STANDING AND THE STATUTORY UNIVERSE

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In 1988, William Fletcher published *The Structure of Standing*.[1] Professor Fletcher persuasively argued that where Congress has conferred a cause of action, standing analysis, to be constitutionally sound and logically defensible, necessarily turns on analysis of the particular cause of action conferred by Congress. Similar arguments were made around the same time and in subsequent scholarship of Professors Gene Nichol, Richard Pierce, and Cass Sunstein.[2]

Despite the power of these scholars' arguments, the Supreme Court's decision in *Lujan v. Defenders of Wildlife*[3] took a decidedly different approach. Justice Scalia's majority opinion undoubtedly required, at a minimum, that Article III courts only recognize standing for litigants if the courts find that the litigant has suffered constitutionally sufficient "injury in fact" that is traceable to the defendant and redressable by the courts. As a prudential or statutory matter, courts must also determine if a litigant seeking standing is within "the zone of interests" relevant to the statutory cause of action. In one sense, *Lujan* decisively rejected the idea that the presence of a legislatively conferred cause of action could end standing analysis; Article

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1. 98 YALE L.J. 221 (1988).

2. *See*, *e.g.*, Gene R. Nichol, Jr., *Justice Scalia, Standing and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); 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. 161 (1992) [hereinafter Sunstein, *What's Standing After* Lujan*?*]; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988) [hereinafter Sunstein, *Standing and the Privatization of Public Law*]. For a pre-*Lujan* analysis of metaphors used in standing analysis and the questionable historical roots of current standing frameworks, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

3. 504 U.S. 555 (1992).

III courts must, at a minimum, determine that a litigant has a sufficiently real stake in the litigation such that she satisfies an Article III court's analysis of the presence of "injury in fact." This is likely a settled core of constitutional standing analysis—courts must ensure that a litigant has a stake in a litigated dispute that in some sense sets that litigant apart from the general public.

As argued in this article, however, close analysis of *Lujan* and subsequent major Supreme Court standing cases reveals that despite the courts' substantial standing role, the "statutory universe" of legislatively created goals, procedures and incentives remains central to standing analysis. Standing cases decided by the Court since *Lujan* provide further guidance regarding the contours of constitutional standing analysis. *Bennett v. Spear,*[4] *Steel Company v. Citizens for a Better Environment,*[5] *Federal Election Commission v. Akins*[6] and now, perhaps most significantly, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*[7] further flesh out the standing framework.[8] Lower courts have also grappled with the Supreme Court's rapidly evolving, or perhaps scattering, jurisprudence. Professor Pierce has questioned if there is much law here at all, arguing that political preferences best explain the Court's active redrawing of the lines and elements of standing jurisprudence.[9] Two notable Courts of Appeals decisions, *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*[10] and *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,*[11] interpreted *Lujan* in a particularly expansive manner that this article finds unjustified, further expanding on the judicial role in erecting standing hurdles.[12] The recent *en banc* rejection of the *Gaston* panel's decision approached standing in a manner

4. 520 U.S. 154 (1997).

5. 523 U.S. 83 (1998).

6. 524 U.S. 11 (1998).

7. 528 U.S. 167 (2000).

8. *See infra* Part I for discussion of these cases. Subsequent to the March, 2000 conference at which this paper was first presented, the Court decided *Vermont Agency of Natural Resources v. United States* ex rel. *Stevens*, 120 S. Ct. 1858 (2000). In evaluating a plaintiff's standing to bring a *qui tam* whistleblower action, the Court found standing based on the deep historical roots of *qui tam* actions and explained the propriety of such standing by characterizing the plaintiff as an assignee of the government's interest in a damages claim. This case shed little new light on the issues addressed by this article, but is briefly discussed *infra* notes 105, 185 and accompanying text.

9. *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

10. 123 F.3d 111 (3d Cir. 1997).

11. 179 F.3d 107 (4th Cir. 1999), *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000).

12. *See infra* at Part I.E.

similar to that suggested by this article, but this article disagrees with several concurring judges' contention that *Laidlaw* was unexpected and a major shift in the law of standing.

The *Laidlaw* case is particularly important to discerning and resolving the disparate standing law strains and approaches of the Supreme Court. As shown below, a consistent strain in the last decade's standing jurisprudence calls for judges to serve in a central but nevertheless limited standing gatekeeping role that still gives statutory frameworks a central role in standing analysis. However, a competing strain in standing analysis—most often articulated by Justice Scalia in opinions that have at times garnered a court majority, but more often garnered only a plurality or court minority—seeks to expand that judicial gatekeeping role under the standing framework. These competing strains of logic and opinion language can be analogized to a symphonic musical moment in which a listener cannot yet discern if the orchestra is playing in a minor or major mode, or perhaps modulating to a different key. Only when the passage resolves itself can one fully comprehend the preceding passage and discern the music's direction. *Laidlaw* is akin to such a musical resolution.

The seven justice *Laidlaw* majority resolved these competing strains by embracing the persistent, albeit contested, strain in standing jurisprudence that calls for a more limited and deferential judicial standing role. Legislative judgments about statutory goals and means, or what I in this article refer to as "the statutory universe," receive substantial deference by courts under this consistent line of standing analysis. Political inclinations may explain much about why particular justices reach particular results, but close scrutiny of the Court's standing opinions and the stated rationales garnering majority support reveals that *Laidlaw* is in harmony with a more judicially restrained line of standing law.[13]

This article develops its thesis by offering two lines of analysis and argument regarding standing law. The article first demonstrates that, as a matter of case interpretation, the Justice Scalia *Lujan* opin-

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13. Subsequent to presentation of this conference paper at Duke Law School in March of 2000, several other scholars had analyzed *Laidlaw's* implications. *See*, *e.g.*, Daniel A. Farber, *Environmental Litigation after* Laidlaw, 30 ENVTL. L. REP. 10,516 (July 2000); Michael P. Healy, *Standing in Environmental Citizen Suits:* Laidlaw's *Clarification of the Injury-in-Fact and Redressability Requirements*, 30 ENVTL. L. REP. 10,455 (June 2000); Craig N. Johnston, *Standing and Mootness after* Laidlaw, 30 ENVTL. L. REP. 10,317 (May 2000). Professor Sunstein also briefly alludes to *Laidlaw* in his recent analysis of standing for animals. *See* Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1343-44 (2000).

ion, the critically important *Lujan* concurrence of Justice Kennedy, joined by Justice Souter, and subsequent Supreme Court standing cases up to and including *Laidlaw,* do not justify standing analysis that ignores the universe of interests and incentives created by a statute. While a majority of the Court undoubtedly requires the federal judiciary to ensure that a particular plaintiff has a "real" stake in the dispute underlying a litigation, nothing in *Lujan* or subsequent Supreme Court standing cases justifies ignoring or belittling the statutory interests Congress has sought to further in a statute conferring a cause of action.[14]

Second, this article offers a normative argument that conceptions of legislative supremacy and considerations of institutional competence confirm the soundness of a more limited judicial standing role. Litigants and courts should defer to Congress in the standing arena by both accepting legislative goals as sufficiently real to justify litigant standing and by accepting the importance of whatever procedures Congress has selected to further attainment of legislative goals. Drawing by analogy on the assertion of Justice Scalia and Judges Easterbrook and Posner in the non-constitutional statutory interpretation arena that courts should not simply seek to further general statutory purposes, but instead should enforce the particular and presumably limited bargain struck by Congress, this article argues that similar logic should prevail in standing analysis. All legislative bargains are limited and uncertain of attaining their articulated goals. Nevertheless, any violation of the regulatory scheme resulting from that bargain should be construed as having an effect. The statutory universe of goals and means should be accepted by courts, even if the courts must still ensure that litigants have a real stake in their case. Only litigants utterly lacking a connection to the interest or area af-

14. In so interpreting these cases, this article does not rely on a history-based theory regarding how standing law should be framed. Historical analysis to date indicates that standing law is primarily a late 20th century construct and that the limited historical antecedents are inconsistent with a substantial judicial gatekeeping role. *See* Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341 (1989); Sunstein, *What's Standing After* Lujan*?*, *supra* note 2; Winter, *supra* note 2. As stated by then-Judge Patricia Wald in a 1993 essay, "the Court's standing cases . . . are very obviously and forthrightly incorporating a *political* (in the broadest sense of the word) philosophy about the function of federal courts. There is no way that the origin of the increasingly tough three-pronged standing test—injury, causation, redressability—can be traced to the stark constitutional phrase 'case or controversy.'" Patricia M. Wald, *The Cinematic Supreme Court: 1991-92 Term*, 7 ADMIN. L.J. AM. U. 238, 239 (1993). For a contrary and overtly anti-regulatory spin on environmental law and standing rooted in an attorney's strong belief in property rights, see MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 1-7, 42-63 (1996).

fected by the legal violation should be turned away on standing grounds. Provided that a litigant has such a connection to the area or interest affected by a legal violation, courts should show deference to the legislature in evaluating the existence of injury in fact, traceability, and redressability of the plaintiff's claim. Based on both close analysis of standing jurisprudence and these normative arguments, the *Magnesium Elektron* opinion and the original panel majority opinion in *Gaston* are egregiously unsound.

Part I sketches out highlights of the Supreme Court's major standing opinions from *Lujan* to *Laidlaw*. Assuming a reader already familiar with the basics of these cases, this Part focuses on language revealing what questions are for Article III courts alone and what questions still must be shaped by deferential acceptance of legislative goals and means as made manifest in relevant statutes. Part II explores the rationale for legislative supremacy and the reasons courts are ill-suited to second guess implicit or explicit legislative articulations of societal interests and choices of procedural means to those ends. This Part develops a normative argument for why courts should defer to legislatively set ends and means. This argument draws on statutory interpretation arguments, legislative supremacy conceptions, and related analysis of comparative institutional competence of courts and the political branches.

Part III concedes that the discussions in Parts I and II weigh strongly in favor of a conclusion that *Lujan* itself is unsound. Judicial narrowing of a citizen-suit provision will have inevitable effects on the regulatory process. Furthermore, it is difficult, if not impossible, to determine the presence of an "injury" without looking at the underlying statutory scheme. This Part also concedes, however, that *Lujan* and its progeny have at this point created settled law establishing at least a narrow independent Article III court determination of the sufficiency of a litigant's interest in a dispute. Nevertheless, whether assessing a litigant's "injury in fact," or examining traceability or redressability of the law violation underlying a plaintiff's claim, courts must conduct their analysis in light of the interests created or recognized and the procedures chosen by Congress.

