theorem and its relevance, see Harold Hotelling, *Stability in Competition*, XXXIX ECON. J. 41-57 (1929); see also Randall G. Holcombe, *An Empirical Test of the Median Voter Model*, 18 ECON. INQUIRY 260 (1980); Thomas Romer & Howard Rosenthal, *The Elusive Median Voter*, 12 J. PUB. ECON. 143 (1979); Charles K. Rowley, *The Relevance of the Median Voter Theorem*, 140 J. INSTITUTIONAL & THEORETICAL ECON. 104 (1984).

66. As a matter of definition, the marginal voters are those members whose decisions to

The bill sponsor could of course water the bill down completely, such that it entirely ratifies present emissions requirements. Doing so, however, would turn the bill from an environmental protection bill into a bill that protects industry from further environmental regulation. At some point, the votes that the sponsor would gain among those who are interested in protecting industry against further environmental regulation will at least partially offset the lost membership from her initial coalition. In addition, and perhaps more obviously, the sponsor will not likely turn her pro-environmental bill into the opposite simply because doing so might increase its prospects for passage.<sup>67</sup> All of this simply underscores that substantive bargaining has an implicit limit. Where this limit lies with respect to any particular bill, environmental or otherwise, is a function of two factors. The first is the need to create, or at least move toward, a successful majority coalition to pass the bill. The second is the need to move the law sufficiently in the favored direction relative to the status quo with respect to the regulatory issue in question to retain the initial impetus in support of the bill. The more critical point is that wherever this limit lies, it might not allow for the requisite support for passage. Simply put, if the only mechanism for gaining support were to water down the bill, the sponsor might have to move unacceptably far from her ideal point to secure passage.

The bill's sponsor has other methods of securing support. For example, the sponsor can also negotiate matters unrelated to the bill's substance. She can promise support for separate legislation, whether general or special interest, in exchange for the support of the sponsor of that legislation for her proposed bill. Alternatively, the sponsor can agree to include nonsubstantive additions to her bill, in the form of special interest items, that will add to the cost of the bill, but that will not modify its substantive content.<sup>68</sup> Through either of these

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support or oppose the bill is a function of the substantive content regarding the timing and extent of required compliance. Those members who are inframarginal and supportive will continue to support the bill even after it is watered down. Those members who are inframarginal and opposed will continue to oppose even after the bill is watered down. Substantive bargaining only has the potential to affect those members who are not inframarginal.

67. If a legislator were only concerned with being a constant member of winning coalitions, without regard to the substance of the approved bills, she could simply vote in favor of all legislation that she expects to see passed.

68. Admittedly, the boundaries between and among all three categories of bargaining are not air tight. Thus, for example, an exception to a general compliance requirement that is sufficiently narrow in scope as to benefit a specific industry might be regarded as a form of special interest legislation or might be regarded as a further substantive modification from the

alternative forms of bargaining, the bill sponsor can trade her support for unrelated legislation, either public or special interest, or for attaching unrelated special interest items to her bill, as the price for gaining additional support. Because this mode of bargaining takes place along a nonsubstantive dimension, the resulting coalition in support of the bill might not line up neatly based upon political ideology. For those legislators seeking the benefits of securing special interest legislation, the environmental bill might present a better vehicle for success than available alternatives.<sup>69</sup> Certainly those who are more inclined toward the substantive merit of the bill will have a stronger preference for this particular bargain than those who are not. While the bargain involves something separate from the content of this bill, we can still intuit internal limits to this form of negotiation. To the extent that it adds special interest items to the bill, it increases the cost of passing that legislation. The cost alone might make the bill less attractive to the sponsor. In addition, the added cost will increase the risk of a presidential veto. As a result of these combined concerns, the bill's sponsor might also be unwilling to negotiate along this dimension sufficiently to secure passage.

There is at least one additional mechanism for gaining support. Assuming the substantive requirements for compliance are determined, and that all nonsubstantive bargaining is agreed to,<sup>70</sup> the bill sponsor can negotiate over who has the power to enforce the statute's substantive provisions.<sup>71</sup> In selecting the appropriate

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sponsor's ideal point. And as Professors Barnett and Terrell explain, rival business groups can benefit from specific regulatory restrictions that take the form of barriers to entry. *See* Barnett & Terrell, *supra* note 62, at 11. Broadening standing can operate as one means of raising a rival's cost, and thus of limiting competition, especially if existing businesses are exempt from new regulations based upon grandfather clauses. While broadening standing can thus be viewed as a form of special interest legislation, for purposes of developing the model in the text, I assume the more common situation in which the regulated industry can be expected to oppose broadened standing. The important point, in any event, is not to put a particular compromise into the correct analytical box. It is instead to understand the relationship between and among the various modes of legislative bargaining and their implications for the Court's evolving statutory standing doctrine.

69. For an analysis of how those empowered to prevent the passage of legislation through the various "negative legislative checkpoints" use their power to procure desired special interest legislation, see Stearns, *supra* note 60.

70. Again, the chronological assumptions set out in the text are simply for expositional purposes. We can instead assume a given level of substantive and nonsubstantive bargaining, whether now or in the future.

71. As seen in *Lujan*, the substantive provisions can include procedural requirements, for example, the failure to engage in statutorily required inter-agency consultation before funding a project that threatens an endangered species or its habitat. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). By substantive, I mean to distinguish other provisions that are the product

enforcement arrangement, the bill sponsor can choose from various points along a spectrum. At one extreme, the bill sponsor can limit enforcement to the relevant executive agency, which in most instances will be the Environmental Protection Agency, the Department of the Interior, or various state environmental agencies. At the opposite extreme, she can confer standing broadly upon “all persons.” In between, she can elect from various private attorneys general provisions that are more or less restrictive in scope. This can include limiting standing to citizens, affected persons, injured persons, or even persons who live within a specified distance of the regulated facility or end point of the emissions flow.<sup>72</sup> A simplified spectrum of options on the supply side is depicted in Figure 2 below:

| Standing in “all persons” | Standing in “injured persons” | Standing in “agency only” |
|---------------------------|-------------------------------|---------------------------|
| Broad standing            |                               | Narrow standing           |

Figure 2: Statutory Standing Options

Like nonsubstantive bargaining, this form of negotiation does not involve a direct change in the bill’s compliance requirements. But compromises over standing might well have the same effect on the ultimate regulated conduct as compromises over substantive compliance. Indeed, by conferring standing more or less broadly, the sponsor can substantially affect the anticipated optimal compliance level among those who are subject to the regulation. And the sponsor

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of nonsubstantive special interest bargaining.

72. Justice Scalia provided a sampling of the range of options in comparing the open-ended standing provision in the Endangered Species Act (ESA) with the standing provisions in some more restrictive statutes, as follows:

The first operative portion of the [ESA standing] provision says that “any person may commence a civil suit”—an authorization of remarkable breadth when compared with the language Congress ordinarily uses. Even in some other environmental statutes, Congress has used more restrictive formulations, such as “[any person] having an interest which is or may be adversely affected,” 33 U.S.C. § 1365(g) (1994) (Clean Water Act); *see also* 30 U.S.C. § 1270(a) (1994) (Surface Mining Control and Reclamation Act); “any person suffering legal wrong,” 15 U.S.C. § 797(b)(5) (1994) (Energy Supply and Environmental Coordination Act); or “any person having a valid legal interest which is or may be adversely affected . . . whenever such action constitutes a case or controversy,” 42 U.S.C. § 9124(a) (1994) (Ocean Thermal Energy Conversion Act). And in contexts other than the environment, Congress has often been even more restrictive. In statutes concerning unfair trade practices and other commercial matters, for example, it has authorized suit only by “any person injured in his business or property,” 7 U.S.C. § 2305(c) (1994); *see also* 15 U.S.C. § 72 (1994), or only by “competitors, customers, or subsequent purchasers,” § 298(b).

*Bennett v. Spear*, 520 U.S. 154, 164-65 (1997).

can do so in a relatively more obfuscatory manner than is the case with substantive bargaining.

While seemingly technical, there is little question that the selected level of standing will affect the substantive construction of and the incentives for compliance under the statute. Indeed, the statute is of little value but for its potential to be enforced. And to a considerable extent, the enforcement level will be a function of who has standing to bring suit to redress a violation. There is, however, a critical difference between the questions of compliance level and standing. While negotiations over compliance level are likely as a general matter to fall along predictable ideological lines, negotiations over standing have the potential to thwart conventional ideological expectations. Certainly we can expect a positive correlation between those who support strict enforcement and those who seek to liberalize standing. But there might well be conditions under which those who are generally more conservative, and even those who are subject to the bill's substantive regulations, might favor broad standing.

Some conservatives might assume, as *Bennett v. Spear*<sup>73</sup> ultimately demonstrated, that broad standing might inure to the benefit of those seeking to limit, rather than to further, the ultimate objectives of environmental statutes, at least if the claimants can demonstrate that regulatory enforcement is overly zealous or fails properly to weigh the economic impact, as required by statute, of the chosen method of enforcement.<sup>74</sup> Others might consider the standing issue as part of a tradeoff for negotiations over the substantive compliance requirements, such that the broader the standing provisions, the more lax the imposed emissions restrictions. This tradeoff might well be worth the risk, especially in a period in which the Court's standing jurisprudence is in flux.<sup>75</sup> In addition, some

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73. 520 U.S. 154 (1997).

74. In *Bennett*, the Court afforded standing to two irrigation districts and to the operators of two ranches within those districts, who claimed that the failure to consider the economic impact upon them of restricting access to a reservoir pursuant to the Endangered Species Act (ESA) violated the ESA. For a more detailed discussion, see *infra* Part III.

75. The federal environmental statutes began to incorporate broad standing provisions based upon the Michigan Environmental Protection Act of 1970, Mich. Comp. Laws §§ 691.1201-691.1207. See Coplan, *supra* note 11, at 215-16. It might not be a coincidence that the expansion of environmental standing began after 1970. As I have demonstrated in prior work, it was during the early 1970's that the Supreme Court became increasingly prone to rulings that revealed the possibility of multidimensionality, and that therefore risked codifying intransitive preferences. It was also in this period, therefore, that ideological interest groups gained a particular interest in manipulating the order of case decisions in the federal judiciary, with an eye toward the Supreme Court. Finally, it was in this period that the Court began to respond to

conservatives might view citizen standing the way they view delegation generally. In an era when the Court is restricting standing generally, broadening statutory standing might allow them to claim credit if the Court expands its restrictive standing jurisprudence into the statutory area, as in *Lujan*, while they can pass blame, if the Court does the opposite, as in *Laidlaw*.<sup>76</sup> For example, some might favor citizen standing simply because the results of such litigation would appear to be further from their oversight control. While industries can call upon members of Congress to engage in regulatory oversight when enforcement is too strict, this is less likely when a federal agency is not responsible in the first instance for the chosen level of enforcement. Finally, as Professors Barnett and Terrell observe, some regulated businesses might prefer broad standing as part of an enforcement scheme to raise barriers to entry.<sup>77</sup>

Liberals will also have a broad set of reasons for supporting liberalized statutory standing. Some liberals might seek broad standing because they correctly anticipate that those who are likely to bring private attorney general suits will tend to have a stronger pro-environmental bias and will likely seek more zealous enforcement than will the EPA. Others might prefer liberal standing because it will deflect pressure from the enforcement agency, thus strengthening the support for the now more moderate federal or state regulatory enforcement. And some liberals might prefer broad standing to hedge against changes in future administrations, which could have the effect of retrenching upon expected governmental enforcement. Finally, among both liberals and conservatives, there will be members who must respond to both industry and pro-environmental constituents. For those members, broad standing allows support for a more modest specified level of substantive compliance, but creates a vehicle for more zealous private enforcement actions. Members can thus claim credit for slight beneficial alterations to substantive compliance levels in the original statute, and blame the courts for enforcement that is more ambitious than their industry constituents

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these external pressures by imposing stricter barriers to constitutional standing. *See generally* STEARNS, *supra* note 4.

