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Is Standing Law Or Politics

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IS STANDING LAW OR POLITICS?

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Many students of the law suspect that something other than black-letter legal doctrines are affecting the outcomes of cases. Political scientists, on the other hand, look unabashedly to the ideological and political leanings of the judiciary as an indicator. In this Article, Professor Richard Pierce applies recent scholarship on judicial decisionmaking to the doctrine of standing. He reviews five recent Supreme Court standing cases supporting the validity of the political approach, followed by a statistical analysis of circuit court standing cases. In light of the development of the modern law of standing, Professor Pierce then suggests ways to make standing a legal doctrine instead of a political one.

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INTRODUCTION

Standing law answers the question of who can obtain access to the courts. The law of standing can be described in at least two ways. A lawyer would describe it with reference to legal doctrines: A plaintiff has standing to sue a defendant if the defendant caused the plaintiff to suffer a legally cognizable and judicially redressable injury, and the plaintiff is asserting an interest within the zone of interests arguably protected or regulated by the statute that is the basis for the plaintiff's complaint on the merits.[1] A political scientist, however, would describe the "law" of standing using a completely different frame of reference. To a political scientist, standing depends on the degree of congruence between the political and ideological goals of the plaintiff and those of the judges who answer the standing question.[2] A political scientist would predict, for instance, that a liberal judge would give standing to environmentalists, employees, and prisoners, but not to banks, while a conservative judge would give standing to banks, but not to environmentalists, employees, or prisoners. A political scientist would find the lawyer's doctrinally-based description of standing law humorous.[3] To a political scientist, legal doctrines are merely tools that judges use to further their political and ideological agendas.

As a lawyer and a law professor, I would like to be able to describe and to teach standing with reference to legal doctrines. The Supreme Court is making that task increasingly difficult. When I teach an area of law, one of my primary goals is to provide law students with a means of predicting the decisions of courts. Thus, for instance, I would like to introduce them to the doctrinal elements of standing law—injury, causation, redressability, and zone of interests—and to provide them with a doctrinal algorithm that they can use to predict judicial decisions with a reasonable degree of confidence. Unfortunately, I have concluded that I would be doing them a grave disservice if I took that traditional legal approach in teaching the law of standing. They can predict judicial decisions in this area with much greater accuracy if they ignore doctrine and rely entirely on a simple description of the law of standing that is rooted in political science: judges provide access to the courts to individuals

1. For a detailed discussion of standing law, see 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 16.1-.16 (3d ed. 1994).

2. *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 253 (1997).

3. *See id.* at 264.

who seek to further the political and ideological agendas of judges. Of course, I still must introduce my students to the doctrines courts use to rationalize their political decisions. I can teach the doctrines, however, only as a vocabulary lesson. The doctrinal elements of standing are nearly worthless as a basis for predicting whether a judge will grant individuals with differing interests access to the courts.

Five Supreme Court decisions issued between 1991 and 1998 illustrate the accuracy of the political scientist's description of the law of standing. In those cases, the Court resolved standing disputes applicable to environmentalists (two cases),[4] employees,[5] prisoners,[6] and banks.[7] In each case, the Justices divided either five-to-four or six-to-three on the standing issue. In each case, the "votes" of the Justices were as easy to predict as the votes of their ideological counterparts in the legislature.[8] Liberals voted to grant access to the courts to environmentalists, employees, and prisoners, but not to banks. Conservatives voted to grant access to banks, but not to environmentalists, employees, or prisoners. Of course, in each case, all the Justices claimed to reach their politically preferred result through objective application of legal doctrines. The applicable doctrines are so malleable, however, that it is impossible to avoid the inference that the Justices manipulated the doctrines to rationalize their politically preferred results.[9] Circuit courts are increasingly following the Supreme Court's lead in this area of law.[10]

In Part I of this Article, I describe the political scientist's method of explaining and predicting judicial decisions and the growing body of scholarly writing in which political scientists test their result-oriented hypotheses. In Part II, I describe and critique the five recent Supreme Court decisions that support the political scientist's approach and refute the lawyer's approach to explaining and predicting judicial decisions that grant or deny access to the courts.

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4. *See infra* text accompanying notes 70-75, 100-02 (discussing *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998)); *infra* text accompanying notes 61-69, 94-99 (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

5. *See infra* text accompanying notes 76-82, 103-06 (discussing *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991)).

6. *See infra* text accompanying notes 49-60, 92-95 (discussing *Lewis v. Casey*, 518 U.S. 343 (1996)).

7. *See infra* text accompanying notes 83-89, 107-11 (discussing *National Credit Union Administration v. First National Bank & Trust Co.*, 118 S. Ct. 927 (1998) ("*NCUA*")).

8. For a discussion of the votes in the cases, see *infra* notes 90-91 and accompanying text.

9. For a discussion of the malleability of the doctrines, see *infra* text accompanying notes 92-127.

10. *See infra* text accompanying notes 112-23.

In Part III, I report the results of an empirical study of all circuit court decisions issued between January 1, 1993, and May 1, 1998, in which a court decided whether an environmental petitioner had standing. Republican judges denied standing to environmental petitioners almost four times as often as did Democratic judges. That pattern of decisionmaking demonstrates the high degree of doctrinal malleability and result-oriented doctrinal manipulation that characterizes modern standing law. Part IV provides a brief historical overview of standing law and questions the textual, historical, and prudential bases for much of the modern law of standing. In Part V, I suggest a variety of ways of changing the doctrines that govern standing that have the potential to make standing part of the legal system, rather than a part of the political system that happens to be implemented by life-tenured politicians who wear robes. I conclude with an optimistic postscript.

I. A POLITICAL SCIENTIST'S PERSPECTIVE ON JUDICIAL DECISIONMAKING

In a 1997 article in *Northwestern Law Review*,[11] Frank Cross urged legal scholars to become familiar with, and to grapple with, the rapidly growing body of empirical research on judicial decisionmaking published by political scientists. These researchers use a wide variety of databases to test the hypothesis that judicial decisionmaking is entirely a function of each judge's political and ideological perspective—what Cross calls "the attitudinal model."[12] Cross described and critiqued this body of work. Not surprisingly, he identified methodological, contextual, and interpretive problems that limit the explanatory and predictive value of the research that supports the validity of the attitudinal model.[13] He concluded that the attitudinal model has much greater predictive power in some contexts, for example Supreme Court interpretations of the Constitution, than in others, such as district court resolutions of contract disputes.[14]

Even after he subjected the studies of political scientists to a rigorous critique, Cross concluded that the attitudinal model has considerable explanatory and predictive power.[15] He offered credible and well-supported findings that the attitudinal model can explain

11. *See* Cross, *supra* note 2, at 252-54.
12. *Id.* at 252.
13. *See id.* at 265-309.
14. *See id.* at 285-94.
15. *See id.* at 309.

and predict as much as 90% of judicial decisionmaking in important contexts,[16] such as constitutional law, and that the attitudinal model has about twice the explanatory and predictive power of the doctrinally based legal model in the same contexts.[17] Cross also determined that administrative law is a context in which the attitudinal model is particularly easy to test, and in which it has unusually strong explanatory and predictive power.[18]

A few legal scholars have analyzed and tested the attitudinal model in the administrative law context. In a 1995 article in *Duke Law Journal*,[19] Sidney Shapiro and Richard Levy analyzed the political science studies of the attitudinal model and concluded that the studies support instead a two-part model of judicial behavior.[20] In their model, all judicial decisions have two components—"craft" and "outcome."[21] *Ceteris paribus*, all judges prefer an outcome that coincides with their political and ideological preferences; at the same time, all judges also prefer to write an opinion that evidences good craftsmanship, an opinion that relies on accurate description and application of precedents and doctrines. In many cases, of course, there is no tension between a judge's craft and outcome preferences. When the two conflict, however, Shapiro and Levy concluded that judicial behavior will depend on two variables. First, a judge is more likely to choose outcome over craft in a public law context with significant ideological implications than in a private law context that does not raise controversial public policy issues.[22] Second, a judge is more likely to choose outcome over craft in a decisionmaking context in which the applicable doctrines are relatively indeterminate.[23] It follows that judges are particularly likely to choose outcome over craft in administrative law decisionmaking, and that the Supreme Court can have a powerful effect on judges' choices between craft and outcome by announcing administrative law doctrines with varying degrees of determinacy. The Shapiro and Levy model captures the results of the many political science studies of judicial decisionmaking better than any other model that has been suggested to date. It also has been corroborated by two recent studies of judicial

16. *See id.* at 310.
17. *See id.* at 275.
18. *See id.* at 293-94.
19. *See* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995).
20. *See id.* at 1053.
21. *Id.* at 1053-56.
22. *See id.* at 1056-58.
23. *See id.* at 1058-62.

decisionmaking in the administrative law context.

In a 1998 article in *Yale Law Journal*,[24] Frank Cross and Emerson Tiller reported the results of their statistical analysis of 170 administrative law cases decided by the District of Columbia Circuit Court of Appeals between 1991 and 1995. They found that the policy preferences of the members of panels had a significant effect on their decisionmaking.[25] Specifically, they found that a panel was 31% more likely to uphold an agency action if the policy preferences of the members of the panel were consistent with the policies implicit in the agency action.[26] Cross and Tiller also found that a politically unified panel was almost twice as likely as a politically divided panel to decide a case in a manner consistent with the judges' policy preferences.[27] Cross and Tiller referred to this result as the "whistleblower effect": The existence of one member of the panel whose policy preferences differ from those of the majority creates an implicit threat of a dissent that tends to deter the majority from manipulating or distorting precedents and doctrines to achieve an outcome that is consistent with their policy preferences.[28]

The first finding in the Cross and Tiller study supports the Shapiro and Levy belief that judges decide administrative law cases based in part on their policy preferences for a particular outcome. The second finding supports the Shapiro and Levy belief that judges attempt to advance simultaneously their often conflicting craft and outcome goals. The value a judge places on craftsmanship is attributable, at least in part, to the judge's reputational interest.[29] Most judges do not want to be known as result-oriented manipulators

24. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

25. *See id.* at 2171.

26. *See id.*

27. *See id.* at 2172.

28. *See id.* at 2173-74. Coincidentally, the whistleblower effect documented by Cross and Tiller identifies one of the potential social values of legal and political science studies of judicial decisionmaking. Scholars can play a role similar to that of a dissenting judge. By blowing the whistle on result-oriented manipulation of precedents and doctrines, we can hope to have some slight effect on judicial decisionmaking, that is, by deterring judges from departing from craft norms to obtain outcomes they prefer, and by identifying and supporting adoption of doctrines that reduce the potential for that pattern of judicial behavior.

Judge Harry Edwards has provided a plausible alternative explanation for the pattern of decisionmaking detected by Cross and Tiller. He explains the pattern with reference to the D.C. Circuit's strong tradition of collegial decisionmaking. *See* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1357-62 (1998).

29. *See* Shapiro & Levy, *supra* note 19, at 1055.

of doctrines and precedents. It follows that a judge will choose craft over outcome more frequently in the presence of a judge who is likely to write a dissenting opinion that exposes weaknesses in the craftsmanship of the majority opinion.

In a 1997 article in *Virginia Law Review*,[30] Richard Revesz published the results of his multivariate study of 250 D.C. Circuit decisions issued between 1970 and 1994 in which the court resolved disputes with respect to the validity of actions taken by the Environmental Protection Agency ("EPA"). Revesz's findings provide powerful support for both the political scientist's attitudinal model and for the more complicated Shapiro and Levy model. Revesz found that a judge's ideology correlated with her pattern of decisionmaking during all periods of time studied and in most contexts.[31] In fact, Revesz concluded that methodological limitations embedded in the prior political science studies of judicial decisionmaking caused such studies to "underestimate the extent of ideological voting."[32] Ideology was an extraordinarily powerful predictor of judicial behavior when a panel resolved a procedural dispute raised by a regulatee during the period between 1987 and 1993.[33] During that period of time, panels consisting of two Democrats and one Republican reversed the EPA in only 2% to 13% of cases.[34] In stark contrast, panels consisting of two Republicans and one Democrat reversed the EPA in 54% to 89% of cases.[35] Thus, the likelihood that the EPA would be reversed by a D.C. Circuit panel on procedural grounds during the period between 1987 and 1993 was almost entirely dependent on the political composition of the panel that decided the case. These findings support the attitudinal model and the outcome preference component of the Shapiro and Levy model.

Another contrasting pair of findings in the Revesz study support the relative doctrinal determinacy component of the Shapiro and Levy model. Revesz found a difference between the reversal rates of Democratic and Republican panels in the context of industry challenges to the procedural adequacy of EPA decisions during the

30. *See* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).
31. *See id.* at 1738-43.
32. *Id.* at 1766.
33. *See id.* at 1763.
34. *See id.*
35. *See id.*

period between 1987 and 1993.[36] He found no statistically significant difference between the decisions of Republican and Democratic panels during that period, however, in the context of industry challenges to the substantive validity of EPA actions.[37] Revesz concluded that this stark difference supported his "hierarchical constraint hypothesis": A circuit court is less likely to engage in ideological decisionmaking when its decision is likely to be reviewed by the Supreme Court.[38] Revesz noted that the Supreme Court is much more likely to review a circuit court decision resolving a substantive issue than a circuit court decision resolving a procedural issue.[39] I am skeptical that the hierarchical constraint hypothesis alone can explain such a disparity between substantive and procedural decisionmaking. While the probability that the Court will reverse a procedural decision is certainly lower than the probability that it will reverse a substantive decision, even the probability that it will reverse a substantive decision is tiny.