Courts may now have an ensconced role in evaluating the actuality of a litigant's interest in a public law dispute, but that role must be a narrow one that does not ignore or question legislative judgments about political goals and process. Justice Scalia, in particular, prefers a much broader judicial gatekeeping role through standing doctrine. However, neither his own logic nor a consistent majority of

the Supreme Court supports a recasting of standing doctrine to allow courts to evaluate *de novo* whether legislative goals are sufficiently tangible or whether the means to those goals are suitable. As confirmed and resolved by *Laidlaw,* a consistent Supreme Court majority calls for a much more limited and deferential judicial standing role.

I. INDEPENDENT JUDICIAL STANDING ANALYSIS VERSUS STATUTORY INFLUENCE

This Part's analysis of standing law takes as its starting point the Court's opinion in *Lujan v. Defenders of Wildlife.* Although *Lujan* itself has been much analyzed and criticized, this article takes its majority opinion and the important Justice Kennedy-Souter concurrence (perhaps better characterized as a partial dissent) as the most important base text from which subsequent opinions have embarked. This Part then reviews post-*Lujan* standing opinions, with emphasis on language reflecting the appropriate roles of courts and the legislature in determining citizen standing.

A. *Lujan's Expanded Judicial Role and Lujan's Limits*

In *Lujan,* the Court concluded that the named plaintiffs had not established at the summary judgment stage of their case a sufficient link to an injury that would flow from a lack of agency consultation over potential endangered species impacts of partial United States funding of projects in foreign countries.[15] Prior to the case, the Secretary of the Interior had promulgated a regulation newly interpreting the Federal Endangered Species Act (the "ESA") as inapplicable to foreign projects supported by U.S. dollars.[16] In accordance with this interpretation, no consultation concerning endangered species impacts occurred regarding several foreign projects. Although these plaintiffs in the past had connections to locations abroad where endangered species existed and where United States funding might have contributed to harm to these species, Justice Scalia's majority opinion denied the plaintiffs' standing. The presence of a broad citizen-suit provision ostensibly conferring a cause of action on "any person" to complain of violations of the ESA was insufficient to end standing analysis.

In his *Lujan* opinion, Justice Scalia articulated Article III standing criteria in a manner that struck down dozens of statutes' citizen-

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15. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992).
16. *See id.* at 557-58.

suit provisions.[17] Particularly in the environmental law arena, citizen-suit provisions authorize "any person" to sue government entities for a failure to act in conformity with "nondiscretionary" obligations and to sue regulatory targets for virtually any violation of obligations imposed pursuant to the enabling act.[18] *Lujan* declared unconstitutional attempts to utilize such provisions by citizens lacking what the Court majority referred to as "actual" or "concrete" "injury in fact."[19] The majority opinion made clear that while Congress can create causes of action for injuries not previously cognizable in the courts,[20] the mere intent of Congress to confer such a cause of action does not end Article III analysis.[21] All plaintiffs must be able to show that their threatened interest and alleged injury add up to a type of interest or injury that the courts determine to be "actual," "particularized," and "concrete."[22] *Lujan* emphatically resolved, contrary to Professor Fletcher's analysis and language in another Supreme Court case,[23]

17. For a cross section of the many articles discussing *Lujan* with a largely critical content, see Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of* Lujan v. Defenders of Wildlife, 22 COLUM. J. ENVTL. L. 169 (1997); Patti A. Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8 J. LAND USE & ENVTL. L. 343 (1993); Nichol, *supra* note 2; Pierce, *supra* note 2; Sunstein, *What's Standing After* Lujan*?*, *supra* note 2. For scholarly critiques defending Justice Scalia and *Lujan*, see GREVE, *supra* note 14, at 99-101, 108 n.1; Marshall J. Breger, *Defending* Defenders*: Remarks on Nichol and Pierce*, 42 DUKE L.J. 1202 (1993); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993). For articles focusing on "procedural" rights and injuries and the impacts of Lujan, see Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After* Lujan v. Defenders of Wildlife, 12 UCLA J. ENVTL. L. & POL'Y 345 (1994); Brian J. Gatchel, *Informational and Procedural Standing After* Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75 (1995); Bruce Morris, *How Footnote 7 in* Lujan II *May Expand Standing for Procedural Injuries*, 9 NAT. RES. & ENVT. 75 (1995); Christopher T. Burt, Comment, *Procedural Injury Standing After* Lujan v. Defenders of Wildlife, 62 U. CHI. L. REV. 275 (1995).

18. For excellent reviews of the history and content of citizen-suit provisions in environmental laws, see ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 667-71 (2d ed. 1996); Barton H. Thompson, *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185.

19. *See* 504 U.S. at 560, 573-74. Prior to *Lujan*, Professor Fletcher's powerful critique of the Court's standing jurisprudence questioned the existence of some objective "injury in fact." *See* Fletcher, *supra* note 1. Professor Sunstein criticized *Lujan* for similar reasons, questioning the Court's assumption that it could objectively determine the existence of an "injury." *See* Sunstein, *What's Standing After* Lujan*?*, *supra* note 2.

20. The Court stated that Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law. . . ." Lujan, 504 U.S. at 578.

21. *See id*. at 577 (citing Stark v. Wickard, 321 U.S. 288, 309-10 (1944)).

22. *See id*. at 560.

23. *See id.* at 575. *But see* International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 77 (1991) (citing Professor Fletcher, *supra* note 1, and stating that "standing is gauged by the specific common-law, statutory or constitutional claims that a

that even where Congress has granted a cause of action to "any person" complaining of agency violation of a nondiscretionary duty, courts must ensure that plaintiffs have a constitutionally sufficient interest, referred to by the phrase "injury in fact."[24] The existence of a cause of action does not itself create a constitutionally sufficient interest to satisfy Article III prerequisites.[25]

The *Lujan* majority looked for evidence of the plaintiffs' actual stake or interest in the environmental amenities allegedly threatened by the government's regulatory and funding choices that were no longer influenced by Endangered Species Act consultations.[26] Central to the Court's conclusions in *Lujan* was the plaintiffs' lack of an ongoing physical presence in the foreign countries allegedly affected by the United States' project funding.[27] The Court distinguished plaintiffs, who could only show an intent "some day" to return to the countries, from plaintiffs who could show that they lived "adjacent to the site" about which consultation was allegedly required.[28] The opinion mocked several "nexus" theories offered by the plaintiffs to show their connections to the areas where endangered species were allegedly threatened.[29]

The majority's critique of the plaintiffs' nexus theories did not question the sufficiency or constitutional adequacy of "aesthetic and environmental" interests as a source of standing where made actionable by positive law. Instead, the question was whether these par-

party presents"); *see also* Fletcher, *supra* note 1 and accompanying text.

24. *See Lujan*, 504 U.S. at 575-76.

25. While Justices Kennedy and Souter were not willing to foreclose judicial recognition of legislatively recognized injuries and interests without a common law analog, they too joined most of Justice Scalia's discussion of the need for judicial evaluation of the reality of a plaintiff's injury. This core of current Article III standing doctrine was recently reemphasized in *Raines v. Byrd*, where the Court denied standing to legislators who claimed that the Line Item Veto Act unconstitutionally impaired their interests by "alter[ing] the legal and practical effects of [their] votes." 521 U.S. 811, 816 (1997). The legislators also claimed that the Line Item Veto Act harmed them by "divest[ing] [the legislators] of their constitutional role in the repeal of legislation" and by "alter[ing] the constitutional balance of powers." *Id.* The Court, in the majority opinion by Chief Justice Rehnquist, confirmed that the core of standing doctrine requires that the plaintiff have a "personal stake" in the alleged dispute apart from the legislators' interests in their legislative power and their concern with the constitutional separation of powers. *See id.* at 818. The Court denied standing. *See id*. The Court gave no apparent weight to the Line Item Veto Act's explicit conferral of a cause of action for legislators, instead heavily considering inter-branch conflict and "attach[ing] some importance to the fact that appellees have not been authorized to represent their Houses of Congress in this action." *Id*. at 827-28.

26. *See* 504 U.S. at 563-67.

27. *See id.*

28. *See id.*

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

ticular plaintiffs had an actual connection to the areas and species allegedly threatened.[30] In addition, the lack of plaintiffs' physical proximity to the areas in question led Justice Kennedy (in his concurrence joined by Justice Souter) to state that the plaintiffs did not deserve standing because they had not established that they were "among the injured."[31] Justice Kennedy further implied that his outcome would have been different had the plaintiffs planned to return to the endangered species habitats: "it may seem trivial to require that Mss. Kelly and Skilbred acquire airline tickets to the project sites," but without such tickets, the Court could not "assume that the affiants will be using the sites on a regular basis."[32]

That the *Lujan* Court knowingly declined to dismiss the constitutional sufficiency of environmental and aesthetic interests for standing is further evident in its discussion of why "procedural injuries" alleged by non-targets of regulation present standing difficulties. The entire concept of "procedural rights" is problematic under the Court's current standing framework.[33] Nevertheless, the *Lujan* Court's analysis of the plaintiffs' efforts to compel ESA agency consultations sheds light on this article's critique of how legislatively defined or created interests influence standing analysis. Justice Scalia stated for the majority that, unlike direct regulatory targets who have standing be-

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30. *See id*. at 564.

31. *See id*. at 579 (Kennedy, J., concurring) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

32. *See id.*; *see also* Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247 (1996).