76. For liberals, delegation produces the opposite tradeoff. Liberals will claim credit if the Court allows expansive statutory standing, as in *Laidlaw*, and will pass blame if it instead imports its stringent constitutional standing restrictions into the statutory context, as in *Lujan*. But the key point is that both liberals and conservatives might prefer judicial resolution of standing to legislative resolution of the substantive question of compliance, for which they cannot simultaneously take credit and pass blame.

77. *See* Barnett & Terrell, *supra* note 62, at 18-19.

would prefer.

The critical point is that unlike choosing the compliance level, which can generally be expected to divide legislators along traditional ideological lines, choosing the level of standing has the potential to produce common interests among some who are generally pro-environmental and some who are generally pro-industry. In this respect, conferring broad standing in environmental statutes is quite like delegating to agencies. But there is a critical difference as well. A delegation to private enforcers *removes* at least some enforcement power *from* the agencies. In many statutes, this is not a complete removal. Once a suit is filed, the claimant must notify the relevant agencies, state and federal, which then have the power to intervene or even take over the suit.<sup>78</sup> Even though the possibility of private standing at least removes some power to control the selection and timing of cases, it is quite plausible to intuit conditions under which a liberal EPA would favor liberalized standing. Under such a regime, the EPA can to some extent deflect blame for the most ambitious enforcement actions, thus allowing such suits to proceed, while appearing more moderate in its own enforcement. It is not surprising, for example, that the EPA favored citizen standing in *Laidlaw*.<sup>79</sup>

#### B. *Modeling the Judicial Response*

The preceding discussion analyzed the supply side of statutory standing. We must now consider how the Court, behaving as a group of rational actors, might respond when confronted with a citizen suit that relies upon a broad based standing provision within an environmental statute. To keep the exposition simple, we can imagine a case that presents the common features of the two most significant recent statutory standing cases, *Lujan* and *Laidlaw*. Assume that the defendant, whether a governmental agency or a private company, has engaged in a series of technical statutory violations. Further assume these technical violations have not produced, and are not likely to produce in the future, any discernible injury to the claimants other than the psychic harm associated with being committed to a safer environment and knowing that technical violations of federal environmental laws are taking place.

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78. As the *Laidlaw* Court explained, “[t]he [Clean Water] Act . . . bars a citizen from suing if the EPA or the State [if after having received the required 60 days notice, either] has already commenced, and is ‘diligently prosecuting,’ an enforcement action.” 528 U.S. at 175.

79. See *id.* at 188 n.4 (stating that “the [Clean Water Act] allows the Administrator of the EPA to ‘intervene as a matter of right . . .’ when the EPA opposes a particular citizen suit”).

By assumption, these are cases that federal enforcers have elected not to prosecute after receiving appropriate notice. If the private attorney general had not sued, the technical violations would have proceeded unabated. The Supreme Court justices understand that in addition to the substantive compliance provisions, enforcement affects overall deterrence under the statute. Some justices might seek to limit the reach of the statute, including its standing provisions, while others might seek to further the reach of the statute, in part by allowing liberalized standing. Setting aside these two opposed groups, at least a subgroup within the Court might try to gauge the appropriate response based upon their best proxy for legislative expectations, which we can cast as those of the median member of the enacting Congress.<sup>80</sup> If ambitious interest group-driven litigation prompts a level of enforcement that varies considerably from that of the median legislator, then the effect of allowing liberalized standing would be to skew enforcement toward the sponsor's ideal point, even though the result would not have garnered majority support of the enacting Congress.<sup>81</sup>

Based upon this analysis, we can now consider why the Court, confronted with a broad statutory standing provision, might seek to impose limits drawn from its constitutional standing requirements, specifically injury in fact, causation, and redressability. In a statute that contemplates only agency enforcement, the agency has considerable enforcement discretion. The regulated industry will attempt to gauge its conduct according to the compliance requirements under the statute times the probability of agency enforcement. Rarely, if ever, will optimal statutory enforcement be one hundred percent.<sup>82</sup> The appropriate analogy is one of triage.

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80. If we assume that the relevant issue spectrum involves a single dimension, then the expectations of the median member of the enacting Congress will be equivalent to Congressional intent. Without the support of the median member, the bill would not have passed. If, on the other hand, the relevant issue spectrum involves more than a single dimension, then there is no median member, thus making it more difficult to gauge Congressional intent. Instead, courts must employ imperfect proxies based, in part, upon the relationships between and among the relevant issue dimensions.

81. Of course, as *Bennett* demonstrates, it is also possible for a broad standing provision to allow for industry-generated litigation that signals an enforcement level closer to a regulatory opponent's ideal point, which also would not have garnered majority support of the enacting Congress.

82. See Barnett & Terrell, *supra* note 62, at 10. There, the authors explain:

Governments will prosecute egregious violations, but pursuing the less significant offenses does not create enough environmental benefit to justify the use of limited funds and runs the risk of upsetting voters. However, private enforcers of environmental law are unresponsive to political pressures, and have no reason to avoid

Given its resource limitations and political pressures, the enforcement agency is likely, as a general matter, to pursue the most egregious violations first, often failing to attend to minor or technical violations.

Like the enforcement agency, organizations that seek to monitor and redress violations in the capacity of private attorneys general also have limited resources, which are offset by the reimbursement provisions under the statutes themselves.<sup>83</sup> Those organizations that are inclined to bring such suits will most likely be motivated by a combination of two objectives: (1) the desire to increase the level of environmental enforcement under the relevant statute; and (2) the desire for reimbursement of expenses and fees.<sup>84</sup> The statutes are generally structured to limit reimbursements such that if the agency has already pursued the action, then the organization will not recover.<sup>85</sup> We may assume that those who are willing to invest the considerable resources to gather the information necessary to identify a *prima facie* statutory violation, retain an attorney, and then bring the suit, are those who are most ideologically committed to strict enforcement. If so, then we can anticipate that a regime allowing both agency and private enforcement risks sending mixed, and perhaps inconsistent, signals to the federal judiciary concerning the preferred level of enforcement of the median member of the enacting Congress. Although there will certainly be exceptions, based upon fairly simple intuitions drawn from public choice, it seems probable that the EPA will prosecute claims that are closer to those favored by the median member of the enacting Congress than will the private litigant. That is because the federal agency, which has a general mandate to enforce the federal environmental statutes, is subject to

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the optimal level of enforcement.

*Id.* One difference between this analysis and the analysis of this text is that Professors Barnett and Terrell anticipate an optimal level of enforcement based upon efficiency concerns, or cost-benefit analysis. In the text, I instead posit that from the perspective of at least a subgroup of Supreme Court Justices, which likely occupies a median position, the optimal level of enforcement, whether or not the most efficient, is that which the median member of the enacting Congress would have condoned had Congress resolved that issue or that which the agency would have sought had it elected to pursue the case.

83. See, e.g., Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365(d) (1994).

84. In addition, the private litigant is motivated by the desire not to be foreclosed by the government agency action and by the cost and difficulty in acquiring data to support her statutory cause of action.

85. As the *Laidlaw* Court explained with respect to the Clean Water Act: "the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 528 U.S. at 175 (internal quotations omitted).

significant political pressures and resource constraints. As a result, the agency is motivated to pursue the most severe violations first, and to leave the minor violations for later, if at all.

When confronted with this divergence, the question for at least some justices, those who lie in the median position on the Court, is likely to be which of the competing signals should receive the Court's imprimatur. While the justices on the wings of the Court might be motivated in part by their views of the merits of the underlying claim, for the median justice, the analysis is more likely to focus upon some proxy for the anticipated level of enforcement of the median member of the enacting Congress. As the *Lujan* Court made plain, in devising a judicial response to these disparate signals, the choice among standing rules is not binary, although they can be cast along a single normative spectrum. Just as Congress has a broad range of choices in conferring standing, the Court has a range of standards to impose upon Congress as a precondition to allowing statutory standing. In *Lujan*, the Court identified three points along this spectrum.<sup>86</sup> While there might be additional points along the spectrum, considering these three is sufficient for purposes of developing the model.

Justice Scalia, writing for a majority, suggested that statutory standing is permissible only when the claimants present an injury that is closely analogous to one recognized at common law. Because such injuries result in harm to the affected individual, caused by someone else, and which a federal court can redress, this requirement, like the constitutional standing elements generally, tends to discourage ideologically motivated litigation. Not surprisingly, this position would appear to correspond with a conservative policy preference against the merits of the underlying claim in the kind of environmental litigation described above. And yet, this rule might well disallow the preferred level of enforcement of the median member of the enacting Congress.<sup>87</sup> Because the Court's rulings have the potential to remain in force even if they are not consistent with what Congress intended, at least some members of the Court might fear that this strict requirement would have the potential to entrench too limited a level of statutory standing.

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86. For a more detailed exposition of each of these positions, see *infra* at Part III.B (discussing *Lujan*).

87. This is consistent with the early holdings on standing under the Fair Housing Act, and the famous dictum from *Linda R.S. v. Richard D.*, that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." 410 U.S. 614, 617 n.3 (1973).

Justice Kennedy, joined by Justice Souter, expressed this concern in his separate concurring opinion, in which he suggested that while Congress does not have entirely free reign to define injuries for standing purposes, it must at the very least define the relevant injury and relate that injury to an identified class of potential claimants.<sup>88</sup> While this would allow broader standing than would Scalia, it does not afford Congress complete discretion. Moreover, this position abstracts from any inquiry into the merits of the underlying claim. While the rule might provide a means of simultaneously broadening statutory standing and limiting the divergent signals from that preferred by the median member of the enacting Congress, at this point it remains to be seen whether the Kennedy position will emerge as dominant.<sup>89</sup>

Finally, Justice Blackmun, who dissented in *Lujan*, suggested that the Court can allow Congress to confer standing broadly, even if in doing so it allows suit by a claimant who has suffered no discernible injury beyond knowing that a federal environmental law has been violated. As with the Scalia position, which correlates with a conservative policy preference on the underlying issue of law, this position correlates with a liberal policy preference favoring the merits of the same underlying issue. Justice Ginsburg essentially embraced this position in her majority *Laidlaw* opinion.<sup>90</sup> While this would allow Congress to choose broad standing, it again risks endorsing a more ambitious level of enforcement than that which the median member of the enacting Congress might have selected if forced to determine the preferred level of compliance in the absence of liberalized standing. The spectrum is depicted in Figure 3 below:

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88. See *infra* note 130 and accompanying text.