There is an alternative explanation for the enormous substantive/procedural disparity Revesz found. As Revesz noted, the substantive decisions involved judicial review of EPA's statutory interpretations,[40] while the procedural decisions involved application of the "hard look" doctrine to EPA's reasoning in support of its decisions.[41] Thus, the substantive decisions were governed by the *Chevron* doctrine,[42] while the procedural decisions were governed by the *State Farm* doctrine.[43] The *Chevron* doctrine has proven to be relatively determinate and to produce relatively predictable results in circuit court decisionmaking.[44] By contrast, the *State Farm* doctrine is

36. *See id.* at 1749, 1763.
37. *See id.* at 1747-48.
38. *Id.* at 1767.
39. *See id.* at 1750.
40. *See id.* at 1747-48.
41. *See id.* at 1769-70.
42. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). For a detailed discussion of *Chevron*, see 1 DAVIS & PIERCE, *supra* note 1, at §§ 3.1-.6.
43. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). For a detailed discussion of *State Farm*, see 1 DAVIS & PIERCE, *supra* note 1, at § 7.4.
44. Several scholars have found that the Supreme Court has a tendency to manipulate the *Chevron* doctrine to further ideological goals. *See, e.g.*, Linda R. Cohen & Mathew L. Spitzer, *Solving the* Chevron *Puzzle*, LAW & CONTEMP. PROBS., Spring 1994, at 65; Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995).

a caricature of an indeterminate doctrine.[45] It is infinitely malleable. Thus, Revesz's findings provide powerful support for the relative doctrinal determinacy component of the Shapiro and Levy model of judicial decisionmaking.

The findings of the Cross and Tiller study and the Revesz study support the model that Shapiro and Levy constructed on the basis of their analysis of the many prior studies reported in the political science literature. That model predicts a pattern of judicial decisionmaking that is largely determined by the ideologically-based outcome preferences of judges in any context in which judicial decisions have significant ideological implications and in which the applicable doctrines are relatively indeterminate. Standing may be the best single example of a context in which judicial decisions have significant ideological implications. If environmentalists or banks cannot obtain access to the courts, for instance, they cannot prevail in even the most meritorious legal action. Thus, judicial decisions that deny standing to environmentalists, for example, will reduce significantly their ability to influence decisionmaking by federal agencies[46] and will reduce significantly the level of enforcement of environmental rules.[47] That result would delight most of my fellow Republicans and dismay most Democrats. In order to see whether standing meets the relative indeterminance criterion in the Shapiro and Levy model, it is necessary to identify and analyze the doctrines applicable to standing. I begin that task with a discussion of the five

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All of the studies of circuit court applications of *Chevron*, however, have found either no ideological manipulation of the doctrine or relatively modest manipulation. Revesz found no evidence of ideological manipulation of *Chevron*. *See* Revesz, *supra* note 30, at 1747-48. Cross and Tiller found a 31% difference between the manner in which Democrats and Republicans apply *Chevron*. *See* Cross & Tiller, *supra* note 24, at 2171. That difference is much lower, however, than the massive difference Revesz found in applications of the *State Farm* doctrine. *See* Revesz, *supra* note 30, at 1763. Orin Kerr found that Democrats and Republicans differed with respect to their applications of *Chevron* in only a few specific substantive contexts. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 36-40 (1998).

45. *See* Edwards, *supra* note 28, at 1362-63; Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 8 (1991); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 300-13.

46. For an explanation of the relationship between standing and influence on agency policy-making, see 3 DAVIS & PIERCE, *supra* note 1, at § 16.11.

47. Congress has authorized "any person" to bring an action to enforce most environmental rules, *e.g.*, 16 U.S.C. § 1540(g) (1994), but the Court has relied on standing as a vehicle to limit severely the parties who can bring such enforcement actions. *See infra* text accompanying notes 61-75.

standing cases in which the Supreme Court Justices divided along ideological lines between 1991 and 1998.

II. FIVE RECENT SUPREME COURT DECISIONS

The "black letter" law of standing can be stated in a single sentence. A plaintiff has standing if he has suffered a legally cognizable and judicially redressable injury caused by the allegedly illegal conduct of the defendant, and the plaintiff is attempting to further an interest that is arguably within the zone of interests to be protected or regulated by the statute or constitutional provision at issue.[48] The Court attributes the injury requirement to the case or controversy clause of Article III of the Constitution, while the zone of interests test is a product of statutory interpretation. The apparent simplicity of the law of standing disappears quickly, however, upon reading the dozens of Court opinions that interpret and apply each of the elements of the doctrine. I concentrate initially on the opinions issued in five cases decided between 1991 and 1998. The first three cases focused on the nature of a judicially cognizable and redressable injury, while the last two focused on the zone of interests test.

In *Lewis v. Casey*,[49] the Court decided what qualifies as an injury sufficient to confer on a prisoner standing to argue, on the merits, that a prison administrator is violating the prisoner's constitutional right to access to the courts by failing to maintain an adequate law library.[50] Twenty-two inmates alleged that they suffered injuries attributable to a variety of inadequacies in the law library at the Arizona state prison.[51] The five-Justice majority held that only one of the prisoners had suffered a judicially cognizable injury.[52] The majority concluded that a prisoner is injured by an inadequacy in a prison law library only if the inadequacy caused the prisoner to be unable to pursue a non-

48. *See* 3 DAVIS & PIERCE, *supra* note 1, at §§ 16.1-.16. The five recent cases I use to illustrate the malleability of modern standing law and the Justices' tendency to manipulate that body of law to further their political and ideological agendas are broadly representative of the more than 100 standing cases the Court has decided during the last two decades, as many scholars have demonstrated. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

49. 518 U.S. 343 (1996).

50. *See id.* at 349.

51. *See id.* at 346.

52. *See id.* at 358.

frivolous legal claim related to his conviction or to the conditions of his confinement.[53]

The concurring Justices criticized the majority for emphasizing standing rather than the merits[54] and for establishing an unduly demanding test for standing.[55] The concurring Justices noted that the majority's test for standing requires a prisoner to prove that he lost the opportunity to pursue an otherwise meritorious claim because of a particular arguable law library deficiency as a prerequisite for judicial consideration of the adequacy of that particular characteristic of the library.[56] Thus, a prisoner would have standing to challenge the adequacy of a library that does not include Supreme Court opinions only if he can first persuade a court that he would have a decent chance of prevailing if he had known of the existence of a Supreme Court decision to which he had no access. The concurring Justices saw no justification in Article III to require a court to determine that a legal dispute is probably meritorious as an essential prerequisite to reaching the merits of the dispute;[57] they thought it enough that a dispute " 'will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' "[58] The majority responded by acknowledging that the standard urged by the concurrence would have satisfied the requirements for standing as recently as 1968.[59] The majority referred to subsequent cases, however, in which the Court announced the much more demanding " 'actual injury' " test it expanded and applied in *Lewis*.[60]

In *Lujan v. Defenders of Wildlife*,[61] a six-Justice majority held unconstitutional as applied the citizen suit provisions that Congress included in the Endangered Species Act ("ESA")[62] and a score of other environmental statutes.[63] This case was the first time in which

53. *See id.* at 351-55.

54. *See id.* at 393 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Thomas filed a separate concurrence on different grounds. *See id.* at 364 (Thomas, J., concurring).

55. *See id.* at 398-402 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

56. *See id.* at 399 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

57. *See id.* at 401 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

58. *Id.* at 398-99 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting Flast v. Cohen, 392 U.S. 83, 101 (1968)).

59. *See id.* at 353 n.3.

60. *Id.*

61. 504 U.S. 555 (1992).

62. 16 U.S.C. § 1540(g) (1988).

63. *See Defenders of Wildlife*, 504 U.S. at 573-78.

the Court had relied on standing as the basis to hold a statute unconstitutional.[64] The majority held that two individuals would not suffer any judicially cognizable and redressable injury attributable to U.S. government decisions to provide financial support for two large projects that would have adverse effects on the habitats of two endangered species.[65] The individuals had professional interests in studying the endangered species, had visited their habitats in the past, and planned to make similar visits in the future.[66] The existence of a four-Justice plurality opinion and two concurring opinions creates difficulties in interpreting the majority decision.[67] All six Justices who comprised the majority found one fatal defect in the plaintiffs' attempts to prove injury. By testifying only that they planned to visit the habitat of the endangered species " 'in the future,' " they had failed to prove an " 'imminent' " injury.[68] The three Justices who dissented on the standing issue characterized the plurality opinion as "a slash-and-burn expedition through the law of environmental standing."[69]

In *Steel Co. v. Citizens for a Better Environment*,[70] a six-Justice majority again relied on standing as the basis for holding citizen suit provisions of environmental statutes unconstitutional as applied. The majority held that Article III precludes a court from entertaining a suit to enforce an environmental statute in the context of a "wholly past" violation,[71] even when the plaintiff has suffered a judicially cognizable injury attributable to the violation. The majority concluded that the plaintiff's injury was not redressable because any fine would go to the government, rather than to the plaintiff, and because an injunction cannot redress a past injury.[72]

The three Justices who dissented on the standing issue questioned the legitimacy of the majority's reliance on lack of redressability as the basis for holding a statute unconstitutional.[73] The dissenting Justices noted that the Court introduced redressability into

64. *See* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1172 (1993).

65. *See Defenders of Wildlife*, 504 U.S. at 562-78.

66. *See id.* at 563-64.

67. *See* Pierce, *supra* note 64, at 1171-74.

68. *Defenders of Wildlife*, 504 U.S. at 564; *id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment).

69. *Id.* at 606 (Blackmun, J., dissenting).

70. 118 S. Ct. 1003 (1998).

71. *Id.* at 1017-20.

72. *See id.* at 1020.

73. *See id.* at 1027 (Stevens, J., concurring in the judgment).

its standing jurisprudence only twenty-five years before and that it had never relied solely on the lack of redressability of an injury as the basis to deny standing.[74] The dissenting Justices also argued that a fine imposed for a past violation of a statute would provide the plaintiffs redress in the form of a reduction of the risk that the defendant would violate the statute in the future.[75]

In *Air Courier Conference of America v. American Postal Workers Union*[76] and *National Credit Union Administration v. First National Bank & Trust Co.* ("*NCUA*"),[77] the Court relied on statutory interpretation to deny standing to employees and to grant standing to banks. In *Air Courier Conference*, a six-Justice majority held that postal employees lacked standing to obtain review of a decision allowing competitors of the Postal Service to perform services that previously could be performed only by the Postal Service, even though the employees suffered injury-in-fact attributable to that decision in the form of lost jobs and lost wages.[78] The majority held that the employees did not fall within the zone of interests protected by the Private Express Statutes,[79] statutes that confer a legal monopoly on the Postal Service. They found no evidence in the language or legislative history of the statute "that Congress intended to protect jobs with the Postal Service."[80] Instead, "the congressional concern was . . . with the receipt of necessary revenues for the Postal Service."[81] The majority held that the absence of evidence of congressional intent to benefit the plaintiffs was fatal to their attempt to obtain access to the courts.[82]

In *NCUA*, a five-Justice majority held that banks had standing to obtain review of a decision that allowed a credit union to expand its membership.[83] The majority concluded that the interests of banks fell within the zone of interests protected by the Federal Credit Union Act,[84] even though "there is no evidence that Congress . . . was at all

74. *See id.* at 1027-28 (Stevens, J., concurring in the judgment).
75. *See id.* at 1029 (Stevens, J., concurring in the judgment).
76. 498 U.S. 517 (1991).
77. 118 S. Ct. 927 (1998).
78. *See Air Courier Conference*, 498 U.S. at 524-30.
79. 18 U.S.C. §§ 1693-1699 (1994); 39 U.S.C.§§ 601-606 (1994).
80. *Air Courier Conference*, 498 U.S. at 524-25.
81. *Id.* at 525-26.
82. *See id.* at 524-25. Three concurring Justices criticized the majority for addressing a "hypothetical standing question" when a statute clearly precluded review of the decision in any event. *Id.* at 531 (Stevens, J., concurring in the judgment).
83. *See* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S. Ct. 927, 933-38 (1998).
84. 12 U.S.C. §§ 1511-1795k (1994). The provision at issue in the case was 12 U.S.C.

concerned with the competitive interests of commercial banks, or indeed at all concerned with competition."[85] The majority distinguished *Air Courier Conference* as a case in which employees were denied standing because they did not suffer an injury directly attributable to competition,[86] even though the Court did not even address that issue in *Air Courier Conference*.[87] The four dissenting Justices demonstrated what the majority implicitly conceded—the statute was not intended to protect banks from credit unions.[88] The dissenting Justices criticized the majority for using reasoning that "eviscerates the zone of interests requirement."[89]

The first notable characteristic of the opinions in these five cases is the strong convergence between the ideological preferences of the Justices and their voting patterns.[90] A political scientist with no knowledge of the law of standing would have had no difficulty predicting the outcome of each case and predicting thirty-one of the

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§ 1759 (1994) (current version at 12 U.S.C.A. § 1759 (West Supp. 1999)).