33. The "procedural rights" terminology is probably embedded now in standing jurisprudence, but many claims described as rooted in "procedural" irregularity are actually best viewed as problematic for standing analysis because the alleged agency misstep occurs in the context of intermediate government actions. By intermediate actions, I mean actions short of the final step in the decision-making process created by a relevant enabling act. Part of a statutory sequence of steps may be complete, but other decisions and actions must occur before final choices are made and tangible results impacting a plaintiff follow. Indeed, numerous standing disputes before the Court have turned on how the Court evaluated "chains of causation" or "causal links" relevant to a plaintiff's claimed injury. *See* PERCIVAL ET AL., *supra* note 18, at 144-50 (discussing major Supreme Court cases evaluating whether plaintiffs' claims were traceable and redressable and analyzing the Court's "tendency to manipulate the causation requirement to further other goals"). As Justice Blackmun (joined by Justice O'Connor) observed in his *Lujan* dissent, "[m]ost governmental conduct can be classified as 'procedural'." Lujan, 504 U.S. at 601 (Blackmun, J., dissenting). He further stated that "[i]n complex regulatory areas . . . Congress often legislates . . . in procedural shades of gray . . . . [I]t sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements." *Id.* at 602. The line between substantive and procedural agency errors is unclear. *See* William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis after* Bennett v. Spear, 49 ADMIN. L. REV. 763, 793-98, 800-09, 811-23 (1997).

cause they can show adverse impacts of the challenged government action, non-targets have tougher standing criteria to meet.[34] In the context of suits initiated by non-targets (often referred to as regulatory beneficiaries), "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well."[35] The Court expressed concern about plaintiffs "raising only a generally available grievance" and claiming "only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large."[36] The Court rejected the proposition that "the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue."[37] The existence of an agency procedural misstep, even with broad citizen-suit conferral of a cause of action, was insufficient to create standing for the *Lujan* plaintiffs.

The *Lujan* Court did not, however, completely eliminate suits based on government failures to follow legislatively prescribed procedures.[38] As noted in the preceding paragraph, the Court repeatedly linked questions about the plaintiffs' standing with assertions that plaintiffs had no distinctive interest in the government action or amenities threatened.[39] Furthermore, in footnotes seven and eight, the Court discussed "procedural rights" standing criteria.[40] In language describing a hypothetical case that would give rise to a plaintiff's standing, the Court described a type of plaintiff who would not have to prove that a particular tangible injury would necessarily flow

34. *See Lujan,* 504 U.S. at 561-63. Justice Scalia stated that where an alleged injury results from "allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Id.* at 562. The *Lujan* majority opinion explained the "substantially more difficult" standing criteria as resulting from courts' difficulty in tracing and redressing injuries that stem from "unfettered choices made by independent actors not before the courts . . . ." *See id.* (quoting ASARCO, Inc. v. Kadish, 490 U.S. 605, 615 (1989)).

35. *Id* at 562.

36. *Id.* at 573-74.

37. *Id.* at 576-77. *Raines* similarly rejected standing for claimants lacking underlying interests apart from their interest in lawful government process. *See* Raines v. Byrd, 521 U.S. 811, 818.

38. *See* 504 U.S. at 577.

39. *See*, *e.g.*, *id*. at 576-77.

40. *See id.* at 572-73.

from a procedural failure or omission.[41] The Court, as an example, referred to a failure of agencies to consult or analyze environmental impacts as required by the National Environmental Policy Act ("NEPA").[42] The Court stated that "the person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[43] The Court distinguished between plaintiffs living "adjacent to a site," who presumably have "procedural rights" standing, and plaintiffs "who live (and propose to live) at the other end of the country" from the site involved in the regulatory dispute.[44] The Court stated that such an adjacent plaintiff has standing "even though he cannot establish with any certainty that the [Environmental Impact Statement analysis] will cause the license to be withheld or altered."[45] In this discussion, "injury in fact" analysis is explained as focusing primarily on whether a litigant has a "concrete" interest that is harmed or threatened by the allegedly illegal action subject to citizen litigation.

Uncertainty about the contours of constitutional standing requirements can also be attributed to Scalia's redressability discussion that garnered only a plurality opinion, as well as the concurring opinion by Justice Kennedy (joined by Justice Souter). In his plurality redressability discussion, Justice Scalia questioned whether a grant of relief for the plaintiffs would redress their alleged injuries.[46] He pointed to several ways in which redress was uncertain.[47] He questioned if 'action agencies' would choose to consult with the Secretary (or with the Fish & Wildlife Service) even if the Court agreed with the plaintiffs that the ESA was applicable to foreign projects.[48] He emphasized that ESA consultation is initiated by the action agencies,

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41. *See id*. at 572 n.7.

42. *See id.*

43. *Id.*

44. *Id.*

45. *Id.* As further stated in footnote eight of *Lujan*, "[w]e do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Id.* at 573 n.8 (emphasis in original). This language appears to call for analysis of the importance of the alleged procedural irregularity at the level of examination of legislative purpose and design—the issue is whether a plaintiff's underlying "concrete" interest is of the type "the procedures in question are designed to protect." *Id.* For exploration of the role of physical proximity and connection to standing analysis, see Farber, *supra* note 32.

46. *See Lujan,* 504 U.S. at 568-71.

47. *See id.*

48. *See id.*

not by the Secretary.[49] He also questioned if agencies not before the Court would be obliged to follow "incidental legal determination[s]" about the reach of the ESA.[50] Finally, he questioned if funding of foreign projects would continue anyway and whether, even without United States funding, the threatening projects would continue.[51] All of these uncertainties exist anytime the alleged government illegality concerns agency actions that are something less than the final certain act affecting a party. Importantly for this article's analysis, his redressability discussion did not garner a Court majority.

In their concurrence, Justices Kennedy and Souter were unwilling to adopt the Scalia opinion's "nexus" discussion.[52] Justices Kennedy and Souter also did not agree with the Scalia opinion's emphasis on a plaintiff's need to show common law-like injury.[53] Justices Kennedy and Souter refused to join in the redressability portions of Justice Scalia's opinion.[54] In a somewhat obscure phrase, they "join[ed] Part IV of the Court's opinion with the following observations."[55] In telling language converting ostensibly majority portions of Justice Scalia's opinion into a minority position, they stated that "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."[56] For Justices Kennedy and Souter (who, combined with Justice Stevens' concurrence on other grounds and the dissenters, appear to make a majority), Congress retains authority to articulate "new rights of action that do not have clear analogs in our common-law tradition."[57] This dense discussion of procedural rights standing spawned substantial lower court litigation and scholarly comment.[58]

For the purposes of this article, a few observations are significant. If, as Justice Scalia concedes, procedural improprieties can give

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49. *See id.*

50. *Id.* at 569.

51. *See id.* at 571.

52. *See id*. at 579 (Kennedy, J., concurring).

53. *See id*. at 580.

54. *See id.*

55. *Id.* at 580.

56. *Id.*

57. *Id.*

58. *See supra* note 17. *See also* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PENN. L. REV. 613 (1999) (discussing *Lujan* in light of the later *Akins* case's more deferential and less restrictive approach to standing). For a discussion of *Akins*, see *infra* Part I.D.

rise to standing provided that a plaintiff has an actual stake in or proximity to the area, and, further, aesthetic interests can suffice for standing, then the focus must be on the reality of a plaintiff's interest in a dispute or case, not on the existence of some court-determined harm to an underlying amenity such as endangered species habitats. Such a reading of *Lujan* would be consistent with the Court's approach in *Sierra Club v. Morton*[59] as well as in *Lujan v. National Wildlife Federation*,[60] where the Court emphasized the importance of environmental litigants having a connection to the area or amenity alleged to be affected by illegal action. Similarly, the problem identified in *Lujan* with the "nexus" theories was not that United States dollars would not have any possible influence on foreign land use decisions affecting endangered species, but that the plaintiffs' link to or concern about those interests was difficult to discern.[61] In the same vein, Justice Kennedy's ostensible concurrence further focused upon legislatively defined interests or chains of causation rather than judicially found injuries to an underlying amenity.[62]

Furthermore, less demanding standing requirements for regulatory targets must mean that standing analysis focuses on the reality of a litigant's stake or "concrete interest" in a particular action that is challenged, not on proof of harm to some amenity protected by a statute. For example, if an ESA prohibition on harming or killing endangered species was applied against a dam builder to preclude building of a dam, Justice Scalia states standing would be easily found.[63] In that setting, however, the challenged action by the government would not cause any harm to the amenity protected by a statute. Once again, to make sense of the *Lujan* majority opinion, the key constitutional standing issue is the reality of a plaintiff's interest or stake in a particular action, as shaped by the underlying statutory framework, not proof sufficient for an independent judicial finding that the amenity protected by a statute was harmed. To the extent courts look for a congruence between a litigant's interests and a statute's goals, "zone of interest" prudential standing analysis remains

59. 405 U.S. 727 (1972).

60. 497 U.S. 871 (1990).

61. In the plurality redressability discussion, Justice Scalia called for such tracing of legal mandates, law violations, and resulting effects. He failed to garner majority support for this approach. *See supra* notes 46-51 and accompanying text.

62. *See Lujan*, 504 U.S. at 581 (Kennedy, J., concurring).

63. *See id.* at 572 n.7.

relevant, but such "zone" analysis is not constitutional in nature and can therefore be adjusted by legislative action.[64]

B. *Bennett v. Spear's Problematic Mode of Analysis*

Most of the *Bennett v. Spear* unanimous opinion further confirms the view that standing analysis is not about independent judicial findings of harms to a statutorily-protected amenity, but merely about the reality of a litigants' stake in a matter placed before the courts.[65] Portions of its discussion, however, give litigants and courts at least a toehold for arguments that courts have an even broader gatekeeping role in standing analysis than indicated in *Lujan.* In seeking to discern the Court's competing standing strains of logic, *Bennett* is one of the few cases that approaches standing in a manner arguably expanding the judicial gatekeeping role.

The *Bennett* petitioners were users of waters who were economically adversely affected by a modification of water levels resulting from measures designed to protect endangered species.[66] The Court easily found that these petitioners satisfied both Article III and "zone of interests" standing criteria.[67] The Article III discussion altogether ignored any possible claim that the petitioners might have to establish harm to an underlying amenity, versus harm to their own interests.[68] The Court's explanation for why these petitioners' claims were redressable presents some problems for the arguments in this article. The Court did not state that remand alone to the relevant agency with instruction to conform to the ESA would constitute redress. Instead, while the Court conceded that ESA biological opinions are only advisory under the statute, the Court stated that an appropriately prepared biological opinion on remand nevertheless would have an actual effect—or what the Court called a "coercive" or "virtually

64. *See* Buzbee, *supra* note 33, at 777-89 (discussing contours of "zone of interest" analysis and implications of *Bennett v. Spear*).

65. For a more complete assessment of *Bennett* by this author, see *id.*; *see also* Sam Kalen, *Standing on its Last Legs:* Bennett v. Spear *and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1 (1997).

66. *See* 520 U.S. 154, 157-61 (1997).