89. Because the various positions on standing described in the text can be cast along a single normative spectrum, under the narrowest grounds rule, the Kennedy position, which lies at the median point along that spectrum, has the potential to become law even if a majority fails to embrace it. See STEARNS, *supra* note 4, at 104-28 (providing social choice analysis of narrowest grounds rule). *Laidlaw* appears to suggest, however, a majority swing from the conservative position in *Lujan* to a new liberal position.

90. See *infra* Part III.E (discussing *Laidlaw*).

|                          |                                                              |                           |
|--------------------------|--------------------------------------------------------------|---------------------------|
| Allow novel injuries     | Allow novel injuries linked to identified class of claimants | Require common law injury |
| Broad statutory standing |                                                              | Narrow statutory standing |

Figure 3: Judicially Imposed Limits on Statutory Standing

While earlier statutory standing cases suggested that the Supreme Court would condone broad statutory standing, the *Lujan* majority instead embraced the extreme opposite position. Most recently, the *Laidlaw* Court appears to have endorsed, once again, the broad standing position. In the next and final part, which reviews these and other environmental standing cases in greater detail, I will apply this model of statutory standing to identify those factors that might have caused the Court to slide back and forth along this justiciability spectrum.

### III. AN OVERVIEW OF ENVIRONMENTAL STANDING

In this part, I will provide a brief overview of some of the Supreme Court's most significant recent statutory standing cases as they relate to the model of statutory standing developed in the prior part. While I will focus in particular upon *Lujan* and *Laidlaw*, given their unique doctrinal significance to modern environmental standing, I will also discuss three other cases, *Raines v. Byrd*, *Bennett v. Spear*, and *Steel Company v. Citizens for a Better Environment*. *Raines v. Byrd*, which did not involve environmental standing, is nonetheless significant to the model developed in Part II. *Raines* highlights the Court's implicit concern in identifying a meaningful proxy for the views of the median member of the enacting Congress when enforcing federal statutes. *Bennett* provides an intriguing example of how superimposing the constitutional standing elements onto a statutory context can lead the Court to prefer the views of those who oppose enforcement to those of the median member of the enacting Congress. And *Steel Company* reveals some of the recent limits that the Court has imposed under the guise of redressability, which provide a means beyond injury in fact of linking the statutory justiciability criteria to the preferences of that median member. The discussion in this part will be limited both in its selection of cases, and

in the presentation of those cases that are discussed.<sup>91</sup> The purpose of the analysis, however, is not to provide a comprehensive presentation of statutory standing case law, but rather is to provide a preliminary assessment based upon prominent recent standing decisions of the social choice model developed in this article.

With the exception of *Raines*, which I will discuss first, I will employ chronology as an organizing principal. I will begin with *Raines*, a case which denied standing to five then-present members and one former member of Congress, who challenged the constitutionality of the Line-Item Veto Act. By focusing on whether losing members of Congress can sue to challenge the constitutionality of a statute, *Raines* highlights the implicit concern of centrist jurists, those most likely to eschew resolutions that might be regarded as ideologically motivated, about gauging standing rules in statutory cases according to how those rules further the preferences of the median member of the enacting Congress.

#### A. *Raines v. Byrd*<sup>92</sup>

In *Raines v. Byrd*,<sup>93</sup> the Supreme Court issued a seven-to-two decision denying standing to five present members and one former member of Congress, who challenged the constitutionality of the Line-Item Veto Act (the "Act").<sup>94</sup> In doing so, the Supreme Court reversed a long-standing practice of the United States Court of Appeals for the District of Columbia Circuit, which had afforded standing to members of Congress who challenged statutes that they alleged compromised their constitutionally established lawmaking powers.<sup>95</sup> At the same time, the *Raines* Court infused uncertainty into the underlying ground rules of legislative bargaining in Congress,<sup>96</sup> for

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91. For some cases, I have previously provided more detailed expositions. For a more detailed discussion and analysis of *Lujan*, *Bennett*, and *Raines*, see STEARNS, *supra* note 4, at ch. 6; see also Stearns, *Standing and Social Choice*, *supra* note 2. Portions of the discussions of these three cases presented below are taken from these works.

92. Portions of this discussion and analysis are based upon the presentation in STEARNS, *supra* note 4, at ch. 6.

93. 521 U.S. 811 (1997).

94. Pub. L. No. 104-30, 110 Stat. 1200 (codified at 2 U.S.C. §§ 691-692 (Supp. V 1999)).

95. See, e.g., *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994); *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 475 U.S. 1044 (1986), *vacated by* 479 U.S. 361 (1987); *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). See also *Raines*, 521 U.S. at 813, 821 n.4. The United States Supreme Court had never endorsed this practice. See *id.* at 815.

96. For a public choice analysis of how the item veto might alter congressional bargaining, see Stearns, *supra* note 60. The article was written prior to the adoption of the Line-Item Veto

a period that lasted until the Court finally reached the merits of the issue presented in *Raines*, in *Clinton v. City of New York*.<sup>97</sup> In *City of New York*, the Court struck down the Act as violating the requirements of Article I, § 7.

While the Act nowhere used the term “veto,” it provided the President with the authority to “cancel” certain spending and tax benefits after he signed them into law.<sup>98</sup> Under the Act, a cancellation became effective when the House and Senate received the President’s “special message” providing notice of the cancellation. The Act further established that within thirty days of receipt of the special message, Congress could disapprove a cancellation through ordinary legislation, meaning a simple majority vote in both houses.<sup>99</sup> Consistent with the requirements of Article I, § 7, the Act specified that if the President then vetoed the disapproval bill, Congress would need to override with a two-thirds majority of both houses.<sup>100</sup>

The Act included two provisions to expedite judicial review of the Act. First, the Act afforded members of Congress with standing. Thus, the Act states that “[a]ny member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.”<sup>101</sup>

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Act and was directed at proposed constitutional amendments conferring item veto power upon the President.

97. 524 U.S. 417 (1998).

98. The Act provided in relevant part:

The President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit, if the President—(A) determines that such cancellation will—(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest; and (B) notifies the Congress of such cancellation by transmitting a special message . . . within five calendar days (excluding Sundays) after the enactment of the law [to which the cancellation applies].

*Raines*, 521 U.S. at 814-15 (quoting 2 U.S.C. § 691(a)) (alterations in original) (indentations omitted). In the case of direct spending allocations, cancel means to rescind, and in the case of limited tax benefits, cancel means to prevent the benefit from having legal effect. See 2 U.S.C. § 691e(4)(A), (B), and (C) (Supp. V 1999); see also *Raines*, 521 U.S. at 815. The Act further defined limited tax benefit to include revenue-losing provisions benefiting 100 or fewer persons under Title 26 in any fiscal year, or a tax provision providing temporary or permanent transitional relief for 10 or fewer persons. See 2 U.S.C. § 691e(9)(A)(i) and (ii) (Supp. V 1999).

99. See 2 U.S.C. § 691d(b) (Supp. V 1999).

100. See 521 U.S. at 825 n.9.

101. 2 U.S.C. § 692 (a)(1) (Supp. V 1999).

Second, it provided for expedited judicial review in the District Court for the District of Columbia and for direct appeal and expedited review of any order concerning the Act by the district court to the United States Supreme Court.<sup>102</sup>

The *Raines* plaintiffs alleged that the Act injured them in their capacity as members of Congress by altering their constitutional role in the drafting and repeal of legislation.<sup>103</sup> The Government moved to dismiss on the grounds of ripeness and standing. On direct appeal from a district court judgment, which rejected the motion to dismiss and then struck down the Act as unconstitutional, the Supreme Court reversed. Writing for a majority of six, with Justice Souter concurring separately, Chief Justice Rehnquist held that plaintiffs lacked standing.<sup>104</sup> The Court issued four separate opinions. For our purposes, the most significant are those authored by Chief Justice Rehnquist for a majority, and by Justice Stevens in dissent. Together, these two opinions squarely present the difficulty in defining injury in the context of a statute that confers standing broadly, other than by identifying proxies for the expectations of the median member of the enacting Congress.

Chief Justice Rehnquist defined the claimed injury as the failure to have one's vote properly counted in the legislative process with respect to future legislation subject to the line-item veto. For the sitting members of Congress seeking standing, this had yet to occur. The difficulty according to Rehnquist was twofold. First, as members of Congress, plaintiffs did not allege a personal injury. Instead, they alleged an injury in their official capacities. Second, even assuming that they were personally injured or that injury in their official capacity sufficed for standing purposes, Rehnquist reasoned that members of Congress suffered no concrete harm in their ability to perform their legislative function.<sup>105</sup> Rehnquist explained that each of

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102. 2 U.S.C. § 692 (b) & (c) (Supp. V 1999).

103. Plaintiffs alleged that the Act injured them in their official capacities in each of the following ways:

The Act . . . (a) alters the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divests the [appellees] of their constitutional role in the repeal of legislation, and (c) alters the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

*Raines*, 521 U.S. at 816.

104. *See id.* at 813.

105. Rehnquist distinguished the famous 1939 standing decision, *Coleman v. Miller*, 307 U.S. 433 (1939), in which the Court had afforded standing to twenty state senators who voted against the child labor amendment to the United States Constitution, but whose votes were effectively

the plaintiffs had initially opposed the proposed Line Item Veto Act, but simply lost. As a result, Rehnquist found no justiciable injury to support standing.

In contrast, Justice Stevens maintained in dissent that the members' claimed injury was their then-present inability to anticipate the consequences of negotiating legislation, and of voting for or against proposed legislation.<sup>106</sup> This difficulty was a direct consequence of the President's power under the Act to effectively alter legislative bargains once bills were signed into law. In this analysis, the members suffered an ongoing injury respecting the consequences of present legislative bargaining.<sup>107</sup>

What makes *Raines* particularly interesting is that from the perspective of constitutional standing, it appears to make little sense. If the Court is using its standing doctrine as a means of preventing path manipulation, it would appear to elevate form over substance to demand that an actual victim of a line-item veto present the constitutional challenge to the Act, as ultimately occurred in *City of New York*. After all, the question of whether the Line-Item Veto Act is constitutional was neither terribly difficult, nor likely to be affected in any significant manner by whatever decisions the Court would issue between the time of *Raines* and the next case to present a constitutional challenge without a standing defect. But as a consequence of denying standing, the *Raines* Court, as Stevens made plain in dissent, continued to infuse a considerable degree of uncertainty into the background rules of legislative bargaining. The uncertainty resulted from the absence of a clear rule. If the Act were upheld, members of Congress could secure agreements from the President's designated Congressional agents that particular items would not be subject to the Act, or they could exempt particular statutes expressly from the Act, as preconditions to exchanging votes.<sup>108</sup> If, instead, as ultimately occurred, the Act were struck down, then members could continue to negotiate as they had before, with the clear understanding that the President could accept or veto entire bills, but that beyond that, he could not alter legislative bargains. It is

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nullified by an alleged illegal tie breaker. See *Raines*, 521 U.S. at 821-24.

