Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976

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Introduction

In 1984, then-Judge Antonin Scalia argued in a law review article that there are two principal types of administrative law cases: those brought by the "very *object* of a law's requirement or prohibition," and those "complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*."[1] Under his view, the first category would always have standing to challenge agency actions, while the latter would be much less likely to be able to show a concrete, particularized harm. As a result, Scalia argued, citizen would-be plaintiffs should find it difficult to obtain judicial review of agency decisions.[2]

Scalia appeared to put his dichotomy into law in the landmark cases *Lujan v. National Wildlife Federation*[3] (*Lujan I*) and *Lujan v. Defenders of Wildlife* (*Lujan II*).[4] In the wake of these cases, Scalia's dichotomy has become firmly embedded in the legal literature. As one recent casebook put it, "Directly regulated parties seldom have a standing problem. Nor . . . do those adversely affected by regulatory action although not its addressees. On the other hand beneficiaries . . . who seek to make the regulatory system have more bite, have often failed to demonstrate the requisite 'injury-in-fact.'"[5] However, in practical terms Scalia's dichotomy has been largely untested. As a result, the question has remained open whether regulated parties in fact have an easier time obtaining standing than parties seeking to force the regulatory system to develop more bite. We answer this question using a novel dataset of virtually all environmental cases decided in appellate courts over a thirty-four year period between 1976 and 2009. This large-scale data

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[1] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894 (1983).

[2] *Id.*

[3] 497 U.S. 871 (1990).

[4] 504 U.S. 555 (1992).

[5] Jerry L. Mashaw, Richard A. Merrill & Peter M. Shane, Administrative Law: The American Public Law System 1101 (6th ed. 2009).

collection enables us to apply modern statistical tools to investigate appellate courts' standing decisions.

We find that Scalia's dichotomy does not survive empirical scrutiny. Over the past three decades, roughly the same numbers of cases from each category of plaintiff were dismissed due to lack of constitutional standing. When we incorporate prudential standing, approximately fifty percent more business cases were dismissed than cases brought by environmental advocacy groups. We believe there are two explanations for the surprising vulnerability of business interests to dismissal due to lack of standing.

First, there is little doctrinal foundation for Scalia's dichotomy between cases brought by regulated businesses and environmentalists. During the bulk of the past three decades, there have been few important differences in standing doctrine for standing in cases brought by businesses and those brought by environmentalists. When the Supreme Court tightened standing requirements in the early 1990s in *Lujan I* and *Lujan II*, it actually heightened the standing threshold for both environmentalists and regulated business interests. The increased level of scrutiny these cases placed on the concrete injury suffered by plaintiffs has doomed several actions brought by regulated industries. Additionally, these cases heightened the necessary geographic nexus for plaintiffs to show injury in fact and causation.[6] Finally, these cases placed more focus on agencies' ability to successfully redress the injuries suffered by businesses due to environmental regulations. As a result, a number of business cases have failed because they do not adequately demonstrate that agencies actually caused, or could fix, their injury.[7] Ironically, the sharpest difference in standing law for environmentalists and businesses emerged in the wake of the Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[8] which relaxed standing requirements for parties seeking to enforce regulations.

Second, many cases brought by regulated industries seeking to relax environmental regulations fall afoul of zone-of-interest requirements in environmental laws. Most importantly, courts have found that many claims under environmental statutes, and especially under the National Environmental Policy Act (NEPA), can only be made based on environmental injuries because often their purpose "is to protect the environment, not the economic interests of those adversely affected by agency decisions."[9] As a

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[6] In *Lujan I*, the Court held "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." Thus, it is insufficient to claim that the plaintiff's injury occurred within "any part of a 'contiguous ecosystem' adversely affected by a [challenged] activity . . . even if the activity is located a great distance away." *Defenders of Wildlife*, 504 U.S. at 565.

[7] The new focus on redressability has been particularly important in the context of state implementation plans (SIPs) under the Clean Air Act, where states generally have significant discretion to design and implement plans that improve their air quality.

[8] 528 U.S. 167 (2000).

[9] Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005) (quoting Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)).

result, business cases challenging NEPA rulings due to injuries to the business' economic interests are often dismissed under the zone-of-interest test.[10]

The paper proceeds as follows. In Section I, we discuss traditional standing norms, their origins and applications, and recent major Supreme Court cases' connection to traditional standing. In Section II, we discuss our research design, data collection, and empirical model, and our empirical results. In Section III, we interpret our empirical results and discuss the implications for our understanding of the role of standing in administrative law. Finally, we discuss implications of our analysis for environmental litigation in this country, and for future legal scholarship. In particular, we believe that our analysis demonstrates the value of empirically evaluating the impact of doctrinal developments. Empirical analysis can be used not only to evaluate academic arguments, but also as a means for advocates to refine their legal strategies and tactics based on how doctrine actually affects case outcomes.

I. The Evolution of Standing Doctrine

In order to bring a claim, all litigants must demonstrate that they have standing. First a plaintiff must demonstrate "constitutional standing" by showing that she has a sufficient "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."[11] Second, the plaintiff must demonstrate "prudential standing." In environmental law, the most important prudential standing requirement is that plaintiffs must show that their claim is within the "zone of interest" of the statute giving rise to the claim.

A. Constitutional Standing

Constitutional standing requirements are rooted in the mandate of Article III of the Constitution that the judicial power extends only to "cases" or "controversies."[12] What this means in practice, however, is very much up for debate. In recent years, several major Supreme Court cases have made major modifications to constitutional standing requirements. First, we examine standing doctrine during the 1970s and 1980s. Next, we examine the changes brought by a pair of Supreme Court decisions in the early 1990s, *Lujan I* and *Lujan II*, which made it more difficult for certain types of plaintiffs to obtain standing. Finally, we examine the shift caused by the Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, which reversed many of the restrictions on standing established just a decade earlier.

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[10] *See*, *e.g.*, Port of Astoria v. Hodel, 595 F.2d 467, 475–76 (9th Cir. 1979).
[11] Baker v. Carr, 369 U.S. 186, 204 (1962).
[12] U.S. Const. art. III, § 2.