67. *See id.* at 166, 179.

68. The "zone of interests" discussion under both the ESA's citizen-suit provisions and Administrative Procedure Act ("APA")-based claims analyzed the statute to discern if these petitioners raised concerns of the sort intended to be litigated under the ESA. The Court resolved this statutory and prudential question by finding that petitioners' interests were relevant to the ESA and hence they were within the statute's "zone of interests," whether their cause of action was based on the ESA's citizen-suit provision or on the APA. *See id.* at 161-74.

determinative effect."[69] The Court ultimately found that the biological opinion and the ESA process had a sufficient effect on the action agency to find the claims redressable.[70]

The *Bennett* Court did not, however, actually offer any explicit analysis of the relative standing roles of the Court and Congress. Instead, the Court's mode of analysis indicated an approach inconsistent with that advocated here. As shown below, however, in the subsequent *Akins* and *Laidlaw* cases, the Court took a notably different and more deferential approach to standing analysis and offered more explicit statements about why it felt such an approach was necessary.[71] *Bennett* approached Article III standing in a potentially problematic manner, but did not offer an explanation for its approach, as do these subsequent cases.

C. *Steel Company's Posture and Potential Expansion of Lujan*

In *Steel Company v. Citizens for a Better Environment*,[72] the Court denied standing to environmentally-motivated plaintiffs who sought imposition of penalties and limited injunctive relief against a company that had failed to file forms required by a federal toxic substances information disclosure statute known as the Emergency Planning and Community Right-to-Know Act ("EPCRA"). The case was problematic for the plaintiffs from the start due to the case's posture. The defendant had promptly filed the required forms once it received notice of the plaintiffs' intent to sue.[73] There was thus no ongoing violation of the statute when the complaint was filed.[74] In addition, the plaintiffs faced the problem of not seeking any potential damage award, because the underlying statute dictated that any penalties would go to the federal treasury.[75] The Court, in a series of somewhat disparate opinions focused on different constitutional and statutory reasoning, found that plaintiffs lacked standing due to a lack of redressability. There was no redressability because penalties would not flow to the plaintiffs, and because injunctive relief requiring legal

69. *See id*. at 169-70.
70. *See id*. at 170-71.
71. *See infra* Part I.D.
72. 523 U.S. 83 (1998).
73. *See id*. at 88.
74. *See id.*
75. *See id*. at 106.

compliance was not necessary given the company's belated, but pre-complaint, observance of EPCRA.[76]

Article III standing inquiries in the *Steel Company* majority opinion thus primarily focused on redressability issues. The opinion also contains, however, brief language shedding additional light on the relative roles of courts and Congress in assessing so-called "injury in fact" questions.[77] The Court briefly mentioned the lack of reporting as relevant to standing based not on some independent judicial weighing of the information's importance, but in a way that wrapped statutory interests and "injury" together. "We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA—or at least being deprived of it when one has a particular plan for its use—is a concrete injury in fact that satisfies Article III."[78] The Court then turned to its redressability analysis. This brief passage, however, appears yet again to call for analysis of the plaintiff's actual interest in the underlying dispute, but does not, for example, look for analysis of whether the absence of this information would lead to some other judicially recognized harm to an underlying interest completely independent of Congress's statutory framework.

The Court's redressability analysis is concededly in tension with this article's thesis, especially in its dismissal of ways penalties created by Congress might further statutory ends and thereby provide redress.[79] Much of the opinion, however, turns on its unusual posture of a case brought completely after a defendant had cured its statutory violation and no basis remained for believing a future violation was likely. Furthermore, the recent *Laidlaw* decision largely resolves questions about *Steel Company*'s reach in ways limiting the courts' standing gatekeeping role.

D. *The Akins and Laidlaw Retreat from Lujan*

Both *Akins* and *Laidlaw* adopted a standing approach that overtly gave paramount importance to legislative judgments and the statutory universe. Neither case reflected independent judicial assessment of the existence of a sufficient injury or redressability that was divorced from the underlying statutory frameworks. The *Akins* Court's focus on the underlying statute for purposes of standing

76. *See id.* at 101-09.
77. *See*, *e.g.*, *id.* at 94-95 .
78. *Id.* at 105.
79. *See id.* at 105-09.

analysis has led Professor Sunstein to view *Akins* as a major standing case, pulling an unsound line of cases back onto a sound footing.[80] In both *Akins* and *Laidlaw*, the Court retained the core *Lujan* assessment of whether the plaintiff had an actual stake or interest in the litigated matter.

In *Federal Election Commission v. Akins,*[81] the respondent's complaint alleged that the FEC had failed to require a lobbying group to disclose legally required information in accordance with the Federal Election Campaign Act of 1971.[82] The Court found that the respondents satisfied both prudential and Article III standing requirements.[83] The Court retained the "injury in fact" analysis prong, characterizing it as a "requirement that helps assure that courts will not 'pass upon . . . abstract, intellectual problems,' but adjudicate 'concrete, living contest[s] between adversaries."[84] The Court addressed this Article III question by linking its analysis of the petitioners' interests with interests made legally actionable by the statute: the "'injury in fact' that respondents have suffered consists of their inability to obtain information . . . the statute requires that AIPAC make public."[85] The Court stated that a plaintiff suffers an "injury in fact" when "the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."[86] The Court declined to follow the line of taxpayer standing cases requiring a "logical nexus" between the "status asserted and the claim sought to be adjudicated."[87] These cases were inapposite, in the Court's view, because in *Akins* "there is a statute which . . . does seek to protect individuals such as respondents from the kind of harm they say they have suffered . . . ."[88] Standing analysis was thus approached in a manner that explicitly wrapped this Article III constitutional question with judicial deference to the statutory universe of interests and incentives created by the legislature.

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80. *See* Sunstein, *supra* note 58.

81. 524 U.S. 11 (1998).

82. *See id.* at 19-26.

83. *See id.*

84. *Id*. at 20 (citing Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)).

85. *Id*. at 21.

86. *Id*. (citing Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989)).

87. *Id*. at 22 (citing as inapposite to the *Akins* setting, Flast v. Cohen, 392 U.S. 83, 102 (1968)).

88. *Id*.

Furthermore, the *Akins* Court's redressability discussion avoided the substantial judicial role apparently envisioned (or at least actually exercised) in *Bennett*. Rather than looking for some near-certain tangible changed result that would flow from the FEC's appropriate exercise of its authority on remand, the Court said that the agency on remand could reach an identical result, but that the respondent's claim was nevertheless redressable and traceable.[89] "[T]he courts . . . can 'redress' respondents' 'injury in fact'" and find "causation" even though the courts "cannot know" that the FEC would exercise its discretion in the way desired by respondents.[90] "Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by discretionary agency action generally have standing to complain that the agency based its decision upon an improper legal ground."[91] Hence, the *Akins* Court made agency conformity with legally required substance and process the touchstone for finding standing causation and redressability, not separate independent judicial assessment that the statutorily required criteria or process mattered.[92]

Laidlaw further continued the Court's overt return to giving the statutory universe a prominent, if not paramount role, in standing analysis. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* was in many respects a run-of-the-mill Clean Water Act violation case that was complicated by the defendant's apparent belated, post-complaint curing of the cause of its permit violations.[93] The court of appeals below questioned the sufficiency of the plaintiffs' environmental interests in the river into which the defendant had discharged, and it consequently found the case required dismissal, primarily on mootness grounds, once the defendant had cured its violations and the causes of those violations.[94] The *Laidlaw* Court rejected the lower court's approach and found that the plaintiffs had standing.[95] The posture of the case was significant to its outcome; in particular, the Court found compelling the existence of numerous post-complaint permit violations.[96]

89. *See id*. at 25.

90. *Id.* at 24-26.

91. *Id*. at 25.

92. *Id*. at 25-26.

93. 528 U.S. 167, 178-79 (2000).

94. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc. 149 F.3d 303, 306-07 (4th Cir. 1998).

95. *See* 528 U.S. at 173-74.

96. *See id*. at 176-78.

The *Laidlaw* Court emphatically rejected the defendant's argument and the appellate court's approach that had analyzed "injury in fact" by examining whether the plaintiffs could establish harm to the excessively polluted river that in turn injured the plaintiffs.[97] Instead, the seven justice majority stated that "[t]he relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff."[98] The Court justified this focus on the plaintiff's injury and on reasons courts cannot require additional proof of environmental harm by once again emphasizing the statutory framework: "[t]o insist upon the former [injury to the environment] rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits alleging noncompliance with a [Clean Water Act] permit."[99] The plaintiffs' somewhat weakly stated links to the polluted river were sufficient for Article III "injury in fact": "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the areas will be lessened' by the challenged activity."[100] The Court's emphasis was on the plaintiffs' stated actual interests in the environmental amenity protected by statute.

In portions of the *Laidlaw* opinion less salient to this article, the Court substantially cut back on the *Steel Company* redressability/deterrence discussion, finding that (at least with the post-complaint permit violations), penalties can serve a deterrent function.[101] The Court concluded that even with subsequent rectification of the underlying causes of the permit violations, plaintiffs' claim could be held redressable.[102] The Court's explanation for why these penalties sufficed to preserve the plaintiffs' standing and not render the case moot was again largely based on the Court's deference to legislative judgment. "Whether proscribed conduct is to be deterred [by a range of potential sanctions] is a matter within the legislature's

97. *See id*. at 180-88.

98. *Id*. at 181.

99. *Id*.

100. *Id*. at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972), and further citing Lujan v. Defenders of Wildlife, 504 U.S. at 562-63, which stated that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.").

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

102. *See id.* at 193-94 (remanding for further examination of mootness and redressability in light of allegations that the problem was cured, that the plant was now closed, but that the permit violator still had a active CWA permit).

range of choice."[103] The Court continued, "[t]his congressional determination [about the deterrent effect of penalties] warrants judicial attention and respect."[104] It therefore found, based substantially on notions of deference to legislative judgments, that penalties would both serve to abate current violations and prevent future ones.[105]

Hence, *Laidlaw, Sierra Club v. Morton,*[106] *Lujan v. National Wildlife Federation*[107] and the *Lujan* opinion discussed at length here (*Lujan v. Defenders of Wildlife)*, all share a standing approach that calls for analysis of a litigant's connection to an amenity protected or regulated by a statute's goals and process, or a litigant's stake in actions taken by regulators or regulated entities under the statutory framework. None of these cases (apart from language by Justice Scalia in *Lujan* that lacks majority support) looks for allegations sufficient to prove, either under the specific facts alleged or under the general statutory framework, that the amenity subject to the statutory framework (for example, receiving waters) would actually be tangibly affected in a different way if the alleged illegalities were corrected.