106. See *id.* at 838 (Stevens, J., dissenting) ("[T]he appellees convincingly explain how the immediate, constant threat of the partial veto power has a palpable effect on their current legislative choices.").

107. Stevens read *Coleman* broadly to support the proposition that legislators whose votes had been denied full effectiveness have standing to challenge the diminution of their legislative power. See *id.* at 837-38 (Stevens, J., dissenting).

108. This thesis is developed more fully in Stearns, *supra* note 60.

only with a regime of uncertainty—which lasted from the passage of the Line-Item Veto Act to *City of New York*—that members were unable to anticipate the future consequences of their present conduct. And yet, by denying standing, the *Raines* Court continued this regime of uncertainty respecting Congressional bargaining. The question is “to what end?” I would suggest that, whether or not *Raines* was rightly decided,<sup>109</sup> the model of statutory standing developed above helps to explain the tradeoffs that the majority perceived in its standing analysis.

Chief Justice Rehnquist’s analysis focused on the fact that those who challenged the Act had also voted against it and lost. The inclusion of a provision for expedited judicial review, which allowed for congressional standing, was apparently necessary to gain the support of at least some members of the winning coalition that enacted the Act. But, as the Chief Justice observed, it is equally obvious that those members who challenged the statute on constitutional grounds were not part of the ultimately successful coalition. Allowing those who voted against the statute to control the timing of the decision to determine its constitutionality would appear to vindicate the preferences of those who were inframarginal and opposed above those who were marginal and supportive. It is, of course, possible that the marginal and supportive member preferred expedited resolution of the Act’s constitutionality, and insisted upon the inclusion of the congressional standing provision as a precondition to supporting the Act. Nonetheless, in attempting to assess the likely preferences of the median member of the enacting Congress, the Court is only able to work with imperfect proxies. It is not surprising, therefore, that the *Raines* majority relied upon the fact that those who brought suit had voted against the bill to intuit that the timing of the requested decision might have thwarted the expectations of that median member. And because this would hold true generally in cases in which Congress afforded its own members standing, it might not be surprising that the Court used *Raines* to end the longstanding contrary practice of the United States Court of Appeals for the District of Columbia Circuit.

In contrast with *Raines*, in most statutory standing cases, the Court does not have such a clear indication that those seeking to advance a given claim at a particular time are advancing an agenda at odds with the median member of the enacting Congress. As a result,

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109. My own opinion, as expressed in prior writings, is that *Raines* was wrongly decided. See STEARNS, *supra* note 4, at ch. 6.

just as the Court employs proxies in the constitutional standing context to determine if the case presents a necessary, rather than opportunistic, vehicle for the creation of substantive law, so too it uses proxies to determine if those seeking to advance claims under a variety of federal statutes, even those that include broad standing provisions, are doing so in a manner that furthers or undermines the expectations of the median member of the enacting Congress. Until *Laidlaw*, the most prominent recent decision that focused on the identification of such proxies was *Lujan v. Defenders of Wildlife*.<sup>110</sup>

B. *Lujan v. Defenders of Wildlife*<sup>111</sup>

In *Lujan*, the Supreme Court denied standing to environmentalist plaintiffs under the citizen-suit provision of the Endangered Species Act (“ESA”). Under the ESA, which divides the responsibilities for protecting endangered species between the Secretary of the Interior and the Secretary of Commerce, federal agencies whose activities might endanger such species are required to consult with the Secretary of the Interior.<sup>112</sup> Reversing a prior joint regulation requiring interagency consultation for all agency activities that might jeopardize endangered species in the United States, on the high seas, and in foreign nations, the Secretary of the Interior and the Secretary of Commerce issued a revised joint rule reinterpreting the ESA.<sup>113</sup> In the revised rule, the two departments limited the geographic scope of the statute for purposes of interagency consultation to those activities within the borders of the United States or on the high seas. The plaintiffs, environmental organizations and two citizens interested in preserving the habitats of particular endangered species abroad, sued the Secretary of the Interior. They claimed that federal agencies were funding projects that jeopardized the habitats of particular endangered species abroad without having engaged in the statutorily required interagency consultation. The plaintiffs claimed that the revised joint rule, which did not require interagency consultation, given that the threatened habitats were within foreign nations, violated the ESA’s substantive provisions requiring such consultation.<sup>114</sup>

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110. 504 U.S. 555 (1992).

111. Portions of this discussion and analysis are based upon the presentations in STEARNS, *supra* note 4, at ch. 6; Stearns, *Standing and Social Choice*, *supra* note 2, at 449-59.

112. *See Lujan*, 504 U.S. at 558.

113. *See id.* at 558-59.

114. *See id.* at 559.

As a basis for standing, plaintiffs relied upon the following citizen-suit provision contained in the ESA: “[A]ny person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.”<sup>115</sup> In denying the plaintiffs standing, Justice Scalia, writing in part for a majority and in part for a plurality of four, determined that plaintiffs had failed to satisfy both the injury and redressability prongs of the Court’s standing formulation.<sup>116</sup> The majority rejected each of three injury theories: first, an actual injury grounded in the plaintiffs’ interest in the species whose habitats were endangered by projects that received partial funding from federal agencies; second, a procedural injury resulting from the failure of the relevant agencies to consult with the Secretary of the Interior as required by statute; and third, and most importantly, three nexus theories under which individuals with an interest in endangered species or who use any part of a contiguous ecosystem, are afforded standing when the habitats of those species, or any part of their ecosystems are endangered.<sup>117</sup>

One petitioner averred by affidavit that she had traveled to Egypt in 1986, where she “observed the traditional habitat of the endangered [N]ile crocodile,” and that, although she did not see the crocodile directly, she hoped to do so when she next traveled to Egypt.<sup>118</sup> She admitted, however, that she had no specific plans to return. Another petitioner averred that she had traveled to Sri Lanka, where she observed the habitat of the Asian elephant and the leopard, which, she alleged, was threatened by a project funded by the federal Agency for International Development (“AID”).<sup>119</sup> In a subsequent deposition, the same petitioner admitted that, although she hoped to return to Sri Lanka, she had no specific plans because that country was engaged in a civil war. Both petitioners alleged that the failure of the agencies funding the programs abroad to consult with the Secretary of the Interior, as required by statute, had injured them.

Writing for a majority, Justice Scalia stated that, even assuming, which he found questionable, that “these affidavits contained facts

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115. *Id.* at 571-72 (quoting 16 U.S.C. § 1540(g)(1)(A)).

116. *See id.* at 562.

117. *See id.* at 565-67.

118. *See id.* at 563.

119. *See id.* at 566.

showing that certain agency-funded projects threaten listed species,” the petitioners lacked the requisite injury to justify granting them standing under the statute.<sup>120</sup> Justice Scalia held for the Court that “‘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.”<sup>121</sup> Justice Scalia also rejected the petitioners’ claim that the ESA’s citizen-suit provision, quoted above, created in all persons a right to challenge the failure of a funding agency to consult with the Secretary of the Interior.<sup>122</sup>

Scalia criticized the analysis used by the United States Court of Appeals for the Eighth Circuit, which had denied the government’s motion for summary judgment on standing. He stated:

To understand the remarkable nature of [the Eighth Circuit] holding one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government’s benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental “right” to have the Executive observe the procedures required by law. We reject this view.<sup>123</sup>

The *Lujan* Court presented no fewer than three competing visions of the appropriate contours of statutory standing doctrine. At the opposite end of the spectrum from that of Scalia, Justice Blackmun, writing in dissent and joined by Justice O’Connor (who authored the *Allen* decision), explained why the standing denial actually undermines, rather than furthers, separation of powers:

The Court expresses concern that allowing judicial enforcement of “agencies’ observance of a particular, statutorily prescribed procedure” would “transfer from the President to the courts the

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120. *See id.* at 564.

121. *Id.*

122. *See id.* at 567.

123. *Id.* at 572-73 (emphasis in original) (internal citations omitted).

Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3.'... In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.<sup>124</sup>

In this analysis, the relevant test of standing is whether it furthers the enforcement objectives of the enacting Congress. Critical to the analysis, however, is Blackmun's implicit assumption that the median member of the Congress that passed the ESA supported the most ambitious citizen-suit enforcement action that could be presented under its liberal standing provision. In contrast, Justice Scalia is dismissive of the citizen standing provision, unless the claimant relying upon it presents an injury that is more akin to one recognized at common law. This need not be a substantive injury. But for Scalia, a procedural injury must also satisfy a traditional model of limited judicial lawmaking, in which rectifying the claimed deficiency has some meaningful linkage to an underlying substantive injury. On the case facts, Scalia found the claimed procedural injury wanting.

Finally, Justice Kennedy offered a third, intermediate position:

In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view.... In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.<sup>125</sup>

While Kennedy tried to strike a middle ground between the Scalia and Blackmun opinions, his suggested compromise would appear to render *Lujan* fairly inconsequential.<sup>126</sup> It might appear that even if the Court had not retrenched from its holding in *Lujan* in the more recent *Laidlaw* decision, Congress could have avoided the *Lujan* result. To do so, Congress only needed to define as injured persons who are interested in visiting locations in which federal agency funding, in violation of the ESA, threatens the habitats of endangered species, and who have even *de minimus* evidence of an intent to travel to those locations. While the Kennedy opinion appears to represent a plausible middle ground, and perhaps the

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124. *Id.* at 602 (Blackmun, J., dissenting).

125. *Id.* at 580 (Kennedy, J., concurring).

126. See, e.g., William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 258 (2001) (discussing the disagreement between Justice Kennedy's concurrence and Justice Scalia's plurality opinion regarding the redressability issue).

median position on the *Lujan* Court, the fact remains that with the exception of the part of his opinion that addressed the issue of redressability, Justice Scalia wrote for a majority in *Lujan*.

*Lujan* appears anomalous in that it limits judicial lawmaking in an effort to protect Congress's power to achieve an appropriate consensus on the underlying environmental policy questions in the future. But it does so by thwarting Congress's consensus with respect to environmental policy—in the form of a liberal grant of standing—achieved in the past. In doing so, the *Lujan* opinion appears to blur—perhaps deliberately—the historical distinction between constitutional and statutory standing. This is perhaps most evident when we compare a well known assertion about statutory standing made by Justice Marshall in the 1973 decision, *Linda R.S. v. Richard D.*,<sup>127</sup> with an assertion by Justice Scalia in *Lujan* itself. In *Linda R.S.*, Justice Marshall stated that: “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”<sup>128</sup> In effect, Justice Marshall recognized the peculiarity of using the Court's emerging limits on standing, which operated to prevent the Court from creating law in place of Congress and which Congress might find itself unable to supplant,<sup>129</sup> to prevent Congress itself from defining novel statutory injuries. In marked contrast, in *Lujan*, Justice Scalia asserted that “there is absolutely no basis for making the Article III inquiry [on injury in fact] turn on the source of the asserted right.”<sup>130</sup> In effect, Justice Scalia thwarted the legislative compromise that produced citizen standing by insisting upon an injury analogous to one at common law.