85. *NCUA*, 118 S. Ct. at 936-37.

86. *See id.* at 938.

87. In *Air Courier Conference*, the majority noted: "The District Court found that the Unions had satisfied the injury-in-fact test .... This finding of injury was not appealed. The question before us, then, is whether the adverse effect ... is within the zone of interests." *Air Courier Conference*, 498 U.S. at 524.

88. *See NCUA*, 118 S. Ct. at 945-47 (O'Connor, J., dissenting).

89. *Id.* at 940 (O'Connor, J., dissenting).

90. In *Lewis v. Casey*, 518 U.S. 343 (1996), Justices Stevens, Souter, Ginsburg, and Breyer voted to grant standing to the prisoners, *see id.* at 393-403 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment), while Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas voted to deny standing to all but one of the prisoners, *see id.* at 360. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), Justices Blackmun, Stevens, and O'Connor voted to grant standing to the environmentalists, while Chief Justice Rehnquist and Justices White, Scalia, Kennedy, Souter, and Thomas voted to deny standing to the environmentalists, *see id.* at 556-57. In *Steel Co.* v. *Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), Justices Stevens, Souter, and Ginsburg voted to grant standing to the environmentalists, *see id.* at 1021 (Stevens, J., concurring in the judgment), while Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Thomas, and Breyer voted to deny standing to the environmentalists, *see id.* at 1008. In *Air Courier Conference*, Justices Stevens, Marshall, and Blackmun saw no need to express a view on the employees' standing, *see Air Courier Conference*, 498 U.S. at 531 (Stevens, J., concurring in the judgment), while Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, and Souter voted to deny the employees standing, *see id.* at 530. In *NCUA*, Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and Ginsburg voted to grant standing to the bank, *see NCUA*, 118 S. Ct. at 938, while Justices O'Connor, Stevens, Souter, and Breyer voted to deny standing to the bank, *see id.* at 940 (O'Connor, J., dissenting). I classify Chief Justice Rehnquist and Justices White, Scalia, Kennedy, and Thomas as conservatives and Justices Marshall, Blackmun, Stevens, Ginsburg, and Breyer as moderate to liberal. Justices O'Connor and Souter are the least ideological Justices; a political scientist would not be able to predict their votes in standing cases based solely on their ideological preferences.

thirty-three votes cast by Justices with clear ideological preferences, based solely on his knowledge of the ideological preferences of the Justices. Conservative Justices voted to provide banks access to the courts and voted to deny access to prisoners, employees, and environmentalists. With only two mild surprises, moderate to liberal Justices voted to grant access to the courts to prisoners, employees, and environmentalists, and voted to deny access to banks.[91] This level of predictive accuracy—94%—is at least as good as the accuracy with which a political scientist can predict the votes of members of the House or Senate. The accuracy of the political scientist's outcome predictions—100%—is even more impressive. It is far greater than the level of accuracy any lawyer could attain by relying solely on his knowledge of the law of standing to predict the outcome of the five cases. The applicable legal doctrines were, and are, far too malleable to use as the basis for predicting the outcome of the five standing disputes the Court resolved.

In order to test the accuracy with which a lawyer could have predicted the Supreme Court's standing decisions, it is necessary to construct a hypothetical lawyer who probably has no real-world counterpart. This hypothetical lawyer has an encyclopedic knowledge of the law of standing, but she has no knowledge of the political and ideological preferences of the members of the Supreme Court. Such a lawyer would have experienced great difficulty predicting the outcome of the five standing disputes.

A politically naive lawyer would have found it a challenge to predict the outcome of the standing dispute resolved in *Lewis v. Casey*.[92] The Court had not previously applied standing law in the context of a prisoner's right to access to the courts, so there was no precedent directly on point. It had, however, vacillated with respect to the broader issue that was determinative of the outcome in *Lewis*. The Court sometimes had asked the injury-in-fact question in broad, probabilistic terms, and it sometimes had asked that question in narrow, particularized terms. Thus, for instance, in its many decisions holding that a firm has standing to challenge a decision to allow another firm to compete with it, the Court consistently has taken a

91. The only votes that I found surprising on ideological grounds were those of Justice Breyer against standing for the environmentalists in *Steel Co.* and by Justice Ginsburg for standing for the bank in *NCUA*. In neither case was the surprising vote determinative of the outcome. In *Steel Co.*, the majority did not need Justice Breyer's vote to prevail. In *NCUA*, Justice Ginsburg's surprising vote for the banks was offset by the decisions of both of the non-ideological Justices—O'Connor and Souter—to vote against the banks.

92. 518 U.S. 343 (1996); *see also* text accompanying notes 49-60 (discussing *Lewis*).

broad, probabilistic approach. It is enough for the plaintiff firm to prove that the challenged decision has some potential to reduce the revenues of firms like the plaintiff firm.[93] The plaintiff certainly is not required to undertake the much more daunting task of proving that it would lose "particular" revenues as a result of the challenged decision or that its loss was "imminent." Yet, in its then-recent decision in *Lujan v. Defenders of Wildlife*,[94] the Court had required proof of a near certain particularized and imminent injury in a case where a plaintiff sought to challenge a violation of an environmental statute.[95] A politically naive lawyer would have no basis for predicting which of these approaches to the injury element of standing doctrine the Court would apply to prisoners. Of course, a legally naive political scientist would not be handicapped by the lawyer's awareness of the two conflicting lines of precedent. He would simply predict—accurately—that the conservative Justices would find a way of greatly limiting prisoners' access to the courts.

The outcome of *Defenders of Wildlife* also would have surprised a politically naive attorney. In its 1986 decision in *Japan Whaling Ass'n v. American Cetacean Society*,[96] the Court held that plaintiffs "undoubtedly . . . alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting."[97] There was no hint that the plaintiffs would have to prove that their future whale-watching plans were "imminent" in order to satisfy the injury-in-fact test. Moreover, the Court had never before relied on standing as a basis to hold a statute unconstitutional.[98] In fact, it had relied heavily on statutes as a basis for resolving many standing disputes.[99] The politically naive lawyer would have predicted erroneously that Defenders of Wildlife would be held to have standing.

The politically naive lawyer would have fared a bit better in attempting to predict the outcome of the standing dispute in *Steel*

93. *See, e.g.*, Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 394-403 (1987); Investment Co. Inst. v. Camp, 401 U.S. 617, 620-21 (1971); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154-56 (1970); Pierce, *supra* note 64, at 1174-75; *infra* text accompanying notes 212-15 (discussing broad approach).

94. 504 U.S. 555 (1992).

95. *See id.* at 560; *see also supra* text accompanying notes 61-69 (discussing *Defenders of Wildlife*).

96. 478 U.S. 221 (1986).

97. *Id.* at 231 n.4.

98. *See* Pierce, *supra* note 64, at 1177-82.

99. *See* 3 DAVIS & PIERCE, *supra* note 1, § 16.8, at 50-53.

Co.[100] He probably would have characterized the case as a toss-up. By the time the Court decided *Steel Co.*, it was clear that a court could rely on standing to hold a statute unconstitutional.[101] On the other hand, no decision had previously relied on the lack of redressability of a judicially cognizable injury caused by the defendant as the basis for holding a statute unconstitutional. The prior cases in which redressability played a role involved situations in which the Court also concluded either that the plaintiff did not suffer a judicially cognizable injury or that the defendant did not cause the plaintiff's injury.[102]

The politically naive lawyer almost certainly would have predicted erroneously that the plaintiffs would be held to have standing in *Air Courier Conference*.[103] It seems intuitively obvious that allowing private firms to perform functions that previously were performed exclusively by the Postal Service would cause injury-in-fact to postal workers. Indeed, the government conceded that the postal workers met the injury-in-fact test. The only dispute was with respect to the results of application of the zone of interests test. In its most recent prior opinion applying that test—its 1987 opinion in *Clarke v. Securities Industry Ass'n*[104]—the Court had emphasized that "the test is not meant to be especially demanding" and that "there need be no indication of congressional purpose to benefit the would-be plaintiff."[105] *Clarke* held that a party would flunk the test only if its "interests are so marginally related or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit."[106] Thus, a politically naive lawyer would have predicted inaccurately that the Court would hold that postal workers had standing to challenge a decision that would cost them jobs and overtime pay.

Of course, the hypothetical attorney then would have relied on *Air Courier Conference* as the basis for an erroneous prediction that

100. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998); *supra* notes 70-75 (discussing the case).

101. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577-78 (1992); *supra* notes 61-69 (discussing the case).

102. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39-42 (1976); Linda R.S. v. Richard D., 410 U.S. 614, 616-19 (1973).

103. *See* Air Courier Conference of Am. v. American Postal Workers Union, 498 U.S. 517 (1991); *supra* notes 78-82 (discussing the case).

104. 479 U.S. 388 (1987).

105. *Id.* at 399-400.

106. *Id.* at 399.

banks would not be held to have standing in *NCUA*.[107] In *Air Courier Conference*, the majority described the zone of interests test as requiring a determination of congressional intent to benefit the would-be plaintiffs. Thus, it said: "We must inquire then, as to Congress's intent in enacting the [Private Express Statutes] in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes."[108] The Court's holding that the postal workers lacked standing was based on its conclusion that there was no evidence that Congress intended to benefit postal workers when it enacted the statute that protects the Postal Service from competition.[109] It logically follows that banks would not have standing to obtain review of an action taken under the Federal Credit Union Act, since there was no evidence that Congress intended to benefit banks, or to protect them from competition, when it passed that statute. Yet, three of the same Justices who joined the majority opinion denying standing in *Air Courier Conference* based on absence of evidence of legislative intent to protect postal employees joined an opinion granting standing on the basis that absence of legislative intent to protect banks was irrelevant in *NCUA*.[110] They disingenuously distinguished *Air Courier Conference* as a case in which the Court denied standing on the basis that the petitioners did not suffer a judicially cognizable injury—an issue that was not even before the Court in *Air Courier Conference*.[111]

III. A STUDY OF CIRCUIT COURT DECISIONS

The foregoing analysis of recent Supreme Court standing decisions demonstrates that the doctrines that purport to govern standing disputes are sufficiently malleable to allow the Justices to use them as tools to further their ideological agendas. It does not necessarily follow, however, that the doctrines are so malleable that they are susceptible to result-oriented manipulation by circuit courts. There are at least two differences between Supreme Court decisionmaking and circuit court decisionmaking that render hazardous any attempt to extrapolate from one decisionmaking

107. *See* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S. Ct. 927 (1998); *supra* notes 83-89 (discussing *NCUA*).

108. *Air Courier Conference*, 498 U.S. at 524.

109. *See id.* at 524-26.

110. Chief Justice Rehnquist and Justices Scalia and Kennedy were members of the majority in both *NCUA* and *Air Courier Conference*. *See NCUA*, 118 S. Ct. at 930; *Air Courier Conference*, 498 U.S. at 518.

111. *See NCUA*, 118 S. Ct. at 938; *Air Courier Conference*, 498 U.S. at 524.

context to the other: The Supreme Court tends to decide more difficult cases than circuit courts, and the Supreme Court alone has the power to change doctrines. Both of these differences suggest the likelihood that the votes of the Justices are more likely to be consistent with their outcome preferences than are the votes of circuit court judges.