Akins and *Laidlaw* thus do much to return standing analysis to a sounder footing that gives appropriate weight to legislative judgments, with a corresponding affirmation that the courts have a lesser independent standing analysis role than was threatened by broad readings of *Lujan* and *Bennett. Laidlaw*, in particular, provides a sound framework, but the opinion perhaps missed a key opportunity to explain why judicial deference to legislative judgments remains important to standing analysis, even if courts must continue to ensure a plaintiff has a real "stake" in federal litigation. An analysis of the line of Supreme Court standing cases since *Lujan* makes readily apparent the erroneously expansive reading given to *Lujan* by the courts of appeals in *Magnesium Elektron* and in the initial panel decision in *Gaston*. After critiquing these two appellate cases and the re-

103. *Id.* at 187 (quoting Tigner v. Texas, 310 U.S. 141, 148 (1940)).

104. *Id.* at 185.

105. *See id.* at 185-89. *See also* Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 120 S. Ct. 1858, 1861-66. The *Vermont Agency qui tam* decision provided little discussion shedding light on how the "statutory universe" of goals and procedures influences standing analysis. Nonetheless, by rejecting the sufficiency of a bounty reward to justify standing, the Court yet again confirmed that mere conferral of a cause of action does not suffice to create standing. The Court failed to explain why its "assignee" theory of whistleblower standing sustained in this case would not also justify environmental "citizen suit" standing. *See also supra* note 8.

106. 405 U.S. 727 (1972); *see also* text accompanying note 59.

107. 497 U.S. 871 (1990); *see also* text accompanying note 60.

cent *en banc* reversal of the original *Gaston* panel decision, this article turns to fleshing out the missing explanatory step in *Laidlaw*.

E. *Lujan-plus: The Errors of Magnesium Elektron and Gaston*

Both the Third and Fourth Circuits' opinions on environmental standing in *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*[108] and *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*[109] can be characterized in fairly simple terms, emphasizing their factual and analytical commonalities. These opinions preceded the Supreme Court's ruling in *Laidlaw*, but even without *Laidlaw's* confirmation that their analysis would be rejected by the Supreme Court, these cases constituted an unsound expansion of *Lujan.* The more recent *en banc Gaston* opinion, issued shortly after the Supreme Court's *Laidlaw* decision, largely hews to the logic and implications of *Laidlaw* reviewed above.

Both cases involved conceded violations of the Clean Water Act that resulted in litigated citizen suits. In each case, defendants sought to defeat the plaintiffs' standing by arguing that due to the inability of the plaintiffs to trace the defendants' permit violations to particular discernible degradations of the excessively polluted receiving waters, the plaintiffs could not show an injury in fact that was traceable or redressable.[110] In essence, these pre-*Laidlaw* opinions revealed a mode of standing analysis in which the courts looked for evidence from which they could independently determine that legal violations made actionable by Congress actually resulted in what the courts found to be tangible "touch and feel" harm.[111]

The *Magnesium Elektron* court acknowledged that the CWA explicitly states that its purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[112] The court rejected the environmental plaintiffs' argument that this statutory goal allowed plaintiffs to sue to maintain a river's "pristine state."[113] The court saw itself as having to determine independently if there was "actual or threatened injury" to the environment, and, in

108. 123 F.3d 111 (3d Cir. 1997).

109. 179 F.3d 107 (4th Cir. 1999), *rev'd en banc,* 204 F.3d 149 (4th Cir. 2000).

110. *See* 123 F.3d at 116; 179 F.3d at 113.

111. *See* 179 F.3d at 120 (Wilkinson, J., dissenting) (criticizing the majority's approach as unnecessarily raising the bar for proof of injury in fact).

112. 123 F.3d at 119.

113. *Id*. at 120.

turn, to these plaintiffs.[114] The court acknowledged that in *Lujan* the plaintiffs "had no plausible connection to the situs of the injury," while plaintiffs before the *Magnesium Elektron* court "no doubt . . . use[d] the Delaware River."[115] Nevertheless, again and again, the Court stated that it must find on its own the presence of "actual, tangible injury to the River or its surroundings," even where plaintiffs were users of the River that was receiving illegal amounts of pollution and where Congress had made such violations actionable by citizens.[116] The court looked for proof of "increases in the River's salinity, or a decrease in the number of fish, or any other negative change in the River's ecosystem."[117] The court went so far as to applaud some of the defendant's permit violations, stating that some violations "actually benefitted the Creek's ecosystem" by adding nutrients to an area that was not "nutrient rich."[118]

In short, for the *Magnesium Elektron* court, the statute's explicit goal of "chemical, physical and biological integrity" was insufficient to make actionable pollution that by definition interfered with that integrity, albeit in ways difficult to establish as tangible harms.[119] The court approached the CWA with what is best viewed as the "fish tank environmentalist view." Regardless of the statute's "integrity" goal, under which rivers and creeks would naturally vary widely in their suitability for a particular species' habitat, the court decided it could measure benefit and harm on its own.[120] If added nutrients would render a particular portion of a river or creek a better fish tank, or a better environment for flourishing of other species, then by definition (according to the court), this was no harm at all.[121] Different legislative judgments or goals about "biological integrity," let alone different "integrity" goals that might be preferred by ecologists, were irrelevant to the *Magnesium Elektron* court's analysis. The court similarly found that alleged informational harms resulting from fail-

114. *See id*. For a critique of concepts of causation and a discussion of *Magnesium Elektron*, see Richard J. Pierce, Jr., *Causation in Government Regulation and Toxic Torts*, 76 WASH. U. L.Q. 1307, 1333-35 (1998).

115. 123 F.3d at 120.

116. *Id*. at 121.

117. *Id*.

118. *Id*. at 123.

119. *See id*. at 120.

120. *See id.*

121. *See id*. at 123.

ures to report as required by the CWA could not be the subject of citizen suits absent underlying environmental harm.[122]

The Fourth Circuit's original panel opinion in *Gaston* was arguably even more problematic than that in *Magnesium Elektron*. The *Gaston* court again faced a case with conceded CWA violations, but this time with plaintiffs alleging not only environmental and aesthetic impairments, but also economic impairments to their real property and businesses using the waters, as perceived economic values dropped in response to public revelation of the excessive pollution in the area waters.[123] Furthermore, testing of the excessive pollution at issue for toxicity concededly showed "observable effects" on test organisms.[124] The court, however, looked for proof that particular permit violations could be traced to particular harms to the receiving waters.[125] In the absence of such proof, the court found that the plaintiffs could not actually have suffered any injury in fact that was traceable to the defendant.[126] Judge Wilkinson, in dissent, characterized the majority as "encroach[ing] on congressional authority" by requiring "evidence that [the court majority] can touch and feel."[127]

In addition to ignoring the legislative goal and judgment that ecological "integrity" matters, both of these cases also failed to consider the repercussions if several polluters in aggregate could add illegal amounts of pollution with impunity from citizen suits. Furthermore, the courts both went well beyond *Lujan* in looking for "touch and feel" evidence of environmental harms even for plaintiffs who, unlike those in *Lujan,* were actual residents and users of areas in the vicinity of the excessively polluted waters. These cases preceded *Laidlaw*, but they are undoubtedly in significant tension with *Laidlaw's* statement that the "relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff."[128]

The *en banc* Fourth Circuit reversal of the pre-*Laidlaw Gaston* opinion approached standing in a manner much more deferential to congressional judgments and choices evident in the Clean Water Act's statutory framework. The unanimous Fourth Circuit empha-

122. *See id*. at 123-24.
123. *See Gaston*, 179 F.3d at 110.
124. *See id*. at 111.
125. *See id*. at 113-14.
126. *See id*.
127. *Id*. at 120 (Wilkinson, J., dissenting).
128. 528 U.S. at 181.

sized that a plaintiff's "sufficient personal stake" presented in a "concrete factual context" is the essence of standing analysis.[129] The courts' critical function in standing is to ensure the plaintiff is "among the injured," so as to "filter the truly afflicted from the abstractly distressed."[130] The *en banc* court explicitly addressed the separation of powers implications of a contrary standing approach that would allow courts to use standing frameworks to close courthouse doors where Congress intended that they be open. Noting the strict liability scheme under the CWA, the court stated that courts cannot "creat[e] evidentiary barriers to standing that the Constitution does not require and Congress has not embraced. In fact, the legislative branch has invited precisely the type of suit brought by [plaintiffs]. The judicial branch is not at liberty to impede its resolution on the merits."[131] The court easily found that the plaintiffs were not "roving environmental ombudsm[e]n" but were easily "differentiate[d] . . . from the general public."[132] The court rejected any requirement of proof of harm to the illegally polluted amenities, quoting *Laidlaw's* key statement that standing is not about "injury to the environment but injury to the plaintiff."[133] The court concluded that "[t]his case illustrates at heart the importance of judicial restraint" and hence refused to "thwart congressional intent" by requiring a type of proof not required by Congress.[134]

The concurring opinions largely conceded that the court's result was required by *Laidlaw*.[135] These concurrences are only worthy of note in their assertion that an opposite result would have been required under pre-*Laidlaw* cases and in their assertion that *Laidlaw* constituted a "sea change in constitutional standing principles."[136] In his concurrence, Judge Luttig characterized the majority opinion as reflecting a "comfortable, but mistaken, assumption that the Supreme Court's decisions prior to *Laidlaw* themselves dictated the conclu-

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129. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 153 (2000).

130. *Id*. at 153-54.

131. *Id*. at 156.

132. *Id*. at 157.

133. *Id*. at 160-61 (quoting Laidlaw, 528 U.S. at 181). The *Gaston en banc* court continued by stating that to "have standing hinge on anything more in a Clean Water Act case would necessitate the litigation of complicated issues of scientific fact that are entirely collateral to the question Congress wished resolved—namely, whether a defendant has exceeded its permit limits." *Id*. at 162.

134. *Id*. at 163.

135. *See id*. at 164-65.