It is more difficult in *Lujan* than in *Raines* to determine whether the litigation is consistent with or in violation of expectations of the median member of the enacting Congress simply because those presenting the suit were not obviously on the losing side of the approved legislation. In fact, by bringing a suit that furthered the overall objectives of the ESA (albeit more ambitiously than the median member of the enacting Congress might have preferred), the *Lujan* claimants sided with the successful coalition that enacted the

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127. 410 U.S. 614 (1973).

128. 410 U.S. at 617 n.3.

129. For an analysis of how the various negative legislative checkpoints can effectively prevent Congress from enacting legislation, even for which there is a strong overall consensus, see Stearns, *supra* note 60.

130. *Lujan v. Defenders of Wildlife*, 504 U.S. at 576.

statute. But because the suit sought to force interagency consultation, the Court might well have used the reluctance of the agency itself to construe the statute as the litigants preferred as a proxy—albeit an imperfect one—for median legislative expectations. At one level, any citizen suit would appear to defy agency preferences if for no other reason than that the agency had been notified and had declined to act in place of the private litigant. But in *Lujan*, the Secretary of the Interior was the defendant. As a result, the agency had lined up in direct opposition to the preferred resolution sought by the citizen plaintiff. In that context, the Court might have been particularly reticent to allow a citizen-suit plaintiff, even with the statutory standing conferral, to supplant what appeared to be a valuable proxy for Congressional expectations. As discussed below, one difficulty with *Lujan*'s doctrinal resolution is that by imposing rigorous common law-based requirements for injury, the Court invited, as shown in *Bennett v. Spear*,<sup>131</sup> a result that risked thwarting Congressional expectations in the opposite direction, thus allowing suits that actually undermine rather than further the overall purpose of the environmental statute, when the claim satisfies a common law understanding of injury.

### C. *Bennett v. Spear*

In the 1997 decision, *Bennett v. Spear*,<sup>132</sup> Justice Scalia, writing for a unanimous Court, applied a zone of interest analysis to confer standing using the same statutory standing provision under which the *Lujan* Court denied standing. And in doing so, he allowed the claimants to undermine, rather than further, the overall objectives of the ESA.

The *Bennett* Court granted standing to two Oregon irrigation districts and to the operators of two ranches within those districts who sought to use the ESA to restrict the authority of the Fish and Wildlife Service (Service), as delegated to the Secretary of the Interior, to protect the habitats of endangered species. In *Bennett*, the Service had issued a Biological Opinion (Opinion) in accordance with the ESA concerning the operation of the Klamath Irrigation Project (Project) by the Bureau of Reclamation and the impact of that project on two listed endangered species of fish, the Lost River

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131. 520 U.S. 154 (1997).

132. Portions of this discussion and analysis are based upon the presentation in STEARNS, *supra* note 4, at ch. 6.

sucker and the shortnose sucker.<sup>133</sup> The Secretary of the Interior undertook the Project and the Bureau of Reclamation (Bureau) administered it under the Secretary's jurisdiction. In 1992, the Bureau notified the Service that the Project might adversely affect the two listed species of fish. After the required consultation with the Bureau, the Service issued its Opinion, as required under the ESA, concluding that the "long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers."<sup>134</sup> The Opinion further identified "reasonable and prudent alternatives," most notably maintaining minimum water levels in the Clear Lake and the Gerber reservoirs, which the Service concluded would avoid this danger. After receiving the Opinion, the Bureau notified the Service that it intended to operate the Project in compliance with the recommendations.<sup>135</sup>

The petitioners, who claimed a competing interest in the water that the Opinion declared necessary to the preservation of the endangered fish, alleged that the required maintenance of minimum water levels for the Clear Lake and the Gerber reservoirs violated § 7 of the ESA.<sup>136</sup> Petitioners alleged that the Service had implicitly determined the critical habitat of the endangered fish without first giving adequate consideration to the economic impact of that designation, in violation of § 4 of the ESA.<sup>137</sup> Petitioners sued the regional director of the Service and the Secretary of the Interior, relying for standing upon both the ESA's broadly worded standing provision and § 10 (a) of the Administrative Procedures Act.<sup>138</sup>

The District Court dismissed for lack of jurisdiction and the United States Court of Appeals for the Ninth Circuit affirmed, holding that only litigants seeking to preserve endangered species or their habitats fell within the zone of interest of the ESA's citizen-suit provision.<sup>139</sup> The Supreme Court reversed, rejecting the Ninth Circuit's zone of interest analysis, and further rejecting three alternative defenses offered by the government to deny standing.<sup>140</sup> While the Ninth Circuit construed the scope of the citizen-suit

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133. *See Bennett*, 520 U.S. at 157.

134. *See id.* at 159.

135. *See id.*

136. *See id.* at 160.

137. *See id.*

138. *See id.* at 175.

139. *See id.* at 160.

140. *See id.* at 166-74.

provision in light of the overall purpose of the ESA, Justice Scalia strictly construed the terms of the citizen-suit provision, eschewing any inquiry into how that provision fit within the overall scheme of the statute.<sup>141</sup> The citizen-suit provision states in relevant part:

any person may commence a civil suit on his own behalf—

(a) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

. . .

(c) against the Secretary [of Commerce or the Interior] where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.<sup>142</sup>

Writing for the *Bennett* Court, Justice Scalia described the citizen-suit provision's "remarkable breadth," as compared with statutory standing provisions generally, and even when compared with the generally broader environmental standing provisions.<sup>143</sup> Justice Scalia's rejoinder to the Ninth Circuit's reliance upon his own opinion in *Lujan* is at the very least ironic. The Ninth Circuit relied upon *Lujan* for the proposition that, its broad language notwithstanding, the ESA citizen-suit provision was not intended to confer standing upon any conceivable litigant. Thus, the Ninth Circuit stated: "As *Lujan* makes clear, Congress may not permit suits by those who fail

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141. The *Bennett* Court relied upon two earlier cases, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), for the proposition that:

Whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies.

*Bennett*, 520 U.S. at 175-76. In contrast, the Ninth Circuit maintained that the overall weight of authority was contrary. See *Bennett v. Plenert*, 63 F.3d 915, 919-22 (9th Cir. 1995) (collecting authorities), *cert. granted* 517 U.S. 1102 (1996), *rev'd sub nom.* *Bennett v. Spear*, 520 U.S. 154 (1997). The Ninth Circuit analysis found support in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987), in which the Court stated that the zone of interest test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." See *Plenert*, 63 F.3d at 917-18 (quoting *Clarke*, 479 U.S. at 399). Thus, the Ninth Circuit reasoned that "the statutory purposes should be divined by considering the particular statutory provision that underlies the complaint within 'the overall context' of the act itself." See *Plenert*, 63 F.3d at 918. At a minimum, this zone of interest analysis appears to be more consistent with the pre-*Lujan* understanding that the purpose of standing is to determine whether Congress intended to allow the claimant to pursue his statutory cause of action in federal court.

142. *Bennett*, 520 U.S. at 165 n.2 (quoting 16 U.S.C. § 1540(g)).

143. See *supra* note 72 (quoting relevant discussion from *Bennett* opinion).

to satisfy the constitutionally-mandated standing requirements. For that reason, suits under the ESA, no less than suits under any statute, are clearly not available to ‘any person’ in the broadest possible sense of that term.”<sup>144</sup>

In contrast, Justice Scalia, writing for the *Bennett* Court, relied upon *Trafficante v. Metropolitan Life Insurance Co.*,<sup>145</sup> a case which vindicated a nontraditional statutory injury of the sort called into question in *Lujan*, this time to confer standing upon plaintiffs whose interests, he admitted, were generally inconsistent with the ESA’s overall purpose.<sup>146</sup>

This irony might help to explain the decision of the liberal and moderate justices to join Scalia’s decision in *Bennett*. While the *Lujan* Court denied standing to environmental plaintiffs on the ground that none of the three articulated nexus theories sufficed to establish a meaningful interest in furthering the habitats of endangered species abroad, the *Bennett* Court expressly rejected such limitations on environmental injuries. Thus, writing for the *Bennett* Court, Justice Scalia stated:

Our readiness to take the term “any person” at face value is greatly augmented by two interrelated considerations: that the overall subject matter of the legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called “private attorneys general”....<sup>147</sup>

One difficulty with the *Bennett* analysis is that whether or not it is common to think that all persons have an interest in the environment, the *Bennett* Court conferred standing to plaintiffs seeking to limit the application of a federal statute to protect the environment. Thus, in rejecting standing, the Ninth Circuit reasoned:

We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do

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144. See *Plenert*, 63 F.3d at 918 n.4 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-80 (1992)).

145. 409 U.S. 205 (1972).

146. *Bennett*, 520 U.S. at 175 (conceding that while plaintiffs’ interests were economic, the “overall purpose of the [ESA]” is “species preservation”). In *Trafficante*, the Supreme Court conferred standing under the Fair Housing Act upon housing testers challenging the dissemination of nontruthful housing information based upon race, even though the testers themselves were not in the market for housing. See 409 U.S. at 210-11. The *Bennett* Court stated that *Trafficante* established that by using appropriate statutory language, Congress can expand standing to the “full extent permitted under Article III.” See 520 U.S. at 165-66.

147. 520 U.S. at 165.

more than ensure rational decision-making by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him. To interpret the statute [otherwise] would be to transform provisions designed to further species protection into the means to frustrate that very goal.<sup>148</sup>

In contrast, Justice Scalia relied upon administrative law principles to assert that one need not allege an ultimate injury to claim the protections of a procedural statutory provision.<sup>149</sup> Instead, Scalia reasoned that petitioners had standing to challenge the failure of the Service, in issuing its Opinion, to consider the environmental impact of its decision, as required by statute.

The model developed above suggests that *Bennett* likely thwarted the expectations of the median member of the enacting Congress, given that she would not have supported the ESA with the understanding that the citizen standing provision would be used to frustrate, rather than to advance, the central purpose of the statute. In effect, by limiting the zone of interest analysis to the particular provision upon which claimants relied for standing and then coupling that analysis with a common law understanding of injury, the *Bennett* Court identified a justiciable injury for purposes of standing that had a perverse connection with the statute's overall purpose. At the same time, however, Justice Scalia's analysis could be read to endorse a more liberal understanding of citizen standing provisions generally, thus encouraging the liberal and moderate members of the Court to join. While the decision might have appeared to be a defeat for those seeking to use the ESA to further environmental interests, by endorsing *Trafficante* and suggesting a generalizable interest in the environment, it also had the effect of suggesting that Congress retains some of its pre-*Lujan* powers to define injury in a novel manner.<sup>150</sup> Moreover, because the decision was largely based upon the prudential zone of interest analysis, it left the door open for Congress to revisit the holding and to restrict standing according to whether future claimants sought to further or undermine the statute's overall objectives.