In order to determine whether circuit court judges manipulate standing doctrines to obtain outcomes they prefer, I read the opinions issued in each of the thirty-three cases in which a circuit court decided whether an environmental plaintiff had standing during the period between the Court's decision in *Defenders of Wildlife* in 1992 and May 1, 1998.[112] During that five and one-half year period, circuit

112. I selected environmental cases on the assumption that the general political and ideological leanings of judges would be clear in this area: Conservative judges are less likely than liberal judges to grant standing. The following describes my search methodology. I began by conducting a Westlaw search of the CTA database on May 14, 1998, using: DA(AFTER 1-1-1993) & "LUJAN V. DEFENDERS OF WILDLIFE" & STANDING. I then eliminated the irrelevant cases, the cases without reported opinions, two cases in which all judges held that plaintiffs had standing to raise one issue but not to raise another issue, and the votes of district judges sitting by designation. The appointing administration's party was used to determine the political affiliation of each judge. The resulting cases were: *Animal Legal Defense Fund, Inc. v. Glickman*, 130 F.3d 464 (D.C. Cir. 1997) (1 Democrat votes yes; 2 Republicans vote no), *rev'd*, 154 F.3d 426 (D.C. Cir. 1998) (en banc), *cert. denied*, 67 U.S.L.W. 3438 (U.S. Apr. 19, 1999) (No. 98-1059); *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron*, 123 F.3d 111 (3d Cir. 1997) (1 Republican votes yes; 2 Republicans vote no); *Davis v. Philadelphia Housing Authority*, 121 F.3d 92 (3d Cir. 1997) (2 Republicans vote yes; 1 Republican votes no); *Keith v. Volpe*, 118 F.3d 1386 (9th Cir. 1997) (1 Democrat and 2 Republicans vote yes); *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065 (9th Cir. 1997) (1 Democrat and 2 Republicans vote yes); *Reytblatt v. United States Regulatory Commission*, 105 F.3d 715 (D.C. Cir. 1997) (2 Democrats and 1 Republican vote yes); *Sierra Club v. Thomas*, 105 F.3d 248 (6th Cir. 1997) (1 Democrat and 1 Republican vote yes), *vacated sub nom. Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665 (1998); *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) (2 Democrats and 1 Republican vote yes); *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445 (10th Cir. 1996) (1 Democrat and 2 Republicans vote yes); *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996) (1 Democrat and 2 Republicans vote no); *Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) (en banc) (4 Democrats vote yes; 7 Republicans vote no); *Louisiana Environmental Action Network v. Browner*, 87 F.3d 1379 (D.C. Cir. 1996) (3 Republicans vote no); *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996) (1 Democrat and 2 Republicans vote yes); *Inland Empire Public Lands Council Ass'n v. Glickman*, 88 F.3d 697 (9th Cir. 1996) (1 Democrat and 2 Republicans vote no); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (3 Democrats vote yes); *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881 (8th Cir. 1995) (3 Democrats vote yes); *Humane Society of the United States v. Babbitt*, 46 F.3d 93 (D.C. Cir. 1995) (1 Democrat and 2 Republicans vote no); *National Wildlife Federation v. Espy*, 45 F.3d 1337 (9th Cir. 1995) (2 Democrats and 1 Republican vote yes); *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995) (1 Democrat and 2 Republicans vote yes); *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995) (2 Republicans vote yes); *Animal League Defense Fund, Inc. v.*

courts denied standing to environmental plaintiffs in 29% of cases, but there was a large disparity in outcomes depending on each judge's political affiliation. Republican judges voted to deny standing to environmental plaintiffs in 43.5% of cases, while Democratic judges voted to deny standing to environmental plaintiffs in only 11.1% of cases. In other words, a Republican judge was almost four times as likely as a Democratic judge to vote to deny an environmental plaintiff standing during the period January 1, 1993, to May 1, 1998. The disparity among D.C. Circuit judges was even larger. Republican judges voted to deny standing to environmental plaintiffs in 79.2% of cases, while Democratic judges voted to deny standing to environmental plaintiffs in only 18.2% of cases. I was able to reject the hypothesis that decisionmaking in standing cases is not influenced by a judge's political affiliation at the 99% confidence level.[113]

One of the cases in the sample illustrates particularly well both the indeterminacy of the applicable doctrines and the strong tendency of judges to engage in ideologically driven doctrinal manipulation in standing cases. In *Florida Audubon Society v. Bentsen*,[114] the en banc D.C. Circuit divided seven-to-four with respect to a standing issue. As so often is the case, the vote was on straight party lines. Seven Republicans voted to deny an environmental plaintiff standing, while four Democrats voted to grant standing.[115] The petitioners in the case sought review of a determination by the Secretary of the Treasury that ETBE, a gasoline additive, was eligible for a large tax credit.[116]

Espy, 29 F.3d 720 (D.C. Cir. 1994) (1 Democrat and 2 Republicans vote no); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346 (9th Cir. 1994) (1 Democrat and 2 Republicans vote yes); *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994) (3 Republicans vote no); *Animal League Defense Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994) (3 Republicans vote no); *Alaska Center for the Environment v. Browner*, 20 F.3d 981 (9th Cir. 1994) (1 Democrat and 2 Republicans vote yes); *Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994) (2 Democrats and 1 Republican vote yes); *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300 (9th Cir. 1994) (3 Republicans vote yes); *Natural Resources Defense Council, Inc. v. Texaco Refining & Marketing*, 2 F.3d 493 (3d Cir. 1993) (3 Republicans vote yes); *Seattle Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993) (2 Democrats and 1 Republican vote yes); *Portland Audubon Society v. Babbitt*, 998 F.2d 705 (9th Cir. 1993) (2 Democrats and 1 Republican vote yes); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568 (9th Cir. 1993) (2 Republicans vote yes); *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 534 (9th Cir. 1993) (2 Democrats and 1 Republican vote yes); *Moreau v. Federal Energy Regulatory Commission*, 982 F.2d 556 (D.C. Cir. 1993) (3 Republicans vote yes).

113. I used both the chi-square test and the binomial test.

114. 94 F.3d 658 (D.C. Cir. 1996) (en banc).

115. Judges Sentelle, Silberman, Williams, Ginsburg, Henderson, Randolph, and Buckley voted to deny standing, while Judge Rogers along with Chief Judge Edwards and Judges Wald and Tatel dissented. *See id.* at 661.

116. *See id.* at 662.

They submitted detailed affidavits, expert testimony, and reports that attempted to demonstrate two types of injuries attributable to the Secretary's decision: injuries to the enjoyment of use of wildlife habitats and injuries to drinking water.[117] One petitioner was a resident of Minneapolis. She submitted a detailed affidavit, accompanied by numerous studies and supported by expert testimony, in which she purported to establish the following causal sequence: (1) the tax credit will induce increased demand for ethanol, a corn derivative; (2) farmers near Minneapolis will respond to that increased demand by increasing their use of pesticides and fertilizer in order to increase their corn yield; and (3) as a result, the concentrations of pesticides and fertilizer will increase both in the animal habitats she uses and in her drinking water.[118]

The seven-judge majority held that the causal chain was too long and too uncertain to support a finding that the Secretary's action would cause "particularized injury" to any petitioner.[119] The majority also seemed to impose a virtually unattainable burden of proof on the petitioners. The petitioners had not established a sufficient causal relationship because they "ha[d] not demonstrated that *individual* corn ... farmers in these areas will affirmatively respond to the tax credit by significantly increasing production."[120] It should be noted that the D.C. Circuit does not require petitioners to prove the actions of individuals in order to establish standing in non-environmental cases. It has recently rejected imposition of such a requirement as part of its competitive injury doctrine.[121] In the view of the Republican members of the court, an environmentalist must prove particularized injury directly attributable to agency action, while a corporation need prove only a generalized, probabilistic, and indirect relationship between the agency action and the injury.

The lengthy opinion of the four dissenting judges in *Florida Audubon Society* describes the extensive and detailed evidence tendered by the petitioners to establish each of the links in the causal chain.[122] The dissenting judges expressed the view that petitioners had demonstrated a causal relationship between the agency action

117. *See id.*; *id.* at 677-78 (Rogers, J., dissenting).

118. *See id.* at 677-84 (Rogers, J., dissenting).

119. *See id.* at 663-72.

120. *Id.* at 667 (emphasis added).

121. *See* Bristol-Myers Squibb Co. v. Shalala, 91 F.3d 1493, 1497-99 (D.C. Cir. 1996); *see also* Louisiana Energy & Power Auth. v. Federal Energy Regulatory Comm'n, 141 F.3d 364, 367 (D.C. Cir. 1998) (stating that under the competitive injury doctrine, a plaintiff need not prove specific and particularized injury).

122. *See Florida Audubon Soc'y*, 94 F.3d at 677-84 (Rogers, J., dissenting).

and two types of particularized injury to the petitioner who was a resident of Minneapolis. The dissenting judges engaged in well-supported criticism of the extraordinary burdens imposed by the majority:

> The irony of the rule announced by the majority today is that it "in essence . . . require[s] that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." The opinion . . . imposes so heavy an evidentiary burden . . . to establish standing that it will be virtually impossible to bring a [National Environmental Policy Act] challenge to rulemakings with diffuse impacts.[123]

We are now in a position to apply the Shapiro and Levy model of judicial decisionmaking in the context of decisions with respect to standing. Shapiro and Levy posit that judges will choose to sacrifice pursuit of craft norms in order to obtain the outcomes they prefer for political and ideological reasons when a class of disputes has significant ideological implications and when resolution of that class of disputes is governed by application of relatively indeterminate legal doctrines.[124] Standing disputes satisfy the first criterion. By severely limiting the circumstances in which environmental plaintiffs have access to courts, for instance, a few standing decisions can have dramatic effects on the outcome of many thousands of disputes between environmentalists and firms that are subject to environmental regulation.

Both the voting patterns of judges in standing cases and the reasoning in the opinions written in those cases demonstrate the high degree of indeterminacy of the applicable doctrines—thus meeting the second criterion of the Shapiro and Levy model.[125] Any judge can write a reasonably well-crafted opinion granting or denying standing in a high proportion of cases. The Supreme Court has issued so many opinions on standing with so many versions of injury, causation, redressability, and zone of interests that any competent judge can find ample precedent to support broad or narrow versions of each of the doctrinal elements that together comprise the law of standing.[126] This characteristic of the applicable doctrines is apparent in the opinions

123. *Id.* at 675 (Rogers, J., dissenting) (citation omitted) (quoting City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975)).

124. *See* Shapiro & Levy, *supra* note 19, at 1056-62.

125. *See supra* text accompanying notes 49-123 (reviewing Supreme Court and circuit court opinions).

126. For a comprehensive discussion of the Supreme Court's standing opinions, see 3 DAVIS & PIERCE, *supra* note 1, at §§ 16.1-.16.

of the en banc D.C. Circuit in *Florida Audubon Society*. Both the seven Republicans and the four Democrats cited numerous Supreme Court opinions to support their politically preferred outcomes of the dispute.

I take it as a given that doctrinal indeterminacy and ideologically motivated judicial manipulation of malleable doctrines are bad for the U.S. legal system. Those characteristics of a legal system are inconsistent with any version of "the rule of law."[127] Indeed, it is particularly bad when a right as important as access to the courts depends primarily on the political and ideological preferences of the individual judges who decide a case. We might have to acquiesce in such a state of affairs, however, if the doctrines that are the source of the problem are solidly anchored in the text of the Constitution, the best evidence of the intentions of the Framers of the Constitution, sound prudential reasoning, or perhaps even stare decisis. Thus, the next logical step is to identify, and to evaluate, the sources of the doctrines that describe the modern law of standing.

IV. THE BASES FOR THE MODERN LAW OF STANDING

A. Constitutional Text

The most obvious and potentially compelling source of modern standing law would be the plain meaning of the language of the Constitution. It is easy to rule out that potential source of authority, however. The Constitution provides only that "[t]he judicial power shall extend to all Cases . . . [and] Controversies."[128] Neither "case" nor "controversy" is defined, and both terms are broad enough linguistically to encompass every case the Court has declined to resolve on standing grounds.

B. Original Intent

The next most obvious and potentially compelling source would be the intent of the Framers. It is equally easy to rule out that potential source of authority. The only remotely relevant reference to the case or controversy clause is Madison's unhelpful and circular assertion that the judicial power ought "to be limited to cases of a

127. *See generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (describing and explaining several versions of "the rule of law").

128. U.S. CONST. art. III, § 2.

Judiciary Nature."[129] Madison's statement does suggest, however, that the Framers wanted to restrict the courts to resolving the types of disputes they had traditionally resolved. That, in turn, suggests that a careful historical study of the practices of English and colonial courts should provide the best evidence of the jurisdictional limits on the power of the judiciary. This endeavor is well-plowed ground. Four scholars have devoted many thousands of hours to the task of reading English and colonial judicial decisions to determine the types of cases courts decided, and the types of plaintiffs who brought those cases, in an effort to try to find some linkage between their practices and the modern law of standing: Louis Jaffe in 1961,[130] Raoul Berger in 1969,[131] Steven Winter in 1988,[132] and Cass Sunstein in 1992.[133]

The findings of the four historical studies are remarkably consistent. Both English and colonial courts regularly resolved disputes brought by "strangers" and "informers."[134] Neither English nor colonial courts applied any jurisdictional limit that bore any resemblance to the modern law of standing.[135] Standing is not mentioned at all in any English case until 1807.[136] No English case even discussed the possibility that a private individual might not have standing to assert a public right until 1897.[137] Neither English nor colonial courts required a plaintiff to establish "injury-in-fact" as a prerequisite to judicial resolution of a dispute.[138] All courts applied the doctrine of *damnum absque injuria* as the basis for potential dismissal of a cause of action.[139] That doctrine, however, bore no relation to the modern law of standing. The relevant "*injuria*" was

129. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911).

130. *See* Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

131. *See* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

132. *See* Winter, *supra* note 48.

133. *See* Sunstein, *supra* note 48.

134. *See* Berger, *supra* note 131, at 819, 827; Jaffe, *supra* note 130, at 1274-75; Sunstein, *supra* note 48, at 171-73; Winter, *supra* note 48, at 1396-97, 1401-04, 1406-09; *see also* Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341 (1989) (providing extensive historical support for the proposition that *qui tam* actions are constitutional).

135. *See* Berger, *supra* note 131, at 818; Winter, *supra* note 48, at 1395.

136. *See* Jaffe, *supra* note 130, at 1270.

137. *See id.* at 1271-72.

138. *See* Berger, *supra* note 131, at 817-18, 840; Jaffe, *supra* note 130, at 1308; Sunstein, *supra* note 48, at 169-71; Winter, *supra* note 48, at 1396.