136. *Id*. at 164 (Niemeyer, J., concurring).

sion" of the *en banc* court.[137] As suggested above in this article's analysis of the Supreme Court's standing jurisprudence from *Lujan* to the present, I believe that the concurring judges' assertions are in error.

The parts below further explain why the standing approach articulated in *Laidlaw* and further fleshed out in the Fourth Circuit's *Gaston en banc* opinion is appropriate and necessary in light of legislative supremacy values and the relative institutional competence of courts and legislatures to make judgments about harms and regulatory ends and means.

II. LEGISLATIVE SUPREMACY AND THE STANDING FRAMEWORK

Congressionally enacted statutes undoubtedly range from the purely symbolic, to the ineffective, to (at least on occasion) the effective.[138] Legislative goals also vary widely and are often difficult to discern. From the public choice perspective, most laws will reflect legislator or presidential attempts to attract votes or campaign contributions, as well as special interest rent seeking.[139] Laws also result from moments of political or societal ferment that lead to unusual degrees of public interest and legislator attention to that heightened citizen interest.[140] Public-spirited or perhaps opportunistic "political entrepreneurs" will sometimes seize on public interest or even lead the public in making an incipient societal issue worthy of legislative attention.[141]

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137. *Id*. at 165 (Luttig, J., concurring); *see also id*. (Hamilton, J., concurring) (criticizing how *Laidlaw* has "unnecessarily opened the standing floodgates").

138. *See generally* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990).

139. *See*, *e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991) (describing and critiquing public choice theories of law and politics); FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION AND POLITICAL EXTORTION (1997) (developing a strong public choice-based critique of legislators' monetary motivations for proposing legislative change); *see also* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) (discussing ways legislators act to enhance their reelection prospects).

140. *See*, *e.g.*, Christopher H. Schroeder, *Rational Choice Versus Republican Moment Explanations for Environmental Laws, 1969-73*, 9 DUKE ENVTL. L. & POL'Y F. 29 (1998) (suggesting that despite interest group theory predictions, strong citizen interest in the environment could explain first generation federal environmental laws).

141. For a discussion of entrepreneurial politics explanations of environmental laws, see William W. Buzbee, *Urban Sprawl, Federalism and the Problem of Institutional Complexity*, 68 FORD. L. REV. 57, 77-91, 128-31 (1999); E. Donald Elliott, et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326-29 (1985); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 65-70 (1992).

Environmental laws share and reflect this whole range of potential traits, from laws containing many provisions and goals that are little more than symbolic, to laws containing special interest-benefitting exceptions, to laws that have created massive societal benefits and costs. Based on recent regulatory reform debates that often focused on environmental laws, United States environmental statutes and their associated regulations and implementation actions have had massive effects on virtually all aspects of life in this country.[142] Any proposal to change the procedural requirements or substance of environmental laws leads to national political battles, as well as considerable associated campaigning and contribution activity by industry and environmental not-for-profits. These laws may be imprudently cost-ineffective to their critics or insufficiently rigorous to their supporters seeking a cleaner environment. However, unless one believes that politicians, industry, and environmental groups all engage in costly political activity merely for sport, it is logical to assume that these laws' substantive goals and procedural devices have real world effects. Indeed, one of the undisputed conclusions of political and academic critiques of efforts to add cost-benefit analysis requirements to environmental and risk regulation is that United States regulatory regimes have substantial aggregate effects.[143]

Discerning these laws' effects on the much smaller scale of individual violations of particular permits is far less easy. The targets of regulation make compliance decisions based on their sense of obligation to comply with the laws, their evaluation of compliance costs and the likelihood particular conduct will result in sanctionable violations, their evaluation of how pollution might result in adverse market evaluations or nuisance liability, and their views of how their workers and neighbors will react to their compliance record.[144] Many pollution permit violations will be difficult if not impossible to trace to particu-

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142. *See generally* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996).

143. *See* MCGARITY, *supra* note 142. For a review of the history and implications of efforts of the 104th Congress to enact a single metastatutory regulatory reform law, including a review of underlying arguments for such legislation and a critique of those arguments, see William W. Buzbee, *Regulatory Reform or Statutory Muddle: The "Legislative Mirage" of Single-Statute Regulatory Reform*, 5 N.Y.U. ENVTL. L.J. 298, 299-312, 313-17 (1996).

144. For a discussion of the U.S. EPA's enforcement history, see JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES (1995). For a more general discussion of regulatory enforcement policy and incentives, see EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982).

lar environmental harms. The faster and larger the receiving waters under the Clean Water Act, or the receiving air under the Clean Air Act, the more difficulty plaintiffs would have in proving the existence of resulting harms or pollution residues.

Hence, for litigants and courts seeking to assess the effects of particular compliance records under any regulatory regime, especially in areas such as environmental law or other bodies of risk regulation, confident assessment is difficult. The aggregate monetary and behavior-modifying effects of such laws are substantial, influencing levels of environmental pollution, government implementation and enforcement, citizen monitoring and litigation, and private sector compliance and pollution control efforts.[145] However, the ways particular litigation choices regarding permit violations will ripple across the regulatory terrain and modify stakeholder behavior is hard to discern. Nevertheless, each statute's regulatory framework, including both goals and means, reflects legislative judgments and changes incentives and probabilities that would have existed in the absence of such a statutory universe.[146]

A. *Standing, Statutory Purpose, and the Layers of Political Judgment*

One of the strange attributes of the standing jurisprudence of Justice Scalia is the considerable tension between his approaches to statutory interpretation and his rhetoric and rulings regarding citizen-suit standing. Echoing earlier scholarly suggestions of Judges Posner and Easterbrook,[147] Justice Scalia scorns "purposive" modes of statutory interpretation that try to resolve tough interpretive questions by looking at a statute's general purposes and merely seeking to further them. For Justice Scalia, the question is how far the legislature went in seeking to achieve a particular goal and by what means it sought to achieve that end: "Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what *means* (and hence to

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145. For further analysis of reasons courts lack the institutional competence to assess the general effects of a regulatory regime or to assess on a case-specific basis the effects of a particular alleged legal violation, see *infra* Part II.A.

146. *See* Sunstein, *What's Standing After* Lujan*?*, *supra* note 2 (characterizing most statutorily required procedures as changing incentives and probabilities rather than guaranteeing outcomes).

147. *See*, *e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59 (1988); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Richard A. Posner, *Statutory Interpretation–In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982).

what *length*) Congress pursued that purpose."[148] Consistent with economic views of the law emphasizing that procedural burdens and options influence regulatory outcomes, at least at the margins, Justice Scalia has noted the importance of congressional procedural devices to regulatory results: "one of the functions of procedure is to limit power—not just the power to be unfair, but the power to act in a political mode, or the power to act at all . . . . The degrees of activism and of political decision which the Congress expects from (or, more precisely, which the legislative struggle finally induces its divergent factions to accord to) [various agencies] may vary enormously–and so will the procedures which reflect those expectations."[149]

As reflected in these quotes, Justice Scalia has shown in other contexts a sensitivity to how legislative goals can be shaped and limited by procedural devices. Implicit in these statements is also at least a weak form of a legislative supremacy argument. A judiciary that seeks to enforce the substantive and procedural choices of the legislature, but avoids expanding on particular preferred statutory purposes or changing the procedural devices chosen, is showing fealty to the discernible legislative bargain manifest in a statute.[150]

In his standing jurisprudence, however, Justice Scalia reaches out and not only undercuts the citizen-suit device, one of Congress's chosen procedural means to further legislative ends, but also fails to acknowledge the multiple layers of politically accountable legislative and regulatory judgments that must precede any meritorious citizen-suit litigation.[151] No citizen plaintiff has even a chance of success on

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148. Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 726 (1995) (Scalia, J., dissenting).

149. Antonin Scalia, Vermont Yankee*: the APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 404-08 (1979); *see also* PETER STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 359-60 (9th ed. 1995) (excerpting and discussing *Vermont Yankee*).

150. In other contexts, Justice Scalia has noted the importance of legislative supremacy. *See*, *e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) (stating "[e]ven where a particular area is quite susceptible of clear and definite rules, we judges cannot create them out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided"). For a critique of Justice Scalia's jurisprudence and views on legislative supremacy, see William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1164, 1167 (1992) (referring to Justice Scalia's view that the legislature is "the preferred source of law" and stating that under his view judges cannot make law because they "lack electoral authority").

151. By referring to "political judgments" made manifest in statutes, implementing regulations, and ultimately permits, this article is not asserting that some anthropomorphized legislature with a common view ever actually exists. As well developed in both public choice literature and in "positive political theory," the most one can claim is that political actors have numerous

the merits unless a citizen suit builds off of just the kind of political judgments that Justice Scalia elsewhere argues deserve judicial respect. These layers of political judgment include, in most contexts, at least the following conditions precedent to citizen litigation.

If the citizen litigation is against a government agency for failures to comply with statutory mandates, such suits, at a minimum, must be rooted in an identifiable tension between a substantive or procedural statutory requirement and the alleged government illegality. Such a suit must also be brought in accordance with the terms of the enabling act or through Administrative Procedure Act (APA) causes of action. Citizen-suit provisions in environmental law contain several prerequisites to pursuing such litigation, including advance notice to the defendant as well as to other layers of government involved in that statute's enforcement.[152] In light of *Chevron U.S.A., Inc. v. Natural Resource Defense Council*'s[153] generally deferential framework for judicial review of agency statutory interpretations, a citizen suit or APA-based claim alleging an erroneous agency statutory interpretation is unlikely to succeed unless the agency has acted in a manner clearly inconsistent with statutory treatment of the "precise question at issue."[154]

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goals and that shifting coalitions will on occasion coalesce to create majorities or supermajorities sufficient to enact legislation or promulgate implementing regulations. The resulting statutory texts, regulations and permits constitute authoritative law in the forms recognized under our legal system. By passing through the crucible of these various types of political and judicially reviewable steps, they are derived from a concededly flawed but nevertheless politically representative process. *See*, *e.g.*, William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1992); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (1990); Matthew D. McCubbins, et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992). *See also* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation,* 149 U. PENN. L. REV. 171 (2000) (building on positive political theory approaches to criticize statutory interpretation methods relying on interstatutory language comparisons). For a symposium exploring the implications and attributes of Positive Political Theory, see Daniel A. Farber & Philip Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L J. 457 (1992). Professors Farber and Frickey define Positive Political Theory ("PPT") as "non-normative, rational-choice theories of political institutions." *Id*. at 462. PPT scholarship and theories focus upon how institutional settings influence political process and outcomes. *See id*. at 460-62.