1. *Accommodating Constitutional Standing Requirements: 1971–1990*

The Supreme Court's standing decisions in the 1970s and 1980s were relatively accommodating on standing. Several of these cases dealt directly with standing for environmental plaintiffs. In the landmark case of *Sierra Club v. Morton*, the Sierra Club argued that it should receive standing to challenge the Walt Disney Enterprises' plans to construct a park in the Sierra Nevada Mountains because it had "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country."[13] However, the Supreme Court rejected this argument. It found that the Sierra Club lacked standing because it failed to allege that it would suffer any "injury in fact" from the construction of the park. The Court stated that "[n]owhere . . . did the Club state that its members use [the area in question] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the [defendants]".[14] Despite the fact that it rejected the Sierra Club's standing argument, the Court's requirement of an injury in fact established a very modest barrier for plaintiffs. Indeed, the Court stated that the Sierra Club could have established an injury in fact by showing that some of its members used the area around the proposed park for recreational purposes. According to the Court, these members could have suffered "aesthetic" and "recreational" injuries due to the construction of the park.[15] Duly following the Court's suggestion, the Sierra Club amended its complaint in the *Morton* case to allege that its members used the area near the planned park for recreational purposes, and the Club was granted standing.[16]

The next Supreme Court case on standing further illustrated that it would not be difficult for environmental advocates to satisfy the constitutional requirement for standing. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, a group of law students challenged an Interstate Commerce Commission (ICC) order on railroad freight rates because they believed it would undermine the market for recycled materials.[17] Their standing argument rested on the premise that the ICC's approval of the rate increase would indirectly make their visits to local parks less enjoyable because of an increase in trash from nonrecycled items.[18] Despite the attenuated line of causation and fairly minimal injuries alleged by the plaintiffs, the Court found their standing arguments sufficient.[19]

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[13] 405 U.S. 727, 730 (1972).
[14] *Id.* at 735.
[15] *Id.*
[16] John D. Echeverria & Jon T. Zeidler, Barely Standing: The Erosion of Citizen "Standing" to Sue to Enforce Federal Environmental Law 5 (June 1999) (unpublished manuscript) (on file with Environmental Policy Project).
[17] 412 U.S. 669, 675–76 (1973).
[18] *Id.* at 676; s*ee also* Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. Rev. 1505, 1513 (2008).
[19] *SCRAP*, 412 U.S. at 687–89.

A prominent administrative law academic, Professor Richard Pierce, has observed that the *SCRAP* case set "an extremely low threshold for the nature and magnitude of the injury sufficient to obtain standing."[20] Indeed, if the "Court had retained the approach it took in [*SCRAP*], almost anyone would have standing to obtain review of almost any action that has an adverse effect on the environment."[21]

The Court continued to follow an expansive approach to standing in *Duke Power Co. v. Carolina Environmental Study Group, Inc*.[22] In this case, the plaintiffs challenged under the Fifth Amendment the constitutionality of a statute that limited the liability of the nuclear power industry for damages resulting from a single nuclear accident. The plaintiffs argued that if the nuclear power industry were exposed to full liability, reactors would not be built, which, in turn, would spare the plaintiffs from radiation from the reactors.[23] The standing claim rested on a chain of causation nearly as attenuated as that in *SCRAP*. Nonetheless, the Court granted standing to the plaintiffs. Taken together, *Morton*, *SCRAP*, and *Duke Power* established few barriers for environmental advocates to obtain standing.

2. *Tightening Constitutional Standing Requirements: 1990–1999*

In the 1980s, the Court did not decide any standing cases in the environmental context.[24] But it began to establish stricter standing requirements in a number of cases outside the environmental context.[25] Some of these cases had implications for environmental lawsuits: notably, *Allen v. Wright* held that the government could only be held accountable for a plaintiff's injury where it had full control over subsequent actions such that it could ensure that the plaintiff's injury could be remedied.[26]

However, the Court did not pull back from *SCRAP* specifically until 1990. First, in a nonenvironmental opinion, the Court described *SCRAP* as involving "[p]robably the most attenuated injury" ever to confer standing.[27] Later that year, in *Lujan I*, the Court began to apply "reinvigorated and more restrictive" standing rules to environmental cases.[28] In this case, the National Wildlife Federation challenged a government program that would

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[20] Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkuil, Administrative Law and Process 148 (4th ed. 2004).

[21] *Id.*

[22] 438 U.S. 59 (1978).

[23] *Id.* at 73.

[24] Farber, *supra* note 18, at 1515 n.39 ("Between *SCRAP* and [*Lujan I*], the Court did not decide any major environmental standing case, but rather it did offhandedly uphold the standing of an environmental group to challenge whaling rules in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986). The standing discussion occupied one sentence in a long footnote about whether the plaintiffs had a cause of action.").

[25] *See* Allen v. Wright, 468 U.S. 737 (1984); City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

[26] *Allen*, 468 U.S. at 759–60.

[27] Whitmore v. Arkansas, 495 U.S. 149, 158–59 (1990).

[28] William W. Buzbee, *The Story of* Laidlaw*: Standing and Citizen Enforcement*, *in* Environmental Law Stories 201, 215 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

open government lands to developers. The Court held that the plaintiff's affidavits asserting that its members used lands "in the vicinity" of those affected by the government program were inadequate to demonstrate that they were "actually affected" by the government's decision.[29]

Two years later, the Court "directly raised the . . . litigation hurdle posed by standing doctrine"[30] in *Lujan II*.[31] In this case, environmental groups were attempting to establish that the Endangered Species Act applies to overseas actions.[32] The plaintiffs' standing argument rested on the claim that federally supported actions taking place in Egypt and Sri Lanka would eventually threaten various endangered species, which, in turn, would ultimately harm their members' enjoyment of the area. However, Justice Scalia's plurality opinion held that the plaintiffs lacked standing to challenge the government's actions.[33] First, he ruled that the plaintiffs failed to demonstrate personal, concrete plans to return to the overseas location of the species in question (e.g., they didn't have a plane ticket). Thus, their injuries were hypothetical rather than concrete, imminent injuries in fact.[34] Second, he ruled that the plaintiffs failed to demonstrate redressability because "[s]ince the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary . . . . But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question."[35]