139. *See* Jaffe, *supra* note 130, at 1271; Sunstein, *supra* note 48, at 170-71, 177-179; Winter, *supra* note 48, at 1425-51. *Damnum absque injuria* is generally defined as "[l]oss, hurt, or harm without injury in the legal sense; that is, without such breach of duty as is redressible by a legal action." BLACK'S LAW DICTIONARY 393 (6th ed. 1990).

not the "injury-in-fact" required by the modern law of standing. "*Injuria*" existed if a plaintiff had a cause of action rooted in the common law, equity, or a statute.[140] Thus, at the time the Constitution was drafted and ratified, any court would have held that a plaintiff who had a statutory cause of action had suffered an "*injuria.*"

The decisions of state and federal courts in the early years following the drafting of the Constitution also should provide evidence of any Article III limit on the power of the judiciary. Surely, at least one of the early judges or Justices would have had occasion to refer to Article III limits on the power of the judiciary if the Framers intended to create such limits. Again, however, all of the scholars who have researched this question have reached the same conclusion. The early Congresses enacted several statutes that authorized private individuals to assert public rights, including the Judiciary Act of 1789.[141] United States courts routinely resolved many disputes in which the plaintiff had not suffered an "injury-in-fact" as the Court has defined that term in modern standing cases.[142] The first Supreme Court opinion to include reasoning remotely similar to modern standing cases was issued in 1923.[143] The first opinion that stated in dicta that Article III standing limits judicial power was issued in 1944.[144] The first opinion that referred to "injury-in-fact" as an Article III limit on judicial power was issued in 1970.[145] The Court first introduced the causation and redressability requirements in 1973.[146] This history has convinced each of the scholars who have studied it that absolutely no historical support exists for the proposition that Article III imposes limits on the types of plaintiffs that can obtain access to federal courts.[147]

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140. *See* Sunstein, *supra* note 48, at 170-71, 177-79.

141. *See* Berger, *supra* note 131, at 840-41; Caminker, *supra* note 134, at 342 n.3; Sunstein, *supra* note 48, at 174-76; Winter, *supra* note 48, at 1406-09.

142. *See* Sunstein, *supra* note 48, at 169-70, 173-75; Winter, *supra* note 48, at 1377, 1401-09.

143. *See* Frothingham v. Mellon, 262 U.S. 447 (1923); Berger, *supra* note 131, at 818-19; Sunstein, *supra* note 48, at 179-81; Winter, *supra* note 48, at 1375-76.

144. *See* Sunstein, *supra* note 48, at 169 (citing Stark v. Wickard, 321 U.S. 288 (1944)).

145. *See id.* (citing Barlow v. Collins, 397 U.S. 159 (1970)).

146. *See* Winter, *supra* note 48, at 1379 (citing Linda R.S. v. Richard D., 410 U.S. 614 (1973)).

147. *See* Berger, *supra* note 131, at 817-18; Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961); Sunstein, *supra* note 48, at 169-70; Winter, *supra* note 48, at 1374. Recently, two scholars have argued that Article II can support at least some elements of standing law, but their argument is based not on history but on modern policy considerations. *See* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993).

C. *Stare Decisis*

The four major scholarly histories of standing also provide the basis for determining the extent to which modern standing law is based on stare decisis. The entire modern law of standing is unsupported by any precedent earlier than 1944.[148] Its primary doctrinal elements—injury-in-fact, causation, and redressability—are unsupported by any precedent earlier than 1970.[149] Moreover, the Court has expanded standing law in unprecedented ways during the 1990s. Thus, for instance, the 1992 opinion in *Defenders of Wildlife* was the first to hold that lack of Article III standing precludes a plaintiff from litigating a statutorily authorized cause of action.[150] Similarly, the 1998 opinion in *Steel Co.* was the first to hold that a plaintiff could not pursue a statutorily authorized cause of action based solely on a judicial determination that his injury was not redressable.[151] The *Steel Co.* majority cited an 1885 opinion in an effort to support its assertion that redressability "has been ingrained in our jurisprudence from the beginning."[152] The majority's interpretation of the opinion, however, is demonstrably ahistorical. The Court in that case dismissed a bill in equity as a "clear case . . . of *damnum absque injuria.*"[153] A dismissal based on *damnum absque injuria* was the nineteenth-century equivalent of a modern dismissal based on a failure to state a cause of action.[154] Thus, the Court dismissed the action because the plaintiff was trying to collect a debt owed by a state, and there was at the time "no remedy by suit to compel the state to pay its debts."[155] No nineteenth-century court would have dismissed the complaint filed by the plaintiff in *Steel Co.* on the basis of *damnum absque injuria* because a statute explicitly gave the plaintiff a cause of action, thereby establishing "*injuria*" as a matter of law.[156]

Of course, now that the Court has created the doctrine of constitutional standing out of whole cloth and has issued scores of opinions elaborating and expanding the doctrine, there is recent

148. *See* Sunstein, *supra* note 48, at 169.

149. *See id.* at 169-70; Winter, *supra* note 48, at 1378-79.

150. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992); *see also supra* text accompanying notes 61-69 (discussing case).

151. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1020 (1998); *see also supra* text accompanying notes 70-75 (discussing case).

152. *Steel Co.*, 118 S. Ct. at 1017 n.5.

153. Marye v. Parsons, 114 U.S. 325, 328 (1885).

154. *See* Sunstein, *supra* note 48, at 170-71.

155. *Marye*, 114 U.S. at 328.

156. *See* Berger, *supra* note 131, at 817-18; Sunstein, *supra* note 48, at 170-71.

precedent to support virtually any conceivable version of standing law. As I illustrated in Parts II and III, recent opinions interpret and apply all four of the doctrinal components of modern standing law—injury, causation, redressability, and zone of interests—in highly variable ways. It is easy to cite one or more modern precedents that support both narrow and broad versions of each element of standing. In this situation, it is hard to make a case that stare decisis compels the Court to adhere to any particular version of modern standing law in future cases.

D. Policy

Any claim that the Constitution, the original intent of the Framers, or Anglo-American legal history and tradition compel modern standing law is undermined by the historical studies of standing. This lack of historical basis leaves the possibility that modern standing law is rooted in policy considerations that have arisen for the first time, or at least have increased in significance, during the twentieth century. Powerful circumstantial evidence supports this hypothesis.

Modern standing law originated with two Justices—Brandeis and Frankfurter—during the 1920s through the 1950s.[157] Standing was one of several doctrines they invented and eventually sold to a majority of their colleagues to further an important policy goal: to minimize the opportunities for activist judges to thwart the will of a majority of citizens by relying on various provisions of the Constitution to hold many new statutes and agency-administered regulatory programs unconstitutional.[158] Thus, the roots of modern standing law lie in a perceived need to insulate democratic institutions from activist, politically unaccountable judges who were hostile to the new preferences expressed by the people and their elected representatives.

Two related features of the standing doctrines created by Brandeis and Frankfurter are particularly noteworthy. First, there is no hint that the Brandeis/Frankfurter version of standing limited the power of the legislature to create a cause of action by statute. Their version of standing was designed to shield politically accountable institutions from potential attacks by politically unaccountable judges. They certainly did not intend to create a weapon that politically

157. *See* Sunstein, *supra* note 48, at 179-81; Winter, *supra* note 48, at 1374, 1453-57.

158. *See supra* note 157 (citing sources); *see also* 3 DAVIS & PIERCE, *supra* note 1, § 16.2 (discussing the historical evolution of standing).

unaccountable judges could use to render statutes ineffective. Second, the Brandeis/Frankfurter version of standing was similar in effect to the ancient doctrine of *damnum absque injuria*. According to their view, the Constitution itself does not create causes of action.[159] It follows that a plaintiff could not litigate a case under the Constitution unless he had a common law or statutory cause of action. To illustrate this point, consider the famous case of *Frothingham v. Mellon*,[160] which many consider to mark the birth of modern standing law. The Court relied on standing to dismiss a taxpayer's complaint that a federal statute violated the Tenth Amendment.[161] The Court could have dismissed Frothingham's action against Mellon as *damnum absque injuria* because the Tenth Amendment does not create a cause of action and a taxpayer has no common law or statutory cause of action to challenge the validity of a federal statute. Viewed in this way, the Brandeis/Frankfurter version of standing was consistent with Anglo-American legal tradition and, hence, with a defensible interpretation of Article III.

The Burger Court greatly expanded the Brandeis/Frankfurter version of standing in the 1970s and 1980s.[162] Again, powerful evidence exists to support the hypothesis that the expanded version of standing created by the Burger Court was motivated by a desire to further a policy goal. Indeed, the Burger Court's version of standing appears to have been motivated by the same policy goal that induced Brandeis and Frankfurter to create standing law in the first place. At the time, the federal judiciary again included a large number of activist judges—albeit liberal activists rather than the conservative activists who concerned Brandeis and Frankfurter. Given the opportunity to do so, many of the federal judges who sat during the 1970s and 1980s would devise creative interpretations of the Constitution. They would then rely on these interpretations as the basis to wrest control of foreign policy from the politically

159. The Court first held that the Constitution sometimes creates a cause of action in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971). It has since signaled its doubts with respect to the legitimacy of the *Bivens* doctrine by severely limiting its scope. *See* 3 DAVIS & PIERCE, *supra* note 1, § 19.5. The Court's unprecedented decision in *Monroe v. Pape*, 365 U.S. 167, 172 (1961), also had the effect of creating a cause of action for violation of the Constitution by disingenuously attributing to the Congress of 1871 an intent to create such a cause of action by enacting the Civil Rights Act of 1871. *See* Crawford-El v. Britton, 118 S. Ct. 1584, 1603 (1998) (Scalia, J., dissenting); 3 DAVIS & PIERCE, *supra* note 1, § 19.6, at 263.

160. 262 U.S. 447 (1923).

161. *See id.* at 479-80.

162. *See* Sunstein, *supra* note 48, at 169-70; Winter, *supra* note 48, at 1372-73, 1379-80.

accountable branches, to exercise plenary power over many important governmental institutions such as schools and prisons, and to force executive branch agencies to reallocate their scarce resources in ways the judges preferred.[163] The circumstances in which the Burger Court applied its expanded version of standing strongly suggest that the Burger Court was trying once more to insulate the politically accountable branches of government from the constant assaults of activist judges. An expanded version of standing law was only one of many tools the Burger Court used in an effort to accomplish this policy goal during the 1970s and 1980s.

There is also another broad similarity between the Brandeis/Frankfurter version of standing and the Burger Court's version of standing. Every case in which the Burger Court relied on standing to dismiss a complaint could have been the subject of an opinion dismissing the complaint as *damnum absque injuria.*[164] To illustrate this point, consider the famous case of *Warth v. Seldin.*[165] In that case, the Court relied on standing to dismiss complaints brought by poor people, a developer, and a neighboring town claiming that a municipality's zoning rules violated the Fourteenth Amendment.[166] The Court could have noted that the Fourteenth Amendment does not itself create a cause of action and that none of the plaintiffs had a common law or statutory cause of action. It then could have reasoned like an eighteenth-century court or a nineteenth-century court and dismissed the complaints as *damnum absque injuria.* Viewed in this manner, the results of the Burger Court's application of standing in *Warth*, and in all the other cases decided during the 1970s and 1980s, are entirely consistent with Anglo-American legal tradition and, therefore, consistent with a defensible interpretation of Article III.

The additional expansions of standing law apparent in the decisions of the 1990s were almost certainly also motivated by a desire to further one or more policy goals. However, it is more difficult to identify the goal or goals the Justices were attempting to further in these opinions. Three of the cases might be explained in a manner consistent with the common goal of the Brandeis/Frankfurter

163. Justice Thomas provided a good summary of the extraordinarily activist actions of federal courts in several contexts during this period in his concurring opinion in *Lewis v. Casey*, 518 U.S. 343, 364-93 (1996) (Thomas, J., concurring).

164. *See* 3 DAVIS & PIERCE, *supra* note 1, § 16.7.

165. 422 U.S. 490 (1975); *see also* 3 DAVIS & PIERCE, *supra* note 1, §§ 16.1, 16.5 (discussing *Warth*).

166. *See Warth*, 422 U.S. at 502-17.

and Burger Court versions of standing—protection of democratic institutions from activist, politically unaccountable judges. The majority opinion in *Lewis v. Casey*[167] furthered that goal. The majority was attempting to insulate prison administrators from the potential excesses of activist judges. The injunction the Court reversed gave a district judge and a special master complete power to dictate every detail of the structure, staffing, and hours of law libraries in Arizona prisons.[168] The result in *Lewis* is entirely consistent with Anglo-American legal tradition and, hence, with a defensible interpretation of Article III. An eighteenth- or nineteenth-century court would have dismissed the complaint because the plaintiff had no cause of action.

It is also possible to reconcile both *Air Courier Conference*[169] and *NCUA*[170] with the policy goals that originally induced the Court to create standing law and with a defensible interpretation of Article III. The zone of interests test, which the Court applied in both cases, prescribes a method of interpreting two statutes—the Administrative Procedure Act ("APA") and the statute the plaintiff relies on as the basis for its argument on the merits.[171] As such, the zone of interests test is consistent both with the respect for democratic institutions that motivated the Court to create a law of standing and with the Anglo-American tradition of entertaining a complaint if, but only if, the plaintiff had a cause of action. There is only one problem with *Air Courier Conference* and *NCUA*. The majority opinions in the two cases adopt totally inconsistent methods of determining whether a plaintiff has a cause of action.[172] Either method may be defensible, but both methods cannot logically be correct.