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148. *Plenert*, 63 F.3d at 921-22 (internal citations omitted).

149. Thus, Justice Scalia stated: "[i]t is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett*, 520 U.S. at 172.

150. 409 U.S. 205, 212 (1972) (stating that the Court could give "vitality" to the Fair Housing Act only by granting broad standing to those who had suffered discrimination).

We will now consider the Supreme Court's two most recent prominent statutory standing decisions. In *Steel Company v. Citizens for a Better Environment*,<sup>151</sup> the Court focused upon redressability to deny standing, while in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,<sup>152</sup> the Court issued an about-face with respect to much of its restrictive post-*Lujan* statutory standing jurisprudence.

#### D. *Steel Company v. Citizens for a Better Environment*

While *Steel Company v. Citizens for a Better Environment* was decided by a majority and was unanimous on the judgment, it was sharply divided on an antecedent jurisdictional question. The Court splintered on whether it had the authority to resolve the relatively easy question whether respondent had stated a valid statutory cause of action prior to resolving the substantially more difficult question of Article III standing.<sup>153</sup> For present purposes, the Court's less than definitive resolution of this question concerning the doctrine of "hypothetical jurisdiction," is less important than is the merits of the Article III standing issue. The constitutional standing question presents a valuable illustration of the potentially divergent enforcement signals presented by the EPA on the one hand and private litigants on the other.

Respondents, an association of private persons interested in environmental protection, brought a private enforcement action

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151. 523 U.S. 83 (1998).

152. 528 U.S. 167 (2000).

153. Justice Scalia managed to cobble together a majority opinion, which was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, and in part by Justice Breyer. Justice Scalia held that the Court is obligated to resolve the Article III issue prior to resolving the statutory issue. And yet, Justice O'Connor, joined by Justice Kennedy, both of whom formed part of the majority, wrote a separate concurrence in which she stated that the majority opinion should not be read as presenting an exhaustive list of the conditions that would justify a departure from the usual sequence in which the Court determines Article III standing prior to the merits of the suit. Justice Breyer, who joined only part of the Scalia opinion, concurred in part and concurred in the judgment in part, and Justices Stevens, Ginsburg, and Souter, also concurred in the judgment. These four justices would have allowed the Court to resolve the relatively easy statutory question, which they also viewed as jurisdictional and thus with an equal claim to priority, first, as a means of avoiding the significantly more difficult Article III question. Thus, while Justice Scalia wrote for a majority, the median position on the Court is likely represented in the separate O'Connor opinion. Justice O'Connor suggested that she would not afford Congress the same free reign as would Justice Breyer and those who refused to join the Scalia opinion altogether in preliminarily considering the statutory issue. But O'Connor further withheld judgment on whether a broader set of circumstances than Scalia suggested justify departing from the Court's usual insistence upon resolving the existence of Article III standing prior to considering the merits of the underlying statutory issue.

under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), against a small manufacturing company in Chicago.<sup>154</sup> The EPCRA sets out a number of reporting requirements for users of specified toxic and hazardous chemicals, including annual filings.<sup>155</sup> While the EPA is actively involved in enforcing the EPCRA, the *Steel Company* Court explained that “[f]or purposes of this case, . . . the crucial enforcement mechanism is the citizen-suit provision.”<sup>156</sup>

After receiving the required notice of intent to sue, the EPA declined to sue on its own behalf, although the United States later filed an amicus supporting the citizen suit.<sup>157</sup> By the time the citizen-suit complaint was filed, Steel Company’s filings were current. Steel Company therefore moved to dismiss, alleging that the court lacked jurisdiction under Article III and that because the statute does not allow suit for purely historical violations, respondents had failed to state a claim upon which relief could be granted.<sup>158</sup> The District Court granted the motion, agreeing with Steel Company on both grounds.<sup>159</sup> The United States Court of Appeals for the Seventh Circuit reversed.<sup>160</sup> The Supreme Court granted certiorari and reversed.<sup>161</sup>

In part IV of his opinion, which was written for a majority of six, and which did not prompt the separate opinions among those who joined and wrote separate concurrences, Justice Scalia declined to reach the question whether being deprived of information that was supposed to have been disclosed in the company’s filings constitutes a justiciable injury.<sup>162</sup> Instead, Justice Scalia concluded that the allegations did not satisfy the Article III requirement of redressability. After reviewing the allegations in the complaint, Justice Scalia concluded: “None of the specific items of relief sought, and none that we can envision as ‘appropriate’ under the general request, would serve to reimburse respondent for losses caused by the

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154. *See Steel Co.*, 523 U.S. at 86.

155. *See id.*

156. The provision, as quoted by the *Steel Company* Court, states: “‘any person may commence a civil action on his own behalf against . . . an owner or operator of a facility for failure,’ among other things, to ‘complete and submit an inventory form under section 11022(a) of this title . . . [and] section 11023(a) of this title.’” *Id.* at 87.

157. *See id.* at 130 (Stevens, J., concurring in the judgment).

158. *See id.* at 88.

159. *See id.*

160. *See id.*

161. *See id.* at 88-89.

162. *See id.* at 103-06.

late reporting, or to eliminate any effects of that late reporting upon respondent.”<sup>163</sup> Because there was no question that petitioner had filed reports late, Scalia concluded that a declaratory judgment was valueless, not only to the respondents, but to “all the world.”<sup>164</sup> More importantly, the claimed damages would not redress respondents’ injuries because under the statute they were payable to the U.S. Treasury rather than to the respondents. In rejecting this claim to redress, Scalia stated:

[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation’s laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.<sup>165</sup>

In an opinion concurring in the judgment, Justice Stevens, who had argued against reaching the merits of the Article III standing question, given that respondents had not stated a valid cause of action under the statute,<sup>166</sup> went on to reject the Court’s redressability analysis on two grounds. First, he noted that in all prior cases in which the Court had suggested a problem of redressability, the root of the difficulty was that the claimant was seeking relief from a government law or practice, the ultimate effect of which involved the conduct of nonlitigants.<sup>167</sup> Never before had the Court imposed this requirement as a barrier to litigation against a present private litigant. Second, and more importantly, Justice Stevens rejected the argument that payment to the U.S. Treasury did not create a meaningful form of redress. Thus, he stated: “When one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer

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163. *Id.* at 105.

164. *See id.* at 106.

165. *Id.* at 107. Scalia also rejected the claim that reimbursement of costs and fees provided redressability adequate for Article III purposes on the ground that one cannot seek standing to bring suit for the cost of the suit itself. He rejected the remaining claims to injunctive relief on the ground that they were premised upon continuing injuries, which respondents did not claim. *See id.* at 108-09.

166. Because the statute framed the requirement of a cause of action in jurisdictional terms, Justice Stevens concluded that the jurisdictional questions of Article III standing and the existence of a valid statutory cause of action had equal priority for judicial resolution. *See id.* at 112-13 (Stevens, J., concurring in the judgment).

167. This was the difficulty, for example, in *Allen v. Wright*, 468 U.S. 737 (1984); *see also supra* Part I (comparing *Allen* with *Board of Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

that will minimize the risk that the harm-causing conduct will be repeated.”<sup>168</sup>

To support the latter point, Justice Stevens relied upon the well supported claim of legal historians that modern notions of justiciability have no antecedents in the framing or early-constitutional periods.<sup>169</sup> Thus, Justice Stevens explained:

History supports the proposition that punishment or deterrence can redress an injury. In past centuries in England, . . . and in the United States, private persons regularly prosecuted criminal cases. The interest in punishing the defendant and deterring violations of law by the defendant and others was sufficient to support the “standing” of the private prosecutor even if the only remedy was the sentencing of the defendant to jail or to the gallows.<sup>170</sup>

Stevens concluded that “[g]iven this history, the Framers of Article III would surely have considered such proceedings to be ‘Cases’ that would ‘redress’ an injury even though the party bringing suit did not receive any monetary compensation.”<sup>171</sup> Finally, Justice Stevens observed that because the EPCRA also provides enforcement authority to state and local governments, the Court’s constricted understanding of redress would appear to prevent those governments from having standing, given that any resulting fines would be paid to the U.S. Treasury.<sup>172</sup>

The *Steel Company* case helps to focus on two important anomalies in recent statutory standing jurisprudence. First, as stated in the introduction and summarized in the excerpts from Justice Stevens’s opinion, modern justiciability concepts appear to be in tension with early litigation which allowed private persons to enforce, among other claims, criminal laws for which the litigant would not receive any direct form of redress, other than knowing that the wrongdoer is punished. And yet, Justice Scalia, who has fashioned himself as an originalist, has implicitly rejected just this historical argument, stating that the “psychic satisfaction” associated with knowing that a “wrongdoer gets his just deserts, or that the nation’s

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168. *Steel Co.*, 523 U.S. at 127 (Stevens, J., concurring in the judgment).

169. *See supra* note 5.

170. *Steel Co.*, 523 U.S. at 128 (Stevens, J., concurring in the judgment).

171. *Id.*

172. *See id.* at 128-29 (Stevens, J., concurring in the judgment). Justice Stevens noted that preventing other governments from enforcing these laws might be justified on separation of powers grounds under the take care clause, but then questioned how this concern could justify limiting standing in the present suit. *See id.* at 129 (Stevens, J., concurring in the judgment). Justice Scalia responded by insisting that the Court’s holding was grounded in Article III, rather than Article II. *See id.* at 116 n.4.

laws are faithfully enforced,” is insufficient to support redressability under Article III.<sup>173</sup> Second, from a policy perspective, as Justice Stevens notes, it is not clear why allowing direct compensation, if only of a peppercorn, should matter for Article III purposes.<sup>174</sup>

As before, considering this case from the perspective of the differential signal that EPA versus citizen-suit enforcement sends to the Court relative to the preferences of the median member of the enacting Congress might help to explain these anomalies. While a detailed historical analysis is beyond the scope of this article, it is worth considering whether those categories of cases that are often relied upon to refute modern standing developments involve the kinds of claims that are plausibly intended to create favorable paths of case law or to create a greater level of enforcement than anticipated under the law. Instead, local private prosecutions that defied modern justiciability norms were likely the product of an historical period before the professionalization of prosecutorial functions, which generally began to emerge around the 19th century.<sup>175</sup> Such suits might also have reflected the relatively weaker communications of local offenses to the sovereign than is routinely the case today, and indeed, as is a statutory prerequisite to the exercise of citizen standing.