These two prongs of Scalia's holding raised the threshold for future plaintiffs to show both injury in fact and redressability. On injury, *Lujan II* made it imperative to demonstrate a concrete link between the environmental harm asserted and the plaintiffs in the case. Under this more stringent test, it is doubtful that the plaintiffs in *SCRAP* would have been able to show an injury. Based on Scalia's logic in *Lujan II*, the plaintiffs there would have had to prove they would visit a *specific* park likely to be impacted by trash from nonrecycled items. On redressability, plaintiffs had to show that the agency being challenged could redress the specific harms being asserted. It is unlikely that the plaintiffs in either *SCRAP* or *Duke Power* would have been able to meet this test.

Justice Scalia's opinion in *Lujan II* went on to discuss why it is often more difficult for environmental advocates, such as the plaintiffs in *Lujan II*, to obtain standing than it is for regulated industries:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order

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[29] Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 886–89 (1990).
[30] Buzbee, *supra* note 28, at 216.
[31] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[32] *See id*. at 562–64.
[33] *Id*. at 562.
[34] *See id*. at 560–63.
[35] *Id*. at 568.

> to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed . . . . Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.[36]

This passage in *Lujan II* built upon the law review article that Justice Scalia had published as a judge prior to joining the Supreme Court.[37] Scalia argued in this piece that there are two principal types of administrative law cases. The first category involves corporations or individuals who are the "very *object* of a law's requirement or prohibition."[38] Scalia argued that when these plaintiffs challenged such a law, they "*always* ha[ve] standing."[39] The second category involves plaintiffs that are "complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*."[40] In these cases, the plaintiff is much less likely to be able to show a concrete, particularized harm. As a result, he said, the courthouse door should remain firmly closed to these plaintiffs.[41]

Scalia further argued in this law review article that "not *all* 'concrete injury' indirectly following from governmental action or inaction would be capable of supporting a congressional conferral of standing."[42] He thus saw this theory not only as limiting standing, but in fact overruling congressional grants in certain cases.[43] He put this theory into law in *Lujan II*, using his opinion to raise a broader dismissal of the idea that Congress could create standing where none existed before. In his mind, citizen suit provisions in the Endangered Species Act (and by extension, elsewhere) could not replace constitutional requirements for standing.[44] This part of his opinion only gained a plurality of the vote, however, as Justice Kennedy noted in a concurrence that "Congress has the power to define injuries and articulate

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[36] *Id.* at 561–62.

[37] *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 164–65 (1992).

[38] Scalia, *supra* note 1, at 894.

[39] *Id.* (emphasis added).

[40] *Id.*

[41] *See id.* at 894–95.

[42] *Id.* at 895.

[43] *See id.* at 894 ("[T]he law of standing . . . excludes [courts] from the . . . undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself*."); *id.* at 897 ("Does what I have said mean that, so long as no minority interests are affected, 'important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?' Of *course* it does—and a good thing, too.").

[44] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992).

chains of causation that will give rise to a case or controversy where none existed before."[45]

The Court continued to tighten standing requirements in *Steel Co. v Citizens for a Better Environment*.[46] In this case, plaintiffs sought to bring a citizen suit against a company for past violations of the Emergency Planning and Community Right-to-Know Act. The Steel Company failed to comply with the Act's requirement to file regular reports with the Environmental Protection Agency on their discharges of various pollutants into the environment. The Court held that the plaintiffs lacked standing because their injuries were no longer redressable. Since the Steel Company was no longer violating the Act, the Court held that there was no basis for injunctive or declaratory relief. The Court also rejected the argument that the deterrent effect of civil penalties was sufficient to satisfy the redressability requirement.[47]

Taken together, *Lujan I*, *Lujan II*, and *Steel Co.* significantly raised the hurdle faced by environmental advocates seeking to obtain standing.[48] In *Lujan I*, the Court raised the bar for the required geographic nexus between the injury faced by a plaintiff and the offending government action.[49] In *Lujan II*, the Court tightened the requirement for injury in fact and redressability. Moreover, a plurality rejected the notion that Congress can confer standing by adopting an expansive citizen suit provision.[50] In *Steel Co.*, the Court continued to tighten the requirements for redressability.[51]

3. *Backing Away from* Lujan—Laidlaw *and Progeny: 2000–2009*

The Court sharply moved away from *Lujan I* and *Lujan II*'s restrictive attitude toward standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*.[52] In *Laidlaw*, environmentalists alleged that a private entity emitted toxins in excess of its statutory limits under the Clean Water Act. The district court found that the defendant did emit unlawful discharges into a South Carolina river, but these discharges did not cause measurable harm to the river's ecology or pose a health threat.[53] This finding left the plaintiff's standing on extremely shaky ground. Yet the Court gave the plaintiff standing with "little hesitation."[54]

First, the Court held that environmental plaintiffs establish injury in fact when (1) "they aver that they use the affected area"[55] and (2) they are "persons for whom the aesthetic and recreational values of the area will be less-

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[45] *Id*. at 580. (Kennedy, J., concurring).
[46] 523 U.S. 83 (1998).
[47] *See id*. at 108–09.
[48] Farber, *supra* note 18, at 1518.
[49] *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 886–89 (1990).
[50] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992).
[51] *See Steel Co*., 523 U.S. at 105–09.
[52] 528 U.S. 167 (2000).
[53] *Id*. at 181.
[54] Farber, *supra* note 18, at 1520.
[55] *Laidlaw*, 528 U.S. at 183.