Defenders of Wildlife[173] and *Steel Co.*[174] cannot be explained as decisions that further the policy goal of insulating democratic institutions from potential overreaching by activist judges. Congress

167. *See* Lewis v. Casey, 518 U.S. 343 (1996); *see also supra* text accompanying notes 49-60 (discussing *Lewis*).

168. *See Lewis*, 518 U.S. at 347-48.

169. *See* Air Courier Conference v. American Postal Workers Union 498 U.S. 517 (1991); *see also supra* notes 78-82 and accompanying text (discussing case).

170. *See* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S. Ct. 927 (1998); *see also supra* notes 83-89 and accompanying text (discussing case).

171. *See* 3 DAVIS & PIERCE, *supra* note 1, §§ 16.3, 16.7-16.9.

172. *See supra* text accompanying notes 103-11 (discussing *Air Courier Conference* and *NCUA*); *infra* text accompanying notes 228-53 (discussing the zone of interests test).

173. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *see also supra* text accompanying notes 61-69 (discussing case).

174. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998); *see also supra* text accompanying notes 70-75 (discussing case).

drafted the citizen suit provisions of environmental statutes in a manner that minimizes the power of judges to become enmeshed in the policymaking process.[175] In both cases, the Court used standing not to shield politically accountable institutions from activist judges, but as a weapon a judge can use to thwart the will of politically accountable institutions.[176] Congress enacted statutes that authorize agencies to establish rules and that confer on "any person" a cause of action to enforce the rules. The Court thwarted the will of the legislature by saying that only a person who meets exceedingly rigorous criteria, defined and applied by the judiciary, has such a cause of action. The Court simultaneously rendered much less effective the environmental rules established by the politically accountable executive branch agencies by depriving them of access to the significant enforcement resources Congress had attempted to make available through the citizen suit provisions.

Ironically, as the Court has made it increasingly difficult for many types of plaintiffs to obtain access to the courts, the need to restrict access in order to protect politically accountable institutions from the potential excesses of activist judges has declined significantly. During the 1980s and 1990s, the Court created numerous legal doctrines that limit the discretion of judges in the classes of cases in which the risks of judicial overreaching are greatest. Six doctrinal developments have been particularly important in furthering this traditional goal of standing law.

First, the Court's landmark 1984 opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*[177] instructs courts to defer to agency interpretations of ambiguous provisions in agency-administered statutes.[178] The *Chevron* doctrine greatly reduces the risk that an activist judge will engage in a creative exercise in statutory construction to force an agency to act in a manner consistent with the judge's ideological preferences.[179] Second, in its landmark 1985 opinion in *Heckler v. Chaney*,[180] the Court announced the presumption of unreviewability of agency inaction. This presumption greatly reduces the risk that a judge will force an agency to reallocate

175. *See* 3 DAVIS & PIERCE, *supra* note 1, § 18.5; Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 12-13 (1996).

176. *See* Pierce, *supra* note 64, at 1170.

177. 467 U.S. 837 (1984).

178. *See id.* at 842-43.

179. *See* Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2233-34 (1997).

180. 470 U.S. 821 (1985).

its scarce resources in a manner consistent with the judge's ideological preferences.[181] Third, in a series of opinions issued in the 1980s and 1990s, the Court has developed strict limits on courts' discretion to impose "structural injunctions" on agencies and other important societal institutions, such as schools and prisons.[182] These restrictions greatly reduce the risk that a judge will take over an institution and manage it in a manner consistent with the judge's ideological preferences.[183] Fourth, in a series of opinions issued from 1979 through 1992, the Court virtually eliminated the discretion of judges to find an "implied" private right of action for violation of an agency-administered statute.[184] This change in doctrine eliminated the risk that a judge would find an implied right of action that Congress did not create when the existence of such a private right of action is consistent with the judge's ideological preferences.[185] Fifth, in its 1989 opinion in *Hallstrom v. Tillamook County*,[186] the Court made it clear that courts must enforce strictly the statutory conditions that limit the power of a party to bring an express private right of action for violation of an agency rule or order.[187] As a result, a private party cannot bring an enforcement action without providing the agency both advance notice of its intent to do so and an opportunity to preclude the private enforcement action by bringing its own enforcement action. Finally, Congress has assisted the Court in its efforts to limit the power of activist judges to displace the judgment of politically accountable institutions. In the Prison Litigation Reform Act of 1995,[188] for example, Congress limited the power of courts to take over the management of prisons.

Each of these doctrinal changes responds directly to the major sources of the risks that politically unaccountable institutions—courts and/or private litigants—will force politically accountable institutions to act in accordance with their political and ideological preferences. Each of these changes is far more effective and more carefully

181. *See* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1267-68 (1989).

182. *See, e.g.*, Blessing v. Freestone, 520 U.S. 329 (1997); Lewis v. Casey, 518 U.S. 343 (1996); Sandin v. Connor, 515 U.S. 472 (1995); Missouri v. Jenkins, 515 U.S. 70 (1995); Heckler v. Day, 467 U.S. 104 (1983).

183. *See* 3 DAVIS & PIERCE, *supra* note 1, § 18.3.

184. *See, e.g.*, Suter v. Artist M., 503 U.S. 347 (1992); California v. Sierra Club, 451 U.S. 287 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

185. *See* 3 DAVIS & PIERCE, *supra* note 1, § 18.5.

186. 493 U.S. 20 (1989).

187. *See id.* at 25-33.

188. Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified as amended at scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., 42 U.S.C.).

targeted than the crude and blunt tool of constitutional standing. Moreover, each of these doctrines is anchored securely in a combination of statutes and the Constitution.[189] Thus, they are more defensible than the complicated combination of doctrines the Court has made up out of whole cloth and attributed to the Framers under the heading of constitutional standing.

The plurality opinion in *Defenders of Wildlife* and the majority opinion in *Steel Co.* cannot be reconciled with Anglo-American legal traditions and, hence, cannot be defended as plausible interpretations of Article III. An eighteenth- or nineteenth-century court would not have doubted that it had the power—and the duty—to entertain a cause of action explicitly created by a statute without any inquiry into injury, causation, or redressability. Nor can these opinions be reconciled with the policy goal that induced the Court to create a law of standing. Thus, these opinions can only be explained with reference to some other policy goal. Powerful circumstantial evidence suggests the policy goal that underlies the dramatic expansion of standing law that has taken place in the 1990s. Justice Scalia wrote both the plurality opinion in *Defenders of Wildlife* and the majority opinion in *Steel Co.* He also wrote an essay describing his views on standing in *Suffolk University Law Review* in 1983.[190]

Justice Scalia's essay begins with an assertion that suggests that he sees standing as serving the same policy goal that motivated Brandeis and Frankfurter to invent standing and that motivated the Burger Court to expand the list of requirements to obtain standing: "My thesis is that the judicial doctrine of standing is a crucial and inseparable element of [separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance."[191] By the end of the essay, however, Scalia has convinced himself that pursuit of this policy goal requires creation of a "doctrine of standing [that] is an essential means of restricting the courts to their assigned role of protecting minority rather than majority interests."[192] It follows that standing should never be available to a member of a majority who is benefited by a statute, such as the Clean Air Act, even when the legislature has authorized a suit by a member of the majority.[193]

189. *See* Pierce, *supra* note 179, at 2227-48.

190. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

191. *Id.* at 881.

192. *Id.* at 895.

193. *See id.* at 895-96.

Indeed, Scalia argues that courts should use standing law to ensure that "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy."[194] In other words, a legislative enactment that benefits the majority can be enforced only by an executive branch agency. If, and to the extent that, agencies lack the resources or the will to enforce such a statute, it should not be enforced. The courts can and should use standing to police this prohibition on law enforcement by institutions or individuals other than executive branch agencies, even when the politically accountable legislature authorizes other institutions or individuals to enforce a statute.[195] In short, Justice Scalia sees standing as providing a means by which the judiciary can limit the power of the legislature—a policy that is very nearly the opposite of the policy that motivated Brandeis, Frankfurter, and the Burger Court.

Justice Scalia's essay on standing helps to explain his opinions in *Defenders of Wildlife* and *Steel Co.* In his essay, and in both of his standing opinions, he makes the same basic argument that he made in his dissenting opinion in *Morrison v. Olson.*[196] In that opinion, Justice Scalia argued that Congress could not assign certain investigative and prosecutorial responsibilities to an independent counsel because law enforcement has been performed by the executive "always and everywhere."[197] As numerous scholars have since documented, Justice Scalia's assertion in *Morrison v. Olson* is historically inaccurate. Institutions other than executive branch agencies, including private individuals, often performed law enforcement functions in Britain, in colonial America, in state courts, and in U.S. courts.[198] His virtually identical assertions about law enforcement responsibilities in the standing context are equally false. Anglo-American courts routinely entertained enforcement actions brought by "informers" and "strangers" when legislatures authorized such actions.[199] The courts left to politically accountable legislators the choice among alternative means of enforcing the law. Thus, while

194. *Id.* at 897.

195. *See id.* at 896.

196. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

197. *Id.* at 706 (Scalia, J., dissenting).

198. *See, e.g.*, ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 5-6 (1989); Caminker, *supra* note 134, at 341-42; Steven L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 126-27 (1988); Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069, 1071-88 (1990).

199. *See supra* note 134 (citing sources).

Justice Scalia's version of Democracy may be defensible in the abstract, it is not the version adopted by Anglo-American courts and implicitly adopted by the Framers. The Framers reposed greater trust in politically accountable legislative bodies than does Justice Scalia.

V. THE FUTURE OF STANDING LAW

So far, I have documented the following four characteristics of the modern law of standing. First, it is extraordinarily complicated and malleable. In a high proportion of cases, a judge can write an opinion that either grants or denies standing without departing from the norms that define the craft of judging. Second, resolutions of standing disputes have unusually large ideological implications. By deciding that environmentalists or banks do not have access to the courts, for example, judges decide, in effect, that they cannot prevail in even the most meritorious cases. Third, judges take advantage of the complicated and malleable standing doctrines to resolve a high proportion of standing disputes in a manner consistent with each judge's own political and ideological preferences. Thus, a Republican judge is nearly four times as likely as a Democrat judge to vote to deny standing to an environmental plaintiff.[200] Fourth, modern standing law has a highly questionable pedigree. It is unsupported by the text of the Constitution, by the evidence of the original intent of the Framers, or by Anglo-American legal history and tradition. It has only weak, recent, and inconsistent support in stare decisis and in pursuit of policy goals that are consistent with the Constitution. Further, the extensions of standing law engineered by Justice Scalia in 1992 and 1998 are impossible to defend as plausible interpretations of the Constitution.

This situation is not a pretty picture. Access to the courts should be governed by the rule of law and not by the political preferences of individual judges and Justices. A politically naive lawyer should be able to predict with reasonable accuracy the likely resolution of a standing dispute. Moreover, standing law should bear some resemblance to the original intent of the Framers.

What can, and should, the Court do to address this problem? It is tempting to suggest that the Court simply abandon the entire twentieth-century effort to create a law of standing as an ill-considered departure from the plain meaning of Article III, the original intent of the Framers, and Anglo-American legal tradition. It is, however, probably too late in the day to adopt that course of

200. *See supra* notes 112-13 and accompanying text.

action. To avoid the unintended, adverse consequences of such a complete abandonment of half a century of precedent, the Court would need to resurrect some of the long-abandoned doctrines and practices that allowed eighteenth- and nineteenth-century courts to decline to resolve disputes that were inappropriate for judicial resolution.[201] In addition, appropriately cabined, the law of standing has little potential to do real harm. It is important to remember that all of the disputes the Court refused to resolve on standing grounds until 1992 were inappropriate for judicial resolution on other grounds.[202] They probably would have been dismissed by an eighteenth- or nineteenth-century court on another basis. Moreover, some version of the injury-in-fact requirement may have beneficial effects. It does seem intuitively inappropriate for a private citizen to be able to sue for conduct that has absolutely no adverse effect on that plaintiff.

Four general types of changes in standing law that would have beneficial effects are easily identifiable. The Court should simplify the applicable doctrines, objectify the doctrines, increase the consistency with which it describes and applies the doctrines, and increase the deference it accords to politically accountable institutions. Each of these changes would increase the degree of determinacy of standing doctrines, reduce the number of cases in which judges succumb to the temptation to manipulate precedents and doctrines in order to further their ideological agendas, enhance the predictability of the results of standing disputes, reduce the resources litigants and courts must devote to resolution of standing disputes, and, more broadly, place standing within the realm of law rather than politics. These types of changes, and particularly changes that increase judicial deference to politically accountable institutions, also would produce a law of standing that bears a closer resemblance to the intent of the Framers when they drafted Article III. No eighteenth- or nineteenth-century court would have relied on lack of standing or lack of injury-in-fact as the basis to refuse to resolve a dispute at the behest of a party who had a cause of action. A modern court should at least be reluctant to refuse to resolve a dispute when the plaintiff has an explicit statutory cause of action, for example,

201. The Court would need to begin by overruling *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *Monroe v. Pape*, 365 U.S. 167 (1961), in order to recreate the legal environment in which a plaintiff has no cause of action based on a violation of the Constitution. *See supra* note 159 and accompanying text.