152. *See* PERCIVAL, ET AL., *supra* note 18, at 1077-78.

153. 467 U.S. 837 (1984).

154. *See id.* at 842-43. For discussions of how *Chevron* deference is applied, see Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under* Chevron, 6 ADMIN. L.J. AM. U. 187 (1992); Thomas W. Merrill, *Judicial Deference to Executive Precedent*,

Where a suit is brought against a defendant violating a permit, many additional layers of political judgment underlie the citizen suit. In most environmental laws, particularly in the Clean Air and Water Acts, Congress first requires the EPA to measure the regulated industry's pollution control capabilities and, measured against additional benchmarks such as the nature of the pollutant, costs and benefits, the age of pollution sources, and possibly the environment receiving the pollution, determine presumptive required levels of pollution control for that category of polluter.[155] As Professor Farber recently explored, slippage from this goal of regulatory uniformity often occurs as one moves down the layers of delegated authority that translate regulatory standards into actual permit requirements.[156] Federal enforcers often hand over authority to state agencies, which then implement and enforce federal laws and regulations either to supplant the federal enforcer or as a condition for receipt of federal conditional federal spending.[157] States, in turn, fit those federal requirements into the body of state law and regulations and turn to subordinate state or local officials who engage in permit negotiations with individual sources.[158] Those permitting proceedings are themselves subject to further opportunities for public input as permit details are hammered out.[159] Illegality in the promulgation of federal regulations, state implementation of federally delegated programs, and permit procedures and substance, all can give rise to potential litigation should legislatively and administratively required substantive or procedural requirements be disregarded.

Only after all of these layers of political judgment have been exercised does a permitted polluter even become vulnerable to citizen suits for permit violations. All a citizen suit for a permit violation can

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101 YALE L.J. 969 (1992).

155. *See* Wendy E. Wagner, *The Triumph of Technology-Based Standards,* 2000 U. ILL. L. REV. 83. For Professor Krier's critical assessment of these "uniform" regulatory standards, see James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System–and Why It Matters*, 54 MD. L. REV. 1226 (1995); James E. Krier, *The Irrational National Air Quality Standards: Macro- and Micro-Mistakes*, 22 UCLA L. REV. 323 (1974).

156. *See* Daniel A. Farber, Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law, 23 HARV. ENVTL. L. REV. 297 (1999).

157. *See*, *e.g*., John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1193-1219 (1995) (analyzing state-federal interactions under delegated program structures in the Clean Air Act).

158. *See id*.

159. *See*, *e.g*., Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co., 735 F. Supp. 1404 (N.D. Ind. 1990) (discussing public notice requirements under federal law and "comparable" state laws).

do is seek to enforce the end result of these layers of political judgment.[160] Furthermore, only politically authorized penalties or injunctive relief can be obtained by a successful citizen litigant. Each of these layers of political judgment has already allowed for some slippage and dovetailing of federal goals to the particular priorities of each state and the capacities of each permitted pollution source.

Given these layers of politically accountable decisions and Justice Scalia's pre-Supreme Court immersion in the nuances of administrative law structures, one might expect his standing opinions to grapple with the implications of the many procedural and substantive political judgments that must precede any citizen suit. Instead, one finds rhetoric of mockery, judicial questioning of plaintiffs' motives, and second-guessing of the implicit legislative judgments in these regulatory statutes that compliance with permits, associated judgments in regulations and required process will make a difference. He neglects the reality of these many layers of politically accountable judgments that originate in legislative choices made law in statutes. His rhetoric appears to assume that citizens bringing such litigation are exercising only their own policy preferences.

In *Lujan,* for example, he mocks the reality of the plaintiffs' alleged connections to sites and endangered species that would be further threatened by United States funds.[161] In his plurality discussion of redressability, he questions if compliance with the Endangered Species Act's required process would matter anyway.[162] In *Laidlaw*, Justice Scalia partly explains his dissent based on his empirical assessment (based on a law review article's assertions) that "the availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing."[163] A scholarly response to the multiple layers of judicial second-guessing here is difficult. How does he know the civil penalties are disproportionate? If so, is that view of legislative choices of sanctions relevant to the Court's review of a plaintiff's standing? On what empirical data does

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160. *See*, *e.g*., Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993) (concluding that the Clean Water Act "permit shield" barred a citizen suit challenging discharges disclosed by a polluter but not made part of the polluter's pollution parameters addressed by its permit).

161. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992).

162. *See id*. at 568.

163. 528 U.S. 167, 209-10 (2000) (Scalia, J., dissenting).

he conclude that plaintiffs have massive bargaining power? Does that bargaining power exist (if at all) apart from the legal structures and many political judgments that wind their way down into particular permits? On what basis does Justice Scalia make the contestable assertion that environmental projects are forced upon reluctant defendants rather than embraced as a more palatable means to soften potential sanctions?[164] He calls plaintiffs suing under a congressionally created cause of action a "self-appointed mini-EPA."[165] In *Laidlaw*, he also calls for a standing framework that would require litigants to establish that in the particular factual setting of their case, a court's intervention would actually deter harms to these particular plaintiffs, rather than focusing on the incentives created by the regulatory framework violated by the defendant.[166]

In the Supreme Court's majority opinion in the *Steel Company* case, Justice Scalia's rhetoric and assumptions about litigants' motivations are even more remarkable.[167] He refers to the plaintiffs as motivated by desire for "psychic satisfaction."[168] Responding to Justice Stevens' dissent, he characterizes plaintiffs' claim as lacking the requisite request for tangible relief and further opines on plaintiffs' motivations: such suits are "most often inspired by the psychological smart of perceived official injustice, or by the government-policy preferences of political activists."[169] This statement is notable for its utter lack of acknowledgement that, whatever Justice Scalia's views of the environmental laws, such plaintiffs could not even begin such a case, let alone succeed on the merits, unless these plaintiffs' claims accorded with all of the preceding political judgments converted into law and made actionable. If the legislature's declarations are supreme under our system of government, then the harshest criticism one can level against such citizen litigants is that their policy prefer-

164. *See* David A. Dana, The Uncertain Merits of Environmental Enforcement Reform: The Case of Supplemental Environmental Projects, 1998 WIS. L. REV. 1181.

165. *Laidlaw*, 528 U.S. at 209.

166. Justice Scalia stated in his dissent that plaintiffs can only show deterrence if they can show "the marginal increase in Laidlaw's fear of future penalties that will be achieved by adding federal penalties for Laidlaw's past conduct." *Id.* at 208 (Scalia, J., dissenting). He argued standing should have been denied because "it is entirely speculative whether it will make the difference between these plaintiffs' suffering injury in the future and plaintiffs' going unharmed." *Id.* Despite these plaintiffs' connection to the illegally polluted areas and Congress' statutory framework, Justice Scalia referred to plaintiffs' deterrence argument as "entirely farfetched" and "speculative." *See id.*

167. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).

168. *Id.*

169. *Id.* at 104.

ences are in accord with those made into statutory law and made actionable through numerous judicially-reviewable regulatory steps that ultimately translate into a permit-based scheme.

The appellate decisions in *Magnesium Elektron* and the pre-*Laidlaw* opinion in *Gaston* are extensions of the strains of logic and approach of Justice Scalia in *Lujan* and *Steel Company*, as well as in his dissent in *Laidlaw*. If one examines the pre-*Laidlaw* and *Akins* standing law as a trajectory, then these cases are understandable as further movement in the direction sought by Justice Scalia. As a matter of faithful adherence to precedent, however, these most activist judicial statements by Justice Scalia embraced in *Magnesium Elektron* and the original panel opinion in *Gaston* arise in portions of opinions where concurring or dissenting opinions rendered his active second-guessing of legislative judgments a minority Court view. The critically important Justice Kennedy *Lujan* concurrence left Justice Scalia in the Court minority on Congress' ability to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ."[170]

Laidlaw's seven-justice majority emphasized the importance of judicial deference to legislative judgments about actionable citizen claims, the deterrent effects of penalties, and conceptions of mootness.[171] Standing analysis has once again been focused on the reality of a litigant's stake in a dispute, as made actionable under a regulatory regime creating a statutory universe of goals and incentives. Furthermore, for a substantial majority of the Court, analysis of a regulatory regime's goals and effects appears to be made at the level of examination of the regime's general effects; contrary to Justice Scalia's preferred approach, a Court majority does not, in the standing context, look for case-specific proof of deterrence or redress.

B. *Regulatory Effectiveness and the Courts' Limited Institutional Competence*

Laidlaw's explicitly stated deference to political judgments about statutory goals and process is appropriate not merely because of the centrality of legislative supremacy under the United State's legal system. From a comparative institutional analysis perspective, courts are simply unsuited to evaluate independently either general legislative

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170. 504 U.S. at 580 (Kennedy, J., concurring).

171. *See* 528 U.S. at 189.

judgments about statutory goals and process or the significance of particular legal breaches and associated litigation.[172]

Courts presented with regulatory disputes and a standing challenge see no more than a sliver of the regulatory process out of which litigation arises. Even if a court can figure out the exact series of regulatory actions surrounding the legal challenge, the court has no way to know what underlying procedural devices and political relationships actually are significant to ultimate regulatory choices. In *Lujan,* for example, Justice Scalia only garners plurality support for a redressability framework requiring case-specific proof of how agency consultations about federal funding might influence the agency with final decision-making authority or influence funding recipients. The lack of majority support here makes sense in light of institutional limitations that preclude courts or litigants from ever knowing how highly political and discretionary decisions might be influenced by statutorily required consultations or other deliberative processes.