ened by the challenged activity."[56] In other words, plaintiffs no longer had to show actual environmental harm. They merely had to show that the reasonable fear of some environmental harm would reduce their aesthetic or recreational enjoyment of an area. Applying this rule to the facts in *Laidlaw*, the Court held that Friends of the Earth had suffered an injury in fact because several of its members filed affidavits stating that they were unable to use the river for recreational purposes due to concerns about Laidlaw's discharges. For example, one Friends of the Earth member stated that

> he lived a half-mile from Laidlaw's facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges.[57]

Next, the Court rejected Laidlaw's argument that "even if [plaintiff] had standing to seek injunctive relief, it lacked standing to seek civil penalties . . . [because c]ivil penalties offer no redress to private plaintiffs."[58] The Court held that civil penalties are sufficient to satisfy the requirement for redressability because of their deterrent effect against future violations.[59]

Laidlaw marked a "wholesale retreat" from the strict requirements for standing established in *Lujan I*, *Lujan II*, and *Steel Co*.[60] It relaxed both the requirements for injury in fact[61] and for redressability. First, it established that environmental advocates no longer had to show concrete harm to the environment to establish injury in fact. Instead, they merely had to show that the reasonable fear of environmental harms would reduce their members' recreational enjoyment of a place.[62] This can be demonstrated through "circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution," which may be used "to prove injury in fact and traceability."[63] Second, it established that civil penalties were sufficient to meet the constitutional requirement for redressability.[64]

In *Massachusetts v. EPA*,[65] the Court continued its retreat from the strict requirements for standing established in *Lujan I*, *Lujan II*, and *Steel Co*. In

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[56] *Id.* at 182.
[57] *Id.* at 181–82.
[58] *Id.* at 185.
[59] *Id.* at 185–86.
[60] Maxwell L. Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321, 378 (2001); *see also* Buzbee, *supra* note 28, at 214; Farber, *supra* note 18, at 1521.
[61] *See* Hudson P. Henry, *A Shift in Citizen Suit Standing Doctrine:* Friends of the Earth, Inc. v. Laidlaw Environmental Services, 28 ECOLOGY L.Q. 233, 236–37 (2001).
[62] *Laidlaw*, 528 U.S. at 169.
[63] Friends of the Earth, Inc., v. Gaston Copper Recycling Corp., 204 F.3d 149, 163 (4th Cir. 2000).
[64] *Laidlaw*, 528 U.S. at 169.
[65] 549 U.S. 497 (2007).

this case, state governments and environmental organizations sought judicial review of the EPA's denial of their petition, asking the EPA to initiate a rulemaking process regarding greenhouse gas emissions from motor vehicles under Section 202 of the Clean Air Act.[66] The Court ruled that Massachusetts "is entitled to special solicitude in our standing analysis" due to its status as a quasi-sovereign state.[67] As a result, the Court granted Massachusetts standing to challenge the EPA's failure to initiate a rulemaking process.[68] In judging the impact of *Massachusetts v. EPA*, one scholar argued that, "[t]o the extent that *Laidlaw* may have cracked the door open slightly for a possible broadened scope of environmental standing . . . the *Massachusetts v. EPA* decision [threw the] door wide open."[69]

B. Prudential Standing Rules

Beyond the constitutional requirements for standing, courts have developed a number of prudential standing requirements. The most important prudential requirement in environmental law is that the claim must be within the "zone of interest" of the statute in question. This requirement grew out of the Administrative Procedure Act, which creates a cause of action for persons who are "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[70]

Under the zone-of-interest test, courts evaluate whether the interest being defended is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[71] Moreover, rather than evaluating the zone of interest "by reference to the overall purpose of the Act in question," courts determine it "by reference to the particular provision of law upon which the plaintiff relies."[72]

In general, the zone-of-interest test is "not meant to be especially demanding" because the APA establishes a presumption of judicial review.[73] The plaintiff's interest only "arguably" needs to be within the zone of interest protected by a particular statutory section. The zone-of-interest test is particularly relaxed in environmental law because most environmental statutes have citizen suit provisions which "extend[ ] standing to the outer boundaries set by the 'case or controversy' requirement of Article III of the Constitution."[74] Similarly, business group plaintiffs who are directly regu-

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[66] *See id*. at 504.
[67] *Id*. at 520.
[68] *See id*.
[69] Randall S. Abate, Massachusetts v. EPA *and the Future of Environmental Standing in Climate Change Litigation and Beyond*, 33 Wm. & Mary Envtl. L. & Pol'y Rev. 121, 124 (2008).
[70] 5 U.S.C. § 702 (2006).
[71] Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).
[72] Bennett v. Spear, 520 U.S. 154, 175–76 (1997).
[73] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).
[74] Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000) (citing Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 16 (1981)); *see also Bennett*, 520 U.S. at 164–65.

lated by environmental statutes face no trouble from a zone-of-interest inquiry; although their interests would be purely economic, the test does not bar their complaints.

However, the presumption in favor of judicial review can be overcome when an affected, but not directly regulated, plaintiff has interests running contrary to the purpose of a statute.[75] This also applies where a plaintiff's interests are "'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"[76] Based on this principle, several courts have found that NEPA claims by nonregulated parties can only be made based on environmental injuries. Indeed, NEPA was enacted in order "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."[77] In other words, "the purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions."[78] This makes many industry claims outside the zone of interest protected by NEPA. In the Ninth Circuit, where many NEPA issues arise, "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA."[79]

II. Empirical Analysis

In our empirical analysis, we examine three research questions. First, we examine whether Scalia's argument, that regulated industries always receive standing while the beneficiaries of regulations are often denied standing, survives empirical scrutiny. Second, we examine the impact of doctrinal changes wrought by the Supreme Court on standing outcomes in the lower courts. One of the central inquires in judicial politics, and perhaps in the entire legal academy, is the degree to which Supreme Court decisions affect outcomes in the lower courts. Finally, we examine why the number of business cases dismissed due to lack of standing appears to be increasing in recent years.

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[75] *See* Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 921–22 (D.C. Cir. 1989).

[76] Harvey v. Veneman, 396 F.3d 28, 34–35 (1st Cir. 2005) (quoting *Clarke*, 479 U.S. at 399).