202. *See* 3 DAVIS & PIERCE, *supra* note 1, § 16.7.

when a statute authorizes "any person" to bring an action to enforce a rule or order issued by an agency. In this section, I suggest these types of changes applicable to each of the doctrinal elements of modern standing law.

A. Injury and Causation

The Court should begin the process of beneficial reform of standing law by focusing on the combination of injury-in-fact and causation. The Court has used two dramatically different approaches in answering the question whether a defendant's conduct caused the plaintiff a judicially cognizable injury. In some cases, including many of the cases in which the plaintiff lacked a cause of action[203] and the two recent environmental cases,[204] the Court required the plaintiff to prove an "actual or imminent," "concrete and particularized" injury "caused by" the defendant's conduct. Each of these descriptive phrases is susceptible to manipulation by result-oriented judges. Typically, Republican judges interpret and apply them in ways that render it virtually impossible for an environmental plaintiff to establish standing. The plurality opinion in *Defenders of Wildlife* implicitly encouraged this conduct by concluding that one of the plaintiffs—a professional biologist who had made a career out of studying a particular endangered species—had not proven "imminent" injury attributable to an action that concededly would destroy habitat critical to the survival of the species because she proved only that she planned to observe the species "in the future" and did not prove that her next visit would be on a date certain in the near future.[205]

The opinion of two Republican judges in *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*[206] illustrates the malleability of the tests of injury and causation adopted in the Court's recent environmental cases and the ways in which judges can manipulate doctrines to further their ideological agendas. The

203. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Linda R.S. v. Richard D., 410 U.S. 614 (1973). *See generally* 3 DAVIS & PIERCE, *supra* note 1, §§ 16.5, 16.7 (discussing causality, redressability, and the differences between common law and statutory standing).

204. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *see also supra* text accompanying notes 70-75 (discussing *Steel Co.*); *supra* text accompanying notes 61-69 (discussing *Defenders of Wildlife*).

205. *Defenders of Wildlife*, 504 U.S. at 564.

206. 123 F.3d 111 (3d Cir. 1997).

plaintiffs in *Magnesium Elektron* proved that (1) they use the Delaware River for various recreational purposes; (2) their recreational uses of the river are adversely affected by pollutants in the river; (3) the defendant illegally discharged pollutants into the river upstream of the plaintiffs' area of use on 150 occasions; and (4) the pollutants were of a type that adversely affect the plaintiffs' recreational uses.[207] The majority held that the plaintiffs lacked standing because they did not prove that the defendant's "particular" emissions caused the plaintiff's "particular" injury.[208] No one can possibly satisfy the test applied by the Republican majority in *Magnesium Elektron.* The Delaware River has poor water quality that adversely affects all recreational uses and users.[209] This poor water quality is attributable to the combined effects of hundreds of discharges—some legal and some illegal. No one using the river can prove a "particular" injury attributable to a "particular" illegal discharge. Moreover, it makes no sense to impose such an impossible burden of proof on a would-be plaintiff. The agencies that decide how much of a pollutant any individual regulatee can legally emit make those decisions based on application of computer models that relate aggregate emissions to water quality.[210] Thus, a politically accountable agency with relevant expertise has already determined that emissions above the legally permitted level cause injury to water quality and, hence, to recreational users. In this recurrent situation, courts should defer to the politically accountable expert agency and apply a causation per se doctrine.[211]

In other types of cases, including all of the "competitive injury" cases[212] and the environmental cases decided before 1992,[213] the Court used a completely different approach to defining the "injury" that must be "caused" by the defendant as a prerequisite for the plaintiff to have standing. The approach is broad, permissive, and probabilistic in nature. Thus, for instance, a bank has standing to

207. *See id.* at 115-16, 121.

208. *Id.* at 121-22.

209. *See* Richard C. Albert, *The Historical Context of Water Quality Management for the Delaware Estuary*, 11 ESTUARIES 99, 106 (1988).

210. *See* 33 U.S.C. § 1313 (1994); 40 C.F.R. § 122.44(c)(1)(vii)(B) (1998); *see, e.g., In re* Broward County, U.S. EPA Envtl. Appeals Bd., NPDES Appeal No. 95-7 (Aug. 27, 1996) (order denying review), *available in* 1996 WL 514111, at *2.

211. *See* Richard J. Pierce, Jr., *Causation in Government Regulation and Toxic Torts*, 76 WASH. U. L.Q. 1307 (1998).

212. *See supra* notes 93, 121 (citing cases).

213. *See, e.g.*, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 75-78 (1978); United States v. Students Challenging Regulatory Procedures, 412 U.S. 669, 683-90 (1973).

challenge the validity of any rule or order that permits a potential competitor to compete with a bank, or that enhances a competitor's ability to compete effectively.[214] The bank is not required to prove that a "particular" competitor will take advantage of the new opportunity, and that the competitor will cause "particular" and "imminent" injury to the bank by taking a "particular" customer from the bank on a "particular" date. In most cases, of course, a bank could not possibly meet such a demanding burden of proof. Nor should it be required to do so. It should be enough that the defendant's conduct has some potential to cause competitive harm to the bank in some manner. That is the law applicable to banks, investment firms, tour companies, data processing companies, and drug manufacturers,[215] but it is no longer the law applicable to individuals who claim that they have been injured by pollution or by an action that jeopardizes the continued survival of a species that an individual studies.

In environmental cases, the Court should apply the same broad, permissive, and probabilistic approach to injury and causation that it routinely applies in competitor standing cases. The argument in support of a permissive, probabilistic approach is particularly strong in the context of citizen suit cases like *Defenders of Wildlife*,[216] *Steel Co.*,[217] and *Magnesium Elektron*.[218] In each of these cases, Congress had explicitly conferred a statutory cause of action on the plaintiffs. By contrast, it is often far from clear that Congress intended to confer a cause of action on a competitor, as even the majority in *NCUA* admitted.[219] Thus, both adherence to the original intent of the Framers and pursuit of the policy goal that induced the Court to create standing law support the use of a more permissive approach to standing in "citizen suit" cases than in most "competitive injury" cases.

The redressability component of the standing test rarely presents

214. *See* 3 DAVIS & PIERCE, *supra* note 1, § 16.4. The Court explicitly adopted that characterization of its "competitive injury" cases in *Clinton v. New York*, 118 S. Ct. 2091, 2100 (1998).

215. *See supra* notes 93, 121 (citing cases).

216. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *see also supra* text accompanying notes 61-69 (discussing case).

217. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998); *see also supra* text accompanying notes 70-75 (discussing case).

218. *See* Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, 123 F.3d 111 (3d Cir. 1997); *see also supra* text accompanying notes 206-08 (discussing case).

219. *See* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S. Ct. 927, 936-37 (1998).

an independent obstacle to a judicial determination that a plaintiff has standing. In the vast majority of cases, the same circumstances that persuade a court that the defendant's conduct did, or did not, cause the plaintiff an injury also persuade the court that the injury is, or is not, redressable by a judicial decision against the defendant on the merits.[220] The only exception to the nearly complete convergence of the causation and redressability requirements surfaced in *Steel Co.* The majority in *Steel Co.* held that even a plaintiff who suffered an injury caused by the defendant's conduct lacked standing because no remedy available to a court could redress the plaintiff's injury when that injury was attributable to a "wholly past" violation of an environmental statute.[221] The redressability-based holding in *Steel Co.* is unfortunate in many respects: it has no basis in the text of the Constitution, the intent of the Framers, Anglo-American legal tradition, stare decisis, or the policy goal that induced the Court to create the law of standing. On the other hand, the holding has limited potential to do any real harm to the legal system. As the concurring Justices in *Steel Co.* recognized, the statute at issue, like most environmental statutes, does not create a cause of action available to a private citizen and applicable to a "wholly past" violation of a statute.[222] It makes little practical difference whether a private individual cannot sue because she lacks standing or because she has no cause of action.

What does matter, however, is that the Court establish a simple, objective test for distinguishing between "wholly past" violations and "continuing violations," the latter of which even the *Steel Co.* majority recognized to be within the jurisdiction of a court.[223] If the Court announces instead a malleable test applicable to that outcome-determinative distinction, it is safe to predict that many lower court judges will likely manipulate the test to support their ideologically preferred outcomes.[224]

The facts of *Steel Co.* clearly placed the violation at issue in the "wholly past" category. The defendant had failed to file mandatory reports in a timely manner. When confronted with its lapse, it

220. *See* 3 DAVIS & PIERCE, *supra* note 1, § 16.5.

221. *Steel Co.*, 118 S. Ct. at 1018-20.

222. *Id.* at 1030-32 (Breyer, J., concurring in part and concurring in the judgment).

223. *Id.* at 1019. The Fourth Circuit's recent decision applying *Steel Co.* is discouraging in this respect. The Fourth Circuit simply denied a plaintiff standing by applying *Steel Co.* without even attempting to apply the distinction between "wholly past" and "continuing" violations. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 149 F.3d 303, 306-07 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999) (No. 98-922).

224. *See supra* text accompanying notes 112-23.

immediately confessed error and filed all of the overdue reports.[225] The risk that the defendant would commit future violations in this situation was remote. Most violations of environmental rules and permits are, however, much more difficult to characterize. The conduct that gives rise to an enforcement action is invariably "past"—for example, a firm has violated its emissions permit 150 times in the last three years.[226] But it is difficult to conclude that the violation is either "wholly past" or "continuing." The defendant might, or might not, take the actions required to avoid the risk of future violations. In this recurring situation, the Court should establish a presumption that multiple past violations foreshadow a high likelihood of future violations and, hence, qualify as "continuing violations." That is the type of situation in which the concurring Justices' discussion of deterrence resonates. In the words of the concurring opinion in *Steel Co.*: "History supports the proposition that punishment or deterrence can redress an injury.... When ... a party obtains a judgment that imposes sanctions on the wrongdoer, it is proper to presume that the wrongdoer will be less likely to repeat the injurious conduct that prompted the litigation."[227]

B. Zone of Interests

The discussion thus far has not focused on the zone of interests test. In one sense, that component of standing law is not central to my concerns. The Court does not attribute the zone of interests test to Article III. Rather, the test is a means through which a court attempts to determine whether Congress intended to give a party a cause of action. As such, the zone of interests test is entirely consistent with the Constitution and with Anglo-American legal tradition.

In another important sense, however, the zone of interests test is central to my concerns. In its present form, the test is extraordinarily malleable. It can be, and frequently is, manipulated by judges to further their ideological agendas.[228] The result of its application in any case is impossible to predict on any basis except the political and ideological preferences of the judges who decide the case.

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225. *See Steel Co.*, 118 S. Ct. at 1009.

226. *See, e.g.*, Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111 (3d Cir. 1997); *see also supra* text accompanying notes 206-08 (discussing case).

227. *Steel Co.*, 118 S. Ct. at 1029 & n.26 (Breyer, J., concurring in part and concurring in the judgment).

228. *See supra* text accompanying notes 103-11.

The Court derived the zone of interests test from section 702 of the APA: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[229] The Court plausibly interpreted "adversely affected or aggrieved ... within the meaning of a relevant statute" as authorizing review at the behest of any party whose interests are "arguably within the zone of interests to be protected or regulated" by the statute that is the basis for the party's claim on the merits.[230] The basic problem that arises with this statutory interpretation exercise is attributable to statutory silence. The statutes to which APA § 702 refers rarely say anything about standing and rarely identify explicitly the interests that are, or are not, within the zone of interests to be protected.[231] In this recurrent situation, a court could use one of two methods of applying the zone of interests test. It could say that the plaintiff's interest is within the zone only if there is specific, direct evidence that Congress intended to protect the interest asserted by the plaintiff. Alternatively, a court could draw the inference that Congress intended to protect any interest that would in fact be protected by a decision favorable to the plaintiff on the merits. Given the dearth of direct evidence of congressional intent in most statutes, a court's choice of one or the other of these methods of applying the test is outcome-determinative in most cases.

Confronted with this important choice between two competing methods of statutory interpretation, the Supreme Court has chosen to adopt both. In its 1987 opinion in *Clarke v. Securities Industry Ass'n*,[232] the Court recognized that circuit courts were using two different methods of applying the test, thereby producing inconsistent and unpredictable results in many standing cases. A five-Justice majority held that courts must use the broad, inferential method of applying the test, thereby making it not "especially demanding."[233] Finding no specific evidence on the issue either way, the majority relied on the presumption of reviewability to support its conclusion

229. 5 U.S.C. § 702 (1994).

230. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). The Court's interpretation of APA § 702 provoked a debate that continues today. *Compare* Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970) (arguing in support of the zone of interests test), *with* Louis L. Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971) (arguing against the test).

231. *See* 3 DAVIS & PIERCE, *supra* note 1, § 16.9.

232. 479 U.S. 388, 396 (1987); *see also supra* text accompanying notes 104-06 (discussing case).