In *Steel Company*, for example, we know that the EPA was notified and declined to bring suit. While the United States backed the respondent as a friend of the Court, the fact remains that when presented with the opportunity to bring suit against a prior violator who was then coming into full compliance with the EPCRA, the EPA declined. This might not be surprising. If the EPA is concerned with using its limited resources to ensure that the laws are complied with, there would be little justification in expending resources on those who are going to be in compliance by the time the complaint is filed. Finally, Justice Stevens is certainly correct that from the perspective of Article III redressability it would appear to make little sense to allow private compensation of a peppercorn, but to disallow substantial fines to be paid to the U.S. Treasury. But the standing denial does not preclude Congress from coming back and correcting

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173. *See id.* at 107.

174. *See id.*

175. *See generally* ALLEN STEINBERG, *TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880* 230-31 (1989) (describing transformation from private settlement to plea bargaining with professionalization of prosecutorial functions in mid-19th century Philadelphia).

the ruling by adding a modest compensatory provision (other than lawyers fees). Nor, of course, does it preclude the EPA from reaching a different decision should a similar case present itself in the future. In contrast, had the Court allowed standing (setting aside the weakness of the underlying substantive claim), it risked endorsing a more ambitious level of enforcement than the median member of the enacting Congress might have preferred.

E. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*<sup>176</sup>

The Supreme Court's most recent major pronouncement on statutory standing is *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* *Laidlaw* was initially conceived as a mootness case, but Justice Ginsburg, writing for a majority of seven, effectively transformed the case into one about Article III standing. In doing so, Justice Ginsburg marked a wholesale retreat from much of the underlying logic of *Lujan* and *Steel Company*.<sup>177</sup>

*Laidlaw* arose under the Clean Water Act (CWA),<sup>178</sup> which confers standing upon any "citizen," defined as "a person or persons having an interest which is or may be adversely affected,"<sup>179</sup> to challenge violations of the CWA in federal district court. The CWA provides for injunctive relief and civil penalties payable to the U.S. Treasury. The CWA also allows successful citizen claimants to recover costs, including reasonable attorneys fees. Pursuant to the CWA, the *Laidlaw* plaintiffs, Friends of the Earth (FOE) and Citizens Local Environmental Action Network (CLEAN), sought an injunction against Laidlaw Environmental Services, Inc. (Laidlaw), and civil penalties payable to the U.S. Treasury, following Laidlaw's repeated violations of National Pollutant Discharge Elimination (NPDES) permits.<sup>180</sup>

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176. 528 U.S. 167 (2000).

177. Justices Stevens and Kennedy joined the majority, but also filed separate concurrences, and Justices Scalia and Thomas dissented.

178. Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251 (1994).

179. 33 U.S.C. § 1365(a), (g) (1994).

180. As required by statute, plaintiffs provided the requisite 60 days notice to the EPA, to the state in which the permit violations occurred, and to Laidlaw. As the *Laidlaw* Court explained: "The purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit." 528 U.S. at 175 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)). If the EPA or the state initiates suit and is "diligently prosecuting," the citizen suit is then barred. The reverse does not hold; if the citizen suit proceeds following the required notice period, the EPA or state agency is free to intervene in the suit.

In 1986, Laidlaw purchased a hazardous waste incinerator facility, including a wastewater treatment plant, in Roebuck, South Carolina. Shortly thereafter, the South Carolina Department of Health and Environmental Control (DHEC), granted Laidlaw a permit authorizing the discharge of treated water into the North Tyger River, effective January 1, 1987. In addition to regulating other aspects of its effluents, the permit limited the discharge of certain pollutants into the river, including the highly toxic mercury.<sup>181</sup> Upon receiving the permit, Laidlaw began to discharge various pollutants. In doing so, Laidlaw repeatedly exceeded its permit limits for mercury emissions.<sup>182</sup>

In April 1992, FOE and CLEAN, later joined by Sierra Club, sent the required notification of intent to sue under the CWA. Laidlaw's lawyer responded by asking DHEC to consider suing Laidlaw, and DHEC agreed. Laidlaw drafted the DHEC complaint and paid the filing fee. Laidlaw and DHEC then "settled" with Laidlaw agreeing to pay \$100,000 in civil penalties, and further agreeing to make "every effort" to comply with the permit requirements. In June 1992, FOE filed suit against Laidlaw, alleging a failure to comply with the permit requirements, and seeking injunctive relief and civil penalties. Laidlaw moved for summary judgment on the ground that FOE had failed to allege an injury in fact, and thus that it lacked Article III standing.

Upon considering various affidavits from FOE and CLEAN members, described below, the District Court concluded that FOE had standing "albeit by the very slimmest of margins."<sup>183</sup> Laidlaw also moved to dismiss on the ground that the DHEC prosecution barred the suit, a motion that the United States, acting as *amicus curiae*, opposed. The District Court rejected the motion on the ground that the DHEC action had not been "diligently prosecuted," as required to bar a citizen suit under the CWA. The District Court noted that between the time that FOE initiated the suit and the time the court had rendered its judgment, Laidlaw had committed 13 mercury

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181. The imposed mercury emissions limit was apparently based upon a series of interpretive and calculation errors, and resulted in a level that would be sufficiently safe for drinking water. For a discussion, see Richard J. Pierce, Jr., *Issues Raised by Friends of the Earth v. Laidlaw Environmental Services: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENVTL. L. & POL'Y F. 207, 233-35 (2001) (citing Supreme Court Brief *Amicus Curiae* of the State of South Carolina, and the District Court opinion).

182. The Court stated that between 1987 and 1995, Laidlaw violated its mercury limits on 489 occasions. See 528 U.S. at 176.

183. See *id.* at 177 (internal quotations omitted).

discharge violations, 13 monitoring violations, and 10 reporting violations. While the District Court declined to enter injunctive relief, it assessed damages based upon its assessment of the economic benefit to Laidlaw and the total deterrent effect, after employing the statutory criteria.<sup>184</sup>

FOE appealed the monetary judgment but not the denial of injunctive relief.<sup>185</sup> The United States Court of Appeals for the Fourth Circuit dismissed the suit on the ground that it had become moot. Relying upon *Steel Company*, the circuit court reasoned that the elements of Article III standing must persist at every stage of the litigation, and that civil penalties paid to the U.S. Treasury would not redress any injury that FOE suffered. After the circuit court issued its decision, but before the Supreme Court granted certiorari, Laidlaw permanently closed its Roebuck incinerator facility, thus ceasing any permit violations. The Supreme Court granted certiorari to resolve the split between the Fourth Circuit and the other circuits that had addressed the question whether defendant's compliance with its permit after commencement of litigation moots a claim for civil penalties under the CWA.<sup>186</sup>

Justice Ginsburg ultimately rejected the mootness challenge on the ground that defendant's voluntary cessation of unlawful conduct, which had the potential to resume, was inadequate as a mooting event.<sup>187</sup> Having rejected mootness, Justice Ginsburg asserted that she was obligated to resolve the question of Article III standing.<sup>188</sup> In arguing that the plaintiffs had failed to allege sufficient injury to support standing, Justice Ginsburg explained, Laidlaw relied upon the

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184. The District Court calculated the economic benefit to Laidlaw to be \$1,092,581 and assessed a civil penalty of \$405,800. *See id.* at 178.

185. Laidlaw cross-appealed, alleging a lack of standing and claiming that the suit was barred based upon the diligently prosecuted DHEC action. *See id.* at 179.

186. *See id.* at 179-80.

187. Justice Ginsburg noted that assuming the Roebuck facility was closed, Laidlaw retained a valid permit, which would presumably allow it to reopen and resume operations at some future time. *See id.* at 193-94.

188. *See id.* at 180. As Justice Scalia noted in dissent, while the District Court found standing by an apparently slim margin in 1993, that was "long before the court's 1997 conclusion that Laidlaw's discharges did not harm the environment." *See id.* at 201 (Scalia, J., dissenting). Justice Scalia added: "As we have previously recognized, an initial conclusion that plaintiffs have standing is subject to reexamination, particularly if later evidence proves inconsistent with that conclusion." *Id.* (Scalia, J., dissenting). In this case, because the Court of Appeals determined the case to be moot, it had not passed on the question of injury in fact for purposes of standing, which proved critical to Ginsburg's analysis. While the mootness issue is important in its own right, I will limit the analysis in the text to the issue of statutory standing, except as necessary to lay a foundation for the standing issue.

District Court's findings used to support its penalty assessment that "there had been no demonstrated proof of harm to the environment from Laidlaw's mercury discharge violations."<sup>189</sup> One of the central issues in the debate over standing between Justices Ginsburg and Scalia was whether proof of harm to the environment leading to a personal injury was a prerequisite to Article III standing. Justice Scalia maintained that if Laidlaw had not caused harm to the environment, then a citizen-suit claimant seeking relief for Laidlaw's unlawful emissions generally cannot have suffered a harm sufficient to satisfy the injury requirement under Article III. Thus, Scalia stated:

Typically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him. This route to injury is barred in the present case, however, since the District Court concluded after considering all the evidence that there had been no demonstrated proof of harm to the environment. . . .<sup>190</sup>

Justice Scalia went on to state that "[w]hile it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury."<sup>191</sup>

In contrast, Justice Ginsburg's analysis began with the following alternative premise:

The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.<sup>192</sup>

Based upon the affidavits submitted by FOE, CLEAN, and Sierra Club, Justice Ginsburg found a sufficient injury to support Article III standing, arising from Laidlaw's discharges prior to the alleged mooted event.

FOE member Kenneth Lee Curtis averred that he lived near the Laidlaw facility and that although he would have liked to fish, camp, or swim within 3 to 15 miles of the facility as he had done as a child,

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189. *See id.* at 181.

190. *Id.* at 199 (Scalia, J., dissenting) (internal quotations omitted).

191. *Id.* As explained below, this might help to explain the relationship between *Laidlaw* and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), another case in which the Court found standing.

192. *Laidlaw*, 528 U.S. at 181.

he chose not to because of his concerns about Laidlaw's discharges and because the river "looked and smelled polluted."<sup>193</sup> CLEAN member Angela Patterson averred that she lived near the facility and that although she once enjoyed picnicking, walking, birdwatching near the river, and wading in the river, she chose not to do so because she "was concerned about the harmful effects from discharged pollutants."<sup>194</sup> Patterson further averred that although she and her husband would have liked to have purchased a home near the river, they chose not to, in part, because of Laidlaw's discharges. CLEAN member Judy Pruitt averred that she lived near the river where she would have liked to fish, hike, and picnic, but did not do so because of the discharges.<sup>195</sup> FOE member Linda Moore attested that she lived 20 miles from the Roebuck facility and would have used the river for recreational purposes had she not been "concerned that the water contained harmful pollutants."<sup>196</sup> CLEAN member Gail Lee alleged that her home had a lower value than that of similar homes located farther from the river, and that "she believed the pollutant discharges accounted for some of the discrepancy."<sup>197</sup> Finally, Sierra Club member Norman Sharp averred that he no longer canoed downstream from the Roebuck facility because he was "concerned that the water contained harmful pollutants."<sup>198</sup>

With the possible exception of Gail Lee, all of the remaining affiants and deponents are similar to those who were found to have alleged insufficient injuries to support Article III standing just eight years earlier in *Lujan v. Defenders of Wildlife*. Gail Lee's affidavit is notably different in that it contained an allegation that had the potential to break the causal chain inherent in Justice Scalia's argument that begins with a violation that causes harm to the environment which leads to harm to the claimant, thus producing an Article III injury. While Justice Scalia apparently found the Gail Lee affidavit deficient, he did leave open the possibility that an affidavit like Lee's might supplant this presumed line of causation.