[77] 42 U.S.C. § 4321 (2006).

[78] Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005) (quoting Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)).

[79] Silver Dollar Graving Ass'n v. U.S. Fish and Wildlife Serv., No. 07-35612, 2009 WL 166924, at *1 (9th Cir. Jan. 13, 2009); s*ee also Nev. Land Action Ass'n*, 8 F.3d 713, 716 (9th Cir. 1993); Port of Astoria v. Hodel, 595 F.2d 467, 475–76 (9th Cir. 1979). There is a circuit split on this issue, however. The Eighth Circuit has held that "even purely economic interests may confer standing under NEPA if the particular NEPA provision giving rise to plaintiff's suit evinces a concern for economic considerations." Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1038 (8th Cir. 2002).

A. Research Design

In order to evaluate the evolution of standing doctrine, we coded virtually every environmental law decision by an appellate court over the past thirty-four years.[80] In particular, we coded every appellate decision where a litigant sued either the federal government or used a citizen suit provision to sue private parties based on one of nine major environmental statutes between 1976 and 2009.[81] This provided a database of 1935 cases.

We used a combination of automatic processes and close readings to code each case. The automatic process enabled us to efficiently code a variety of descriptive information about each case, such as its circuit, the type of litigants, the statutory claims raised in the case, the threshold issues raised in each case, and the judges that sat on the case.[82] We then read each case closely to check the automated coding process, and to determine its resolution of various threshold issues and the statutory issues on the merits. During this process, we coded each judge's individual vote as well as the overall resolution of the case.

Looking first at the nine statutes we chose, we coded which statute or statutes gave rise to claims. If a case had multiple statutory issues, we coded each of these issues. For instance, a case that included issues related to the Clean Air Act and Clean Water Act would be coded for both statutes separately. The Clean Air Act (23%), Clean Water Act (19%), Endangered Species Act (18%), and National Environmental Policy Act (33%) cover the vast majority of the claims in our data. We also coded the circuit where each case was brought. The Ninth and District of Columbia Circuits accounted for over half of all environmental cases brought in the appellate courts over the past thirty-five years.

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[80] Similarly to previous research, we "confined the case population to challenges to the government rather than considering purely private disputes as well in order to narrow the inquiry to a group of lawsuits that would all be subject to a judge's view of the correct relationship between the judiciary and other branches of government." Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 939–40 (2008). Moreover, like Richard Revesz's seminal study of environmental cases in the D.C. Circuit, we did not include cases that addressed issues primarily related to the Freedom of Information Act or attorneys fees' claims. *See* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1725 (1997). We also did not include cases primarily addressing whether third parties could intervene in a case.

[81] The nine major environmental statutes were: the Clean Air Act (CAA), the Clean Water Act (CWA), the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Safe Water Drinking Act (SWDA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and the Toxic Substances Control Act (TSCA).

[82] After compiling the initial list of cases, we ran secondary searches in Westlaw to code the parties, statutory issues, and judges on each case. We also ran secondary searches to code the circuit where the case was heard. We then checked the results of these secondary searches when we manually coded the disposition of each case.

Our dependent variable was coded as "1" if the plaintiffs obtained standing, and "0" otherwise. Where parts of a claim were dismissed due to lack of standing while others were decided on the merits, we only deemed a case dismissed when the decision on standing was potentially outcome determinative. Where the challenger was dismissed on one statutory claim and lost all other statutory claims (*within a single statute*), we coded the case as dismissed because that dismissed claim could have changed the outcome. However, where the challenger instead won on a different claim (*within that statute*), we coded the case as obtaining standing, because the challenger had won its case regardless.

We examine three primary explanatory variables. First we include a variable indicating the doctrinal period in which the case took place. Approximately 40% of the cases in our data took place prior to *Lujan I* between 1976 and 1990, 23% took place during the 1990s, and 38% took place during the 2000s after *Laidlaw*.

Second, we coded the agency being sued. If a litigant sued multiple agencies, we coded the primary agency sued in the case. The majority of environmental law claims are brought against the EPA (Figure 1). A sizeable number, however, are also brought against the Department of the Interior (DOI) or the U.S. Department of Agriculture (USDA). Thus, an advantage of our analysis is that we can generalize beyond one agency (the EPA) to look more broadly at the administrative state's enforcement of environmental laws.[83] Indeed, approximately 44% of the cases in our dataset were brought against the DOI, the USDA, or the Department of Commerce, rather than the EPA.

Finally, we categorized the plaintiffs into three mutually exclusive categories: environment-protection advocacy groups, businesses and industry groups, and a residual category for other types of claimants.[84] We used the lead plaintiff in each case to guide our coding decisions. Overall, environmental advocacy groups brought approximately 43% of the claims in our database, and businesses and industry associations brought approximately 33% of the cases (Figure 2).

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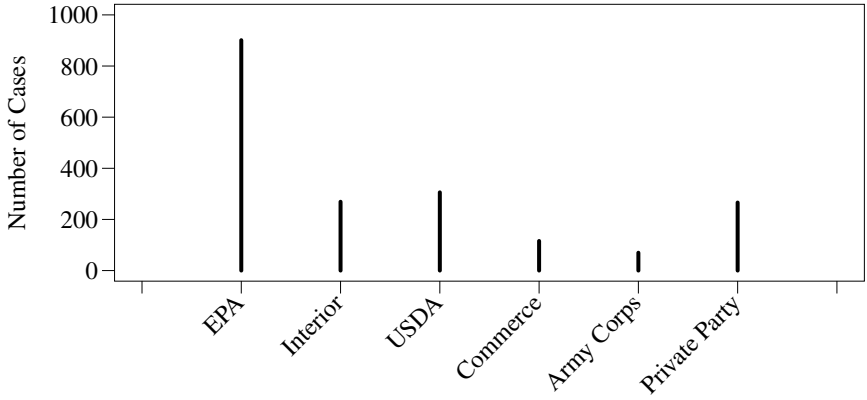
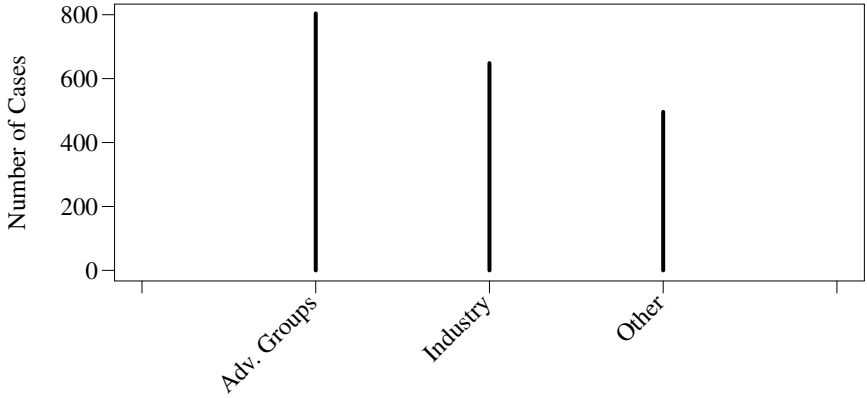
[83] To our knowledge, all previous empirical studies of environmental law have focused solely on cases challenging the EPA. *See, e.g.*, Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 792 (2008); Revesz, *supra* note 80, at 1725.

[84] This coding system was based on the system described in Scott Ainsworth, Appeals Court Reactions to the Political Control of Bureaucracies: Who Sues the EPA and Who Wins? (2008) (unpublished manuscript) (on file with author). The "environmental protection advocacy group" category includes all claims brought by citizens' groups seeking to expand environmental protections. The "business" category includes all cases brought by both individual companies and industry associations. In virtually all of these cases, these business interests are seeking to curb environmental protections. The residual "other" category includes claims brought by state and local governments, individuals, and conservative citizens' advocacy groups seeking to curb environmental protections (e.g., Pacific Legal Foundation).



This figure breaks down the cases in our data by the agency being sued.



This figure breaks down the cases in our data by type of plaintiff.

B. Empirical Results

The implication of Scalia's dichotomy is that the beneficiaries of regulations should be more likely to be denied standing than regulated industries. However, we find the opposite. Over the entire period we study, claims brought by regulated industries were dismissed due to lack of standing approximately 4.6% of the time, while just 3.1% of claims brought by advocacy groups were dismissed. In other words, regulated industries were about 50% more likely to be denied standing than the beneficiaries of regulations.[85] These findings suggest that environmentalists have more opportunities to effectively challenge environmental degradation through the judiciary today than they feared during the 1990s, and indeed have court access akin to that enjoyed earlier in the 20th Century. In contrast, businesses do not have the

[85] This difference is statistically significant using a one-tailed p-test at the .1 level.

same unfettered access to challenge environmental regulations in court than conventional wisdom has heretofore suggested. Why are regulated industries less likely to obtain standing than citizens' groups?

First, it makes sense that the rate of dismissal due to constitutional standing concerns is similar for both groups of cases. Scalia's strict view of standing for the beneficiaries of regulations was only the law of the land for less than a decade between *Lujan I* and *Laidlaw*. Prior to *Lujan I* and *Lujan II*, there were very lax standing requirements for both regulated industries and the beneficiaries of regulations. Moreover, *Laidlaw* largely reversed the stricter standing rules established by *Lujan I* and *Lujan II* on citizens groups seeking to strengthen environmental laws. It did not similarly address the difficulties faced by businesses resulting from the stricter rules established by *Lujan II*.

Second, claims brought by regulated industries are much less likely to satisfy prudential standing requirements under the zone-of-interest test than those brought by advocacy groups. In addition, the number of cases brought by businesses under statutes with more difficult zone-of-interest tests has increased in recent years.[86]

1. *The Effect of Doctrinal Changes on Environmentalist Constitutional Standing Dismissals*

Over the past thirty-five years, the Supreme Court doctrine on what kinds of plaintiffs and claims can obtain constitutional standing has shifted dramatically. In this section, we examine how these decisions have affected who gets standing. For example, did Supreme Court decisions in *Lujan I* and *Lujan II* actually cause a decrease in the probability that environmental advocates would get standing in the lower courts? Similarly, did the Supreme Court's decision in *Laidlaw* relaxing standing requirements cause an increase in the probability that environmental advocates would get standing in the lower courts?

In the era before *Lujan I*, there were few doctrinal hurdles for plaintiffs seeking standing to challenge environmental standards. As a result, we expected virtually all plaintiffs challenging environmental laws, regulations, and private entities' compliance with these laws to obtain standing during this period. In fact, the results of our analysis confirm this expectation. We find that only 1.5% of cases brought by environmental groups were dismissed due to lack of constitutional standing prior to *Lujan I*.

The doctrinal landscape for standing shifted dramatically in the early 1990s when *Lujan I* and *Lujan II* significantly tightened the requirements for environmental advocates to obtain standing. As we discussed above, Justice Scalia's plurality opinion in *Lujan II* argued it should be "substantially more difficult" for environmental groups to obtain standing than for regulated in-

[86] For instance, our data indicate that the percentage of business claims brought under NEPA has tripled between the 1980s and 2000s.

dustries. Many academics agreed that *Lujan II* would make it more difficult for the beneficiaries of environmental laws to obtain standing.[87] Notably, Richard Pierce noted in 1993 that *Lujan II* "could produce a situation in which no intended beneficiary of an environmental statute has standing to obtain judicial review."[88] He then explained this conclusion:

> [I]f the Court, as it suggests in [*Lujan II*], applies to statutory standing cases the same impossibly demanding tests it has applied in some of its nonstatutory standing cases, it will create a legal regime in which only regulated firms have standing to obtain judicial review of most broadly applicable agency actions. Regulated firms almost invariably will be able to establish "concrete and particularized" injury directly attributable to agency actions. For anyone else, the injury almost always will be characterized as "generalized" or as the product of an indirect causal claim that is "conjectural" or insufficiently precise and "imminent" in its temporal dimension.[89]

In recent years, the prediction that *Lujan I* and *Lujan II* would cause a dramatic decrease in the number of environmental advocates that obtain standing has become the conventional wisdom. Cass Sunstein predicted,

> Post-*Lujan*, most environmental suits will be able to go forward . . . [b]ut the need to show an injury will complicate such suits, and some occasions will arise where no plaintiff can be found . . . [or] the insistence on an actual injury, as understood in *Lujan*, will bar the action altogether.[90]

Our results indicate that the percentage of environmental groups' claims dismissed due to lack of constitutional standing did increase after *Lujan I* from 2.0% to 5.8% (Figure 3).[91] This certainly demonstrates that *Lujan I* and *Lujan II* made it more difficult for environmental groups to obtain standing.