233. *Clarke*, 479 U.S. at 399-400.

that the plaintiff had standing.[234] In its 1991 opinion in *Air Courier Conference*,[235] however, a six-Justice majority held that a court must use the much more demanding method of searching for affirmative evidence "as to Congress' intent . . . in order to determine whether [plaintiffs' interests] were meant to be within the zone of interests protected."[236] Finding no such evidence, the majority concluded that the plaintiff lacked standing.[237] Then, in its 1998 opinion in *NCUA*,[238] a five-Justice majority held that lack of evidence of congressional intent to protect the interests asserted by the plaintiff is "irrelevant" to application of the test and that courts must use the permissive, inferential method of applying the test.[239] The Court did not overrule *Clarke* in *Air Courier Conference*, nor did it overrule *Air Courier Conference* in *NCUA*. Instead, the Court discussed each of its prior opinions as if each was still good law. The majority in each case engaged in an unconvincing and unsuccessful attempt to reconcile the obviously inconsistent precedents.[240]

It is easy to predict what will happen if the Court leaves the zone of interests test in its present state. In a high proportion of cases, each judge will choose which putatively binding precedent to apply, depending on which method of applying the test will produce a result consistent with the judge's ideological preferences.[241] If the judge wants to give parties with the plaintiff's interests access to the courts, he will rely on *NCUA* and *Clarke* and distinguish *Air Courier Conference*. If he wants to deny the plaintiffs access to the courts, he will rely on *Air Courier Conference* and distinguish *NCUA* and *Clarke*.

The most important reform the Court can make with respect to the zone of interests test is to maintain consistency in its method of describing and applying the test. Either of the methods the Court has chosen in the past is defensible, but the Court cannot continue to vacillate between the two if it wants to restore standing to a position in the world of law rather than to retain its present status as a branch of politics implemented by unelected, life-tenured judges. The choice between the methods of applying the test requires more detailed

234. *See id.* at 399.
235. *See supra* text accompanying notes 78-82 (discussing case).
236. *Air Courier Conference*, 498 U.S. at 524-25.
237. *See id.* at 525-26.
238. *See supra* text accompanying notes 83-89 (discussing case).
239. *NCUA*, 118 S. Ct. at 937.
240. *See id.* at 938; *Air Courier Conference*, 498 U.S. at 528-29.
241. *See supra* text accompanying notes 110-25.

discussion of the two competing methods. The majority and dissenting opinions in *NCUA* provide a good starting point for such a discussion.

The case arose when the National Credit Union Administration ("NCUA") adopted and applied a new interpretation of the "common bond" provision of the Federal Credit Union Act ("FCUA").[242] The new interpretation would have allowed credit unions to become much larger and to enroll many new members that previously relied exclusively on banks to provide financial services. Banks sought the opportunity to argue that the new interpretation of the statute was inconsistent with its language. The banks obviously would further their interests in reducing competition from credit unions if they were successful in persuading a court that NCUA's interpretation was inconsistent with the common bond provision of FCUA. That was enough to convince the majority that the banks' interest was within the zone of interests arguably protected by the common bond provision of the statute.[243] The dissent would have required more. Specifically, it would have required evidence that Congress actually intended to protect banks' interests in reducing the potential effects of competition from credit unions when it enacted FCUA.[244] Finding no such evidence, the dissent would have held that the banks' interest was not within the "zone." The permissive, inferential approach adopted by the majority in *NCUA* is preferable to the more demanding, specific-evidence-of-intent approach taken by the dissent, both because the majority's approach provides a better fit with the realities of the legislative process and because it provides a better fit with the institutional limitations of courts.

1. The Legislative Process

When Congress considers enactment of any statute, an army of lobbyists descends upon it in an effort to shape the legislation. In the typical case, every interest group that is potentially affected in some significant way by any potential variant of the bill under consideration is represented in the legislative process. Moreover, unless an interest group has chosen to retain utterly incompetent lobbyists, it will have some effect on the shape of the statute—it will be responsible for the addition of a provision here or the change of a word there.[245] In the

242. *See NCUA*, 118 S. Ct. at 931 (citing 12 U.S.C. § 1759 (1994)).
243. *See id.* at 935-36.
244. *See id.* at 945 (O'Connor, J., dissenting).
245. *See* Pierce, *supra* note 181, at 1244-47, 1282-84.

vast majority of circumstances, it is fair to draw the inference that Congress crafted the statute in an effort to protect all potentially affected interests to some extent and in some ways. Thus, for instance, if a statute includes a provision, like the "common bond" provision, that has the effect of limiting the ability of credit unions to compete with banks, it is entirely fair and appropriate to infer that banks played a role in ensuring that the provision was included in the statute and, hence, that the statute was intended to protect the interests of banks.

It is certainly possible that the process through which FCUA was enacted was aberrational, in the sense that banks did not play any role in that legislative process even though their interests obviously would be affected by enactment of the statute and by the manner in which the statute was drafted. The dissenting Justices referred to the legislative history of the statute in an attempt to prove that Congress did not intend to protect banks. I have not put in the hundreds of hours of research necessary to form an opinion on that issue of fact. Congress enacted FCUA in 1934 at a time when banks' political clout was at an extraordinarily low ebb.[246] Perhaps banks were asleep at the switch or politically impotent when Congress enacted FCUA. If so, that legislative process was a true rarity. A court rarely will go wrong by drawing the inference that a statutory provision that in fact protects an interest group was intended to have that effect.

2. Determining Legislative Intent

The primary disadvantage of the more demanding, specific-evidence-of-intent method of applying the zone of interests test becomes apparent upon consideration of the institutional limitations of courts. The language of a statute rarely includes unambiguous evidence of an intent to protect, or not to protect, the plaintiff's interests. In most cases, a court must search the legislative history of the statute to find evidence of an intent one way or the other. This inquiry presents a problem of principle for Justices who believe that judicial consideration of legislative history is inappropriate and illegitimate. Thus, for instance, two of the Justices who joined the majority opinion in *NCUA*, including the author of the opinion, refused to join the portion of the opinion in which the majority relied on legislative history in an attempt to demonstrate that Congress did

246. *See, e.g.*, Milton Friedman & Anna Jacobsen Schwartz, A MONETARY HISTORY OF THE UNITED STATES, 1867-1960, at 299-419 (1963) (describing the banking crisis of the 1930s).

intend to protect the interests of banks.[247]

Independent of each Justice's principled beliefs with respect to the legitimacy of judicial reliance on legislative history, all Justices should be concerned about a purely pragmatic question: How well can courts interpret legislative history? Adrian Vermeule's outstanding article in *Stanford Law Review* answers that important question.[248] Vermeule begins by demonstrating that the Court completely misinterpreted legislative history in *Church of the Holy Trinity v. United States*,[249] the first and most famous case in which the Court relied on legislative history to determine congressional intent.[250] Vermeule goes on to document half a dozen reasons why courts are poorly positioned to interpret legislative histories.[251] He urges courts to refrain from attempting to do so because they are likely to come away with an erroneous understanding of legislative intent in so many cases that their overall accuracy rate in statutory interpretation cases would be better if they did not attempt to interpret legislative history in any case.[252]

Vermeule's recommendation applies with particular force in the context of the zone of interests test. The courts rarely will err if they simply assume that Congress intended to protect an interest in any case in which enforcement of the language of a statute has the effect of protecting an interest.[253] They are highly unlikely to improve their track record by attempting the daunting task of determining legislative intent based on their invariably imperfect understanding of a statute's legislative history.

CONCLUSION

Modern standing law is closer to a part of the political system than to a part of the legal system. It is characterized by numerous malleable doctrines and numerous inconsistent precedents. Judges regularly manipulate the doctrines and rely on selective citation of precedents to further their own political preferences. Because modern standing law is entirely a creation of the judicial branch of

247. *See NCUA*, 118 S. Ct. at 930 (noting that Justice Thomas, author of the opinion, and Justice Scalia, did not join footnote 6).

248. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998).

249. 143 U.S. 457 (1892).

250. *See* Vermeule, *supra* note 248, at 1839-57.

251. *See id.* at 1857-85.

252. *See id.* at 1885-96.

253. *See supra* text accompanying notes 241-44.

government, that branch bears sole responsibility for the present sad state of the law and sole responsibility to reduce the problems inherent in modern standing law. The Court can accomplish that important task by implementing a series of doctrinal reforms that simplify, objectify, enhance the consistency of, and increase judicial deference to politically accountable institutions. Through such reforms, the Court can restore the rule of law to the law of standing.

AN OPTIMISTIC POSTSCRIPT

At the end of the 1997 Term, the Court resolved another standing dispute in a manner that provides cause for optimism. In *Federal Election Commission v. Akins*,[254] a six-Justice majority rejected Justice Scalia's idiosyncratic and unsupportable version of standing. The majority also took a large step in the direction of simplifying the concept of injury-in-fact and rendering it more consistent with the Constitution.

The Federal Election Campaign Act of 1971 requires any "political committee" to register with the Federal Election Commission ("FEC") and to report its contributions to political candidates.[255] The Act then makes the information reported accessible to the public.[256] The Act authorizes "any person who believes a violation of this Act . . . has occurred" to file a complaint with the FEC.[257] It further authorizes "any party aggrieved by an order . . . dismissing a complaint filed by such party" to obtain judicial review of that order.[258]

The plaintiffs in *Akins* filed a complaint with the FEC in which they argued that an organization was a "political committee," within the meaning of the statute.[259] The FEC dismissed the complaint on the basis of its determination that the organization was not a "political committee."[260] The plaintiffs sought judicial review of that order. The FEC argued that courts had no jurisdiction to review the order because the plaintiffs lacked Article III standing.[261] The plaintiffs argued that they suffered a judicially cognizable and redressable injury-in-fact attributable to the order in their capacity as

254. 118 S. Ct. 1777 (1998).
255. *See* 2 U.S.C. §§ 431-455 (1994).
256. *See Akins*, 118 S. Ct. at 1784.
257. 2 U.S.C. § 437g(a)(1); *see Akins*, 118 S. Ct. at 1783.
258. 2 U.S.C. § 437g(a)(8)(A); *see Akins*, 118 S. Ct. at 1783.
259. *See Akins*, 118 S. Ct. at 1781-82.
260. *See id.* at 1782-83.
261. *See id.* at 1783.

voters: The FEC's determination that the organization was not a "political committee" deprived them of information about the organization's campaign contributions that would be valuable to them in deciding whether to vote for particular candidates.[262]

The case required the Court to revisit and clarify the confusing and inconsistent jumble of precedents that purported to describe the nature of the injury a plaintiff must suffer to have Article III standing. As the cases cited in both the majority and dissenting opinions demonstrate, the Court had characterized injuries that do not qualify as an injury-in-fact in at least four different ways. It had described them as "abstract," "generalized," "undifferentiated," and "shared in substantially equal measure by all or a large class of citizens."[263] Moreover, one of the cases in which the Court used loose language of this type was arguably directly on point. In *United States v. Richardson*,[264] the Court held that a taxpayer/voter lacked standing to rely on the "Statement and Accounts" clause of the Constitution to compel the CIA to report its expenditures.[265]

The majority in *Akins* recognized that the plaintiffs' injury was "undifferentiated" and "shared in substantially equal measure by all or a large class of citizens."[266] Yet, the majority held that the injury was sufficient to support the plaintiffs' standing.[267] The majority held that only "abstract" injuries fall outside the range of injuries a court is willing to recognize for Article III standing purposes.[268] Throughout the opinion, the majority emphasized a crucial distinction between *Akins* and the precedents the government cited to support its argument that the plaintiffs lacked standing. The plaintiffs in *Akins* were asserting a right that Congress conferred upon them by statute and that Congress instructed the courts to enforce at the behest of the plaintiffs.[269] Thus, for instance, the majority distinguished *Richardson* as a case in which Congress had enacted a statute in which it specifically limited the scope of the expenditure information that the CIA was authorized to report to the public.[270] By contrast, in *Akins* "there is a statute which . . . does seek to protect individuals such as [plaintiffs] from the kind of harm they say they have suffered, that is,

262. *See id.* at 1784.
263. *Id.* at 1784-87.
264. 418 U.S. 166 (1974).
265. *See id.* at 179-80.
266. *Akins*, 118 S. Ct. at 1785-86.
267. *See id.* at 1787.
268. *Id.* at 1785-86.
269. *See id.* at 1783-84, 1787.
270. *See id.* at 1784.

failing to receive particular information about campaign-related activities."[271] The majority made it clear that Congress has broad discretion to recognize injuries that courts must vindicate: "We conclude that . . . the . . . injury at issue . . . is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the courts."[272] The majority opinion in *Akins* is an important first step in the process of beneficial reform of standing law.[273] If the Court can maintain consistency in its application of the principles announced in *Akins*, it can move standing out of the world of judicial politics and back into the world of the law, at the same time that it returns to an interpretation of Article III that is consistent with the original intent of the Framers.

271. *Id.* at 1785.

272. *Id.* at 1786.

273. *See also* Clinton v. New York, 118 S. Ct. 2091, 2100 (1998) (adopting a broad probabilistic approach to determine whether a government action caused a plaintiff injury and to determine whether a judicial decision is likely to redress that injury in cases in which Congress has indicated its desire that courts be receptive to judicial challenges to the legality of the challenged action).