Assume, for example, that Gail Lee had been able to prove by a preponderance of the evidence that although the Laidlaw discharges produced no discernible environmental harm, the attendant publicity

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193. *See id.*

194. *See id.* at 182.

195. *See id.*

196. *See id.*

197. *See id.* at 182-83.

198. *See id.* at 183.

following its unlawful discharges resulted in a demonstrable reduction in the value of her home. If so, then even without any discernible harm to the environment, Lee would have been able to allege a justiciable injury, which would presumably satisfy even Justice Scalia's strict standing analysis. This harm, which is akin to a common law injury and thus consistent with Justice Scalia's analyses in both *Lujan* and *Bennett*, would exist in a manner that was entirely independent of the scientific validity of any claim concerning the alleged harm of the Laidlaw discharges. Instead, the harm would arise because of the perception of harm in the market which resulted from those discharges and which would plausibly be redressed by a Court order enjoining those discharges or by imposing civil damages of a sufficient magnitude to prevent a recurrence of voluntarily ceased activity. And this holds even if any and all claims to environmental harm are deficient.

This analysis is substantially similar to that which ultimately prevailed in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*<sup>199</sup> In *Duke Power Co.*, the plaintiffs, who challenged the constitutionality of the \$560 million liability cap for nuclear accidents contained in the Price Anderson Act lived near a proposed nuclear power plant. The *Duke Power Co.* case also thwarted the chain from a violation to harm to the environment to harm to the plaintiff to Article III injury. The *Duke Power Co.* plaintiffs, once granted standing, could ultimately have lost on the merits as they actually did, thus leaving the cap in place. And even if they had succeeded on the merits, it remained possible that with the liability cap lifted, and thus with unlimited liability in the event of a nuclear accident, the plant would still have been built. Nevertheless, at least part of their claimed injury, namely the present decline in property values, existed independently of any proof of environmental harm, or even of their ultimate success on the merits. The diminished likelihood of the plant's construction once liability was lifted had the potential to restore at least some of the lost property value. And the *Duke Power Co.* plaintiffs were entitled to seek to redress of that injury. I have previously explained that the social choice model of standing helps to explain *Duke Power Co.*<sup>200</sup> While that case, along with *Allen* and *Bakke*, falls into the "no right to an undistorted market" category, the Court found standing because it was apparent that the litigants were

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199. 438 U.S. 59 (1978).

200. See Stearns, *Standing and Social Choice*, *supra* note 2; see also *supra* Part I (summarizing model).

seeking to secure concrete relief, in spite of, rather than because of, the need to make law to resolve the dispute.

Gail Lee's affidavit might have fallen into this category, and could perhaps have satisfied Justice Scalia's exception to insisting upon injury to the environment as a precondition to citizen standing, but for the arguably vague nature of her averment: "she *believed* the pollutant discharges accounted for *some of* the discrepancy."<sup>201</sup> The attenuated nature of her allegation likely prevented Justice Scalia, but not the *Laidlaw* majority, from affording Gail Lee standing.

In addition to the problem of injury, *Laidlaw* further presented a problem of redress. Although the plaintiffs might have had standing to challenge the denial of injunctive relief, they had not appealed that denial. Civil damages would have been paid to the U.S. Treasury. Relying in part upon congressional findings, Justice Ginsburg determined that the deterrent effect of such damages was sufficient to support the Article III redressability requirement.<sup>202</sup> In finding redressability satisfied, Justice Ginsburg distinguished *Steel Company* on the ground that that case involved wholly past violations, as opposed to violations that were ongoing at the time the complaint was filed.<sup>203</sup>

Setting aside Gail Lee, the remaining affiants alleged harm that resulted from unlawful discharges that the District Court found had produced no discernible environmental harm. The Supreme Court did not upset that finding. And yet, unlike in *Lujan*, the *Laidlaw* majority found standing. Two questions then arise. First, can *Lujan* and *Laidlaw* be reconciled, and second, if not, which is more consistent with the social choice model? To answer these questions, it will be helpful to compare the postures of the United States in the two cases.

As Justice Ginsburg noted in response to Justice Scalia's allegation that the decision threatened to undermine democratic principles of governance,<sup>204</sup> the Department of Justice sided with the

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201. See *Laidlaw*, 528 U.S. at 182-83 (emphasis added).

202. See *id.* at 184-85. Ginsburg stated: "Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect." *Id.* at 185.

203. See *id.* at 187-88.

204. Justice Scalia had stated: "The new standing law that the Court makes—like all expansions of standing beyond the traditional constitutional limits—has grave implications for democratic governance." *Id.* at 202 (Scalia, J., dissenting).

*Laidlaw* plaintiffs on the issue of standing.<sup>205</sup> In contrast, the Department of the Interior, acting as defendant in *Lujan*, sought to bar standing. It certainly will not do to suggest that wherever the government comes out on standing resolves the constitutional standing issue. Such a suggestion would substitute an Article III requirement for a pure exercise of agency discretion. But the difference between the government positions in *Lujan* and *Laidlaw* was more profound, and likely affected the perception of at least some justices as to the location of the preference of the median member of the enacting Congress with respect to the Endangered Species Act and the Clean Water Act, respectively.

In *Lujan*, the citizen claimants sought to affect directly the government's interpretation and application of an environmental statute, and they did so in a context that involved governmental funding of foreign development projects. In contrast, the citizen claimants in *Laidlaw* sought to ensure private compliance with a state-issued permit. To the extent that the relevant federal agency position on standing—Department of the Interior in *Lujan* and EPA in *Laidlaw*—and more to the point, federal agency policies under the statute, serve as a meaningful proxy for what the median member of the enacting Congress intended, or at least was willing to condone, the two cases could justifiably be distinguished. After all, while it is not possible to know with certainty what the median member of the enacting Congress actually would have preferred when evaluating the application of a statute to previously unknown facts, we do know that the federal agency is subject to substantial political pressures and resource constraints that vary considerably from those of the citizen plaintiff. We also know that a federal agency can back a citizen suit easily and at a low cost. After all, doing so allows the agency to appear more moderate in its own enforcement actions, while it encourages others to pursue more zealous enforcement. But when the agency itself is on the line and is defending against a citizen suit, this might provide the best available proxy for the contrary expectations of the median member of the enacting Congress.<sup>206</sup>

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205. *Id.* at 188 n.4.

206. In his dissenting opinion in *Laidlaw*, Justice Scalia makes a substantially similar point:

The Court points out that the government is allowed to intervene in a citizen suit, . . . but this power to “bring the Government’s views to the attention of the court,” . . . is [a] meager substitute for the power to decide whether prosecution will occur. Indeed, according the Chief Executive of the United States the ability to intervene does no more than place him on a par with John Q. Public, who can intervene—whether the government likes it or not—when the United States files suit.

*Id.* at 209 n.2 (Scalia, J., dissenting) (internal citations omitted).

I do not wish to oversell the above distinction between *Lujan* and *Laidlaw*. The fact remains that the two cases are in significant tension and that the Court has issued two sharply opposed decisions in a very short period of time. Both *Lujan* and *Laidlaw* present plaintiffs who, it can be argued, have suffered no personal or direct injury, but who are concerned about technical violations of federal environmental laws that have not (yet) been shown to have caused any actual harm to the environment. Justice Ginsburg is certainly correct that standing should turn on the injury to the claimant, rather than to the environment. And as I have argued, there exists a category of claimants who could satisfy this criterion in a meaningful way. An injury to property value, as seen in *Duke Power Co.*, would certainly suffice. But setting aside Gail Lee's affidavit, there was no averment that obviously compelled a departure from the more common chain of an unlawful act causing harm to the environment causing harm to the claimant creating Article III standing. Instead, given the absence of any discernible environmental harm, the claimed injuries could credibly be categorized as psychological, and the underlying litigation as ideologically motivated. And herein lies the real difficulty.

Congress has the power to define such injuries as justiciable and to provide a statutory means of redressing them. This much was apparent from Justice Kennedy's concurrence in *Lujan* (assuming as seems probable that he was the median justice on the *Lujan* Court), and is all the more evident from Justice Ginsburg's majority opinion in *Laidlaw*. But it is difficult, perhaps ultimately impossible, for those justices who are motivated to do so, to actually determine the intent of the median member of the enacting Congress. That is because while the Clean Water Act, for example, confers standing liberally, it has done so for reasons that reflect an expansion of the underlying issue spectrum beyond a straightforward determination of the preferred level of compliance. Instead, as part of a complex scheme of negotiations that were necessary to secure the passage of that, or any other, statute that confers standing broadly, the bill sponsor assembled a coalition that simultaneously preserved the bill's overall objectives and secured enough votes. It is possible that the relevant bargaining occurred across no fewer than three issue dimensions, as explained in Part II, but even if we were to limit our inquiry to two issue dimensions, substantive bargaining and bargaining over standing, that alone would be sufficient to prevent the Court from ascertaining with any reasonable degree of certainty, which proxy—

the citizen suit or the failure of the governing agency to sue instead—is most meaningful in assessing the preferred position of the median member of the enacting Congress. In the end, just as the Court cannot know what Congress really “intended” when bargaining occurs across more dimensions than one, we cannot predict with any reasonable degree of certainty how the median members of the Court will respond when sent conflicting signals about the intended enforcement of a statute that confers standing broadly.

My own view is that we are watching a work in progress, and frankly, one that might not admit of a truly stable resolution. Thus far, the Court has vacillated on whether it is willing to become the vehicle for resolving open questions regarding the optimal enforcement of federal environmental statutes, when in doing so it risks condoning a level of enforcement that is at odds with the preferred position of the median member of the enacting Congress. When the Court faced a similar set of concerns in the nondelegation context, it ultimately capitulated to Congress. Whether its apparent willingness to do so in the context of statutory standing, as seen in *Laidlaw*, represents a stable outcome, however, remains to be seen.

#### CONCLUSION

While it is customary in at least a good many law review articles to tie a neat bow around a newly advanced thesis, I will not afford myself that luxury here. The best I can do is identify those factors that give rise to what I consider to be an uncertain state surrounding the doctrine of statutory standing. But all is not lost. After all, if we can identify the causes of doctrinal instability, then living with the resulting uncertainty becomes more tolerable. At a minimum, we can gain increased respect for those who are confronted with the very difficult questions that the sorts of cases discussed in Part III pose, even while we are frustrated with their inability to provide us with clear guidance. I hope that this article has provided some insight into how the nature of collective decision making, both in Congress and in the Supreme Court, has affected, and might well affect in the future, this increasingly important body of developing law.