There are a number of examples of appellate courts rejecting standing claims after the Court's rulings in *Lujan I* and *Lujan II* that certainly would have been sufficient prior to these rulings. For instance, in *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, the Third

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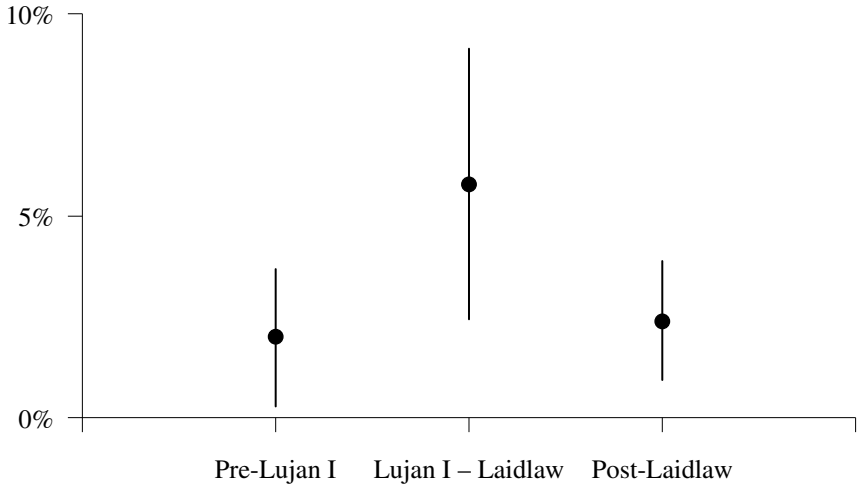
[87] *See generally* Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of* Lujan v. Defenders of Wildlife, 22 COLUM. J. ENVTL. L. 169 (1997); Harold Feld, *Saving the Citizen Suit: The Effect of* Lujan v. Defenders of Wildlife *and the Role of Citizens Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141, 183 (1994); Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761 (1994); Gene R. Nichol, *The Impossibility of* Lujan*'s Project*, 11 DUKE ENVTL. L. & POL'Y F. 193, 195–97 (2001) (noting that at first *Lujan* had a restrictive effect on standing but that later courts backed away from this position); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L. J. 1170 (1993); Stearns, *supra* note 60; Sunstein, *supra* note 37.

[88] Pierce, *supra* note 87, at 1189.

[89] *Id.* at 1194.

[90] Sunstein, *supra* note 37, at 221.

[91] This difference is statistically significant at the 5% level.



This graph shows the dismissal rates before Lujan I*, between* Lujan I *and* Laidlaw*, and after* Laidlaw *in cases brought by environmental advocacy groups. The dots show the dismissal rates and the solid lines show 95% confidence intervals.*

Circuit ruled that a citizens' group lacked standing to sue a corporation for violating the terms of its National Pollutant Discharge Elimination System (NPDES) Clean Water Act permit despite the fact that the plaintiffs had stopped fishing, swimming, and eating fish from the waterway because they knew an unpermitted pollutant was being discharged.[92] The Court held that "*knowledge* that a corporation has polluted waters is an 'injury' suffered by the public generally" and is thus not sufficient to confer standing absent an "actual, tangible injury to the River or its immediate surroundings."[93] In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, a panel of the Fourth Circuit adopted a similar argument, concluding that the plaintiffs lacked standing to sue a Clean Water Act violator because they failed to present evidence demonstrating an "observable negative impact on the waterways."[94]

But our findings do not support Professor Pierce's claim that *Lujan II* could produce a situation "in which no intended beneficiary of an environmental statute has standing to obtain judicial review."[95] Instead, it seems that Professor Sunstein's claim that "Post-*Lujan*, most environmental suits will be able to go forward" was closer to the mark.[96]

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[92] 123 F.3d 111, 123 (3d Cir. 1997).
[93] *Id.* at 121.
[94] 179 F.3d 107, 114 (4th Cir. 1999), *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000).
[95] Pierce, *supra* note 87, at 1189.
[96] Sunstein, *supra* note 37, at 221.

The Court's decision in *Laidlaw* largely reversed the tough new standards in *Lujan I* and *Lujan II*.[97] As a result, academics argued that "*Laidlaw* was immediately interpreted by the lower courts as an expansion of standing."[98] The most immediate result of *Laidlaw* was the Fourth Circuit's unanimous en banc reversal of its *Gaston Copper* decision.[99] In its opinion, the Fourth Circuit noted that *Laidlaw* "made it clear that [damage to an individual's aesthetic or recreational interests] may be vindicated in the federal courts."[100] As a result, the court found that the plaintiff's testimony that he would conduct recreational activities in a lake more often if pollution were reduced was sufficient to establish standing, despite the lack of any evidence that the pollution caused environmental damage to the lake.[101]

Similarly, in *Ecological Rights Foundation v. Pacific Lumber Co.*, the Ninth Circuit found that the connection between a plaintiff and the "area of concern" must merely be sufficient to "make credible the contention that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded."[102] More recently, the D.C. Circuit applied *Laidlaw* to hold that recreational and aesthetic injuries were sufficient to sustain an environmental organization's standing to challenge rules that exempt certain facilities from rules governing hazardous air pollutants (HAPs).[103]

We find strong empirical evidence that these examples played out throughout the circuit courts. Overall we find that *Laidlaw* reduced the number of environmental claims dismissed due to lack of constitutional standing by more than 50%, from 5.8% to 2.4% (Figure 3).[104]

2. *The Effect of Doctrinal Changes on Business Case Constitutional Standing Dismissals*

In contrast to the situation for environmental advocacy groups, there have been few obvious doctrinal changes for regulated industries. Certainly in the era before *Lujan I* and *Lujan II*, regulated industries had few doctrinal constraints on their ability to obtain standing. At first glance, *Lujan I* and *Lujan II* established few new doctrinal constraints on business. In *Lujan II*, Scalia himself stated that "[w]hen the suit is one challenging the legality of government action or inaction . . . there is ordinarily little question that the

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[97] One judge described *Laidlaw* as having worked "a sea change in constitutional standing principles." *Gaston Copper*, 204 F.3d at 164 (Niemeyer, J., concurring in the judgment). *See also* John D. Echeverria, *Standing and Mootness Decisions in the Wake of* Laidlaw, 10 WIDENER L. REV. 183 (2003).

[98] Farber, *supra* note 18, at 1521.

[99] 204 F.3d 149 (4th Cir. 2000).

[100] *Id.* at 154.

[101] *Id.* at 155.

[102] 230 F.3d 1141, 1149 (9th Cir. 2000).

[103] *See* Natural Res. Def. Council v. EPA, 489 F.3d 1364, 1370–71 (D.C. Cir. 2007).

[104] This difference is statistically significant at the 5% level.

action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it."[105] Similarly, a recent casebook stated that "directly regulated parties seldom have a standing problem. Nor . . . do those adversely affected by regulatory action *although not its addressees*."[106]

As Scalia described the injury in fact requirements, there is some basis for predicting that business interests will seldom have standing problems. Upon further examination, however, *Lujan II* heightened the stringency for several components of the injury in fact inquiry for business plaintiffs.

First, it increased the scrutiny on the concrete injury suffered by plaintiffs, including business interests, because "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[107] Instead, plaintiffs have to show specific evidence regarding how the government's actions will cause them continuing harm. In *Lujan II*, the Court failed to find continuing, present adverse effects due to the plaintiffs' failure to purchase an airline ticket to return to Egypt.[108] This heightened injury in fact requirement has doomed several actions brought by regulated industries. In *American Forest & Paper Ass'n v. EPA*, the Court found that the plaintiff

> has not alleged that any of its members hold permits to discharge into sensitive waters nor has it alleged that any of its members intend to apply for such a permit. . . . [A]bsent an allegation that its members currently discharge or intend to discharge into sensitive waters, the Association cannot demonstrate that its members are themselves "among the injured."[109]

In other cases, courts rejected claims that challenged discretionary, nonbinding governmental actions that may or may not lead to a concrete injury. In *Utility Air Regulatory Group v. EPA*, a challenge to an EPA guidance document was dismissed because it was applied "it appears, on a purely ad hoc basis—and in no way [bound] the Agency or regulated entities";[110] and a challenge to nonbinding DOI decision was dismissed in *National Ass'n of Manufacturers v. U.S. Department of the Interior*.[111] Finally, *Texas Independent Producers & Royalty Owners Ass'n v. EPA*[112] was dismissed because a subsequent statutory change exempted plaintiffs from the statutory provision they had challenged.

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[105] Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992).

[106] MASHAW ET AL., *supra* note 5, at 1101 (emphasis added).

[107] Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

[108] *Id.*

[109] 154 F.3d 1155, 1159 (10th Cir. 1998) (quoting Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972)).

[110] 320 F.3d 272, 278 (D.C. Cir. 2003).

[111] 134 F.3d 1095, 1120–21 (D.C. Cir. 1998).

[112] 435 F.3d 758, 767 (7th Cir. 2006).

Second, in *Lujan I* and *Lujan II*, the Court heightened the geographic nexus required for plaintiffs to show an injury in fact. In *Lujan I*, the Court affirmed the district court's ruling that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it.[113] Thus, it is insufficient to claim that the plaintiff's injury occurred within "any part of a 'contiguous ecosystem' adversely affected by a [challenged] activity . . . even if the activity is located far away from the area of their use."[114] This heightened focus on the geographic location of a plaintiff's injury led to the dismissal of the plaintiff's suit in *Ashley Creek Phosphate Co. v. Norton* because "Ashley Creek, whose phosphate leases are in Utah, lacks any judicially recognizable geographic nexus to the area that would be affected by mining on the North Rasmussen Ridge, which is approximately 250 miles away in Idaho."[115]

One aspect of the injury in fact inquiry in *Lujan II* did not affect businesses: concerns about the concreteness of the injury alleged. As explained above, this tightening of the inquiry led to increased environmental case dismissal, but did not significantly affect business cases, where the injuries alleged are almost uniformly monetary in nature. This helps to explain why recent Supreme Court case law has not affected business plaintiffs as much as it has affected environmental plaintiffs. Specifically, *Laidlaw* loosened the doctrinal standards for plaintiffs to demonstrate standing predominantly in considering the legitimacy of environmentalists' noneconomic (there, aesthetic) injuries. But it did not significantly develop the "continuing injury" and geographic nexus doctrines that did affect business cases, and it also did not significantly change redressability doctrine for business plaintiffs.[116]

Turning now to the other two elements of standing, the heightened causation and redressability requirements established by Scalia in *Lujan I* and *Lujan II* have also made it more difficult for businesses to obtain standing. The causation and redressability requirements simply ask whether some action by the defendant agency in fact directly caused an injury, and whether the agency could do anything to prevent this injury going forward. *Lujan II* was based in part on the contention that where private parties' actions cause the complained-of harm and a government agency merely allows or encourages these actions, it may not be appropriate to sue the government agency. This basis would seem to be equally possible in injuries claimed by environmental groups and by businesses.

In fact, the basis for many business cases' failure to satisfy constitutional standing requirements has instead been a failure to demonstrate that