For example, the Army Corps of Engineers ("COE") and the United States Environmental Protection Agency ("EPA") share responsibility for reviewing applications for "dredge and fill" wetland permits under the Clean Water Act.[173] Both agencies are required to enforce the statute's presumption against wetlands development, but the EPA is only authorized to intervene and veto such permits where the EPA concludes there are significant adverse environmental effects. The COE shares such authority, yet the EPA, perhaps due to its more exclusively environmental focus contrasted with the COE's

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172. Comparative institutional analysis examines the relative capabilities of institutional actors that might be given a particular policy goal or task. Such analysis builds off of public choice and positive political theory approaches to legal analysis, but generally reflects a less pessimistic view of the capabilities of politics to address societal problems. *See*, *e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994). For further refinements of Komesar's analysis and assessments of comparative institutional analysis, see Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 L. & SOC. INQUIRY 959 (1997) (reviewing Komesar's book and offering additional elements for assessing institutional competence); Edward L. Rubin, *Institutional Analysis and the New Legal Process,* 1995 WIS. L. REV. 463 (reviewing Komesar's book as well); *see also* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996) (tracing the development of comparative institutional analysis and arguing for "closely analyzed institutional context" instead of overly simplified analytical approaches).

173. For discussions of "dredge and fill" permits and the shared COE and EPA turf, see Michael C. Blumm & D. Bernard Zalecha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695 (1989); Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the § 404 Program*, 20 ENVTL. L. REP. 10,212 (June 1990).

focus on engineering, appears to evaluate environmental effects with greater rigor than the COE.[174] However, assessments of these different agencies' political cultures and how those proclivities will play out in the setting of a particular permit dispute are difficult for the courts and litigants to make. This overlapping COE and EPA turf nevertheless reflects a legislative judgment that such a dual role might make a difference.

Yet another example of a scheme where courts logically should not require case-specific proof of changed outcomes is under the National Environmental Policy Act (NEPA). NEPA has again and again been construed merely to force analysis of environmental effects rather than mandate particular environmental results.[175] How that analytical process will in any particular environmental dispute influence agency choices is unpredictable. A high-stakes government action subject to NEPA analysis will often set in motion pitched political battles, delay the agency action, and trigger scrutiny under other bodies of law.[176] How such a multi-stage, multiple stakeholder political process will play out will often be impossible to forecast or prove.

For the same reasons early political science "pluralist" analysis erred in assuming that overt political contacts reflect political power and in underplaying the clout of interests that may never need to seek an audience with politicians, it would be erroneous to assume that only regulatory participation that can be recorded influences outcomes.[177] Because high stakes discretionary government actions are subject to polycentric pressures, where different stakeholders wield disparate amounts of clout, and where that clout may be felt without any overt stakeholder action, the regulatory "record" that can be

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174. *See* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1254-57 (1995) (discussing COE and EPA § 404 roles and reasons EPA's role keeps "the system focused on its statutory goals").

175. For a comprehensive gathering of materials about NEPA and its construction by the courts, see JOHN E. BONINE & THOMAS O. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION (1992).

176. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 810, 817-18, 849-56 (2d ed. 1992).

177. For a summary of "pluralist" assumptions, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 49-51 (2d ed. 1995). For exploration of reasons that analysis of politician-citizen contacts will misapprehend political power and likely political results, see generally PAUL E. PETERSON, CITY LIMITS (1981) (exploring limitations of pluralist political science in understanding issues local governments actually are willing to address and exploring structural reasons that redistributive policies are particularly uncommon at the local level).

placed before a court will necessarily be incomplete.[178] Case-specific assessment of whether an alleged legal breach will influence a regulatory or environmental outcome is simply beyond judicial competence.

As Professor Fletcher argued in 1988, standing questions about causation and redressability "should be asked at the level of general rule formation, rather than at the level of predictions made in individual cases."[179] Judicial review of allegations of illegality that starts with the assumption that legislative and regulatory choices will always have some kind of influence is consistent with conceptions of legislative supremacy and acknowledgment of limited judicial competence. The *Laidlaw* and *Akins* Courts' enforcement of required regulatory process, despite uncertainties about the effects of that enforcement, accords with that limited competence.[180]

III. "INJURY IN FACT," A POSSIBLE SCALIA RATIONALE, AND THE IMPORTANCE OF PRECEDENT

Carrying the previous parts' analysis further, it is difficult to justify holding onto any aspect of the "injury in fact" requirement as fleshed out in Justice Scalia's *Lujan* majority opinion. The overall legislative bargain includes, as part of its substantive and procedural package, citizen-suit enforcement. That citizen-suit threat modifies the behavior of all stakeholders under the environmental laws. Standing barriers to citizen litigation will alter the dynamics of law implementation and regulation promulgation, long before any participant in that process even decides to commence litigation.[181] The legal arsenal of each regulatory participant influences the clout that stakeholder will wield in the process of statutory implementation. To undercut the viability of citizen suits for any litigants other than those who can show some tangible "injury in fact" weakens citizen power in

178. *See* Peter L. Strauss, *Revisiting* Overton Park*: Political and Judicial Controls Over Administrative Action Affecting the Community*, 39 UCLA L. REV. 1251 (1992) (exploring the complex and lengthy political skirmishing leading up to regulatory decisions to allow building of a highway extension through a Memphis park and questioning the Supreme Court's judicial review assumptions in such a "polycentric" political setting).

179. Fletcher, *supra* note 1, at 242.

180. *Lujan's* footnotes 7 and 8 similarly are consistent with the view that courts cannot and should not look for outcome specific results of discretionary agency process. *See supra* notes 40-45 and accompanying text. As Professor Pierce observed in his critique of *Lujan*, a standing framework that requires case-specific judicial assessment of the significance of particular legal breaches empowers courts and changes standing doctrine from a doctrine rooted in conceptions of judicial restraint into "a judicially enforced doctrine of congressional restraint." Pierce, *supra* note 2, at 1199.

181. *See* Buzbee, *supra* note 33, at 768-73.

all aspects of statutory implementation and will likely modify regulatory outcomes. If regulatory targets can make more realistic litigation threats, risk averse agencies and their administrators are likely to give greater weight to the targets' concerns than to those of beneficiaries who will find it harder to be heard in court.[182] As well-argued in the past by Professors Fletcher, Nichol, Pierce and Sunstein, logic argues strongly for standing analysis tied merely to the presence or absence of a statutorily conferred cause of action.[183]

At this time, however, too many decisions have embraced at least a limited "injury in fact" framework to justify its wholesale abandonment. Much of *Lujan* has been limited in subsequent exposition of its rationale, but in case after case, a majority of the Supreme Court has looked to see if a citizen litigant is in some sense different from the general public in her interest in the litigation. The focus on physical proximity to threatened resources, on a litigant's common law-like harms resulting from government action or permit violations, or on evidence of a plaintiff's actual stake in or enjoyment of an amenity for its environmental or aesthetic features all make sense as devices to ensure litigants have a genuine stake in the controversy placed by Congress before the courts. This core of *Lujan* appears to be a durable precedent. To recall the musical analogy mentioned above, this strain or theme is consistent across the last decade of standing cases, and in fact can be traced back to 1970s standing analyses, but *Laidlaw* provides an important resolution of this period of competing standing approaches.

Retaining this core of standing analysis also at least slightly addresses Justice Scalia's inchoate Article II standing strain of logic. In *Lujan* and in his dissent in *Laidlaw*, he explains his approach as in part rooted in his view of Article II's mandate that the President "take care that the Laws be faithfully executed."[184] Under this view, the more enforcement decisions are handed to citizens, the more this portion of the President's constitutionally assigned role is undercut. Yet Justice Scalia nowhere argues that citizens can never enforce statutory law. In dozens, if not hundreds, of administrative law cases heard by Judge and later Justice Scalia, litigants sued under enabling act or APA-based provisions, in essence enforcing statutory law by seeking to ensure the laws are "faithfully executed." Even in his recent articulations of Article II's role in standing analysis, Justice

182. *See id*.
183. *See* sources cited *supra* note 2.
184. U.S. CONST. Art. II, § 3.

Scalia gives no indication that he now rejects the constitutional validity of such run of the mill public law litigation. Furthermore, in Justice Scalia's majority opinion regarding qui tam suit whistleblower standing, he concludes that such citizens can have standing under an "assignee" theory under which "the United States' injury in fact suffices to confer standing upon [the whistleblower]."[185]

Justice Scalia's Article II argument is thus best understood as requiring that only a limited subset of citizens be allowed to supplant (or perhaps more accurately, complement) the executive branch's enforcement role. Only citizens who show that they have a distinctive stake in the litigation such that they are different from mere bystanders or the general public can be heard in federal courts.[186] By retaining the more limited injury in fact test that this article suggests is all that remains of *Lujan*, Justice Scalia's Article II concerns are also addressed.

CONCLUSION

All statutes reflect diverse legislative goals and an array of procedural devices to move toward attainment of those statutory goals. Standing analysis appears now to require a judicial affirmation that a citizen empowered by a statutory cause of action actually has an interest in litigation setting her apart from the general public. This aspect of "injury in fact" analysis, that looks for a litigant to have a so-called "concrete interest," is unlikely to change. This "concrete interest" can include the environmental and aesthetic interests of the litigant, provided that she has a connection to an amenity or interest affected by a legal violation.

This article has shown, however, that despite this substantial judicial standing role, a consistent but concededly contested strain in standing jurisprudence has now been decisively resolved by *Laidlaw,* fashioning a standing framework that gives great weight to the statutory universe of goals, process and incentives. *Laidlaw* does not constitute a judicial about face, but instead is consistent with a line of logic embraced by a Supreme Court majority from *Lujan* to the present.

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185. Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 120 S. Ct. 1858, 1863-64 (2000). On statutory grounds, however, the Court concluded that Stevens, the whistleblower, could not sue a state for *qui tam* liability. *See id*. at 1865-71.

186. I acknowledge the assistance of Professors Michael Axline, William Funk and Craig Oren for engaging in an environmental law professors' internet debate that refined my understanding of how Justice Scalia's Article II analysis fits into his standing jurisprudence.

This *Laidlaw* resolution is not only consistent with a durable strain in previous opinions, but is also appropriate in light of conceptions of legislative supremacy and the limited institutional competence of courts. Standing law does not empower courts to assess independently the effects of a particular statutory breach. Instead, courts must show deference to legislatively determined goals and means. *Laidlaw* may have only partially articulated why such deference is appropriate, but the case does much to affirm that a solid Supreme Court majority believes in the necessity of a more restrained judicial standing role under our Constitution. Especially in analyzing the "traceability" and "redressability" prongs of standing, courts should heed explicit or implicit legislative judgments about interests created or protected and about the importance of legislatively chosen procedures for furthering those interests. After *Laidlaw*, courts engaged in standing analysis cannot second-guess legislative goals and the effects of the procedures chosen to achieve those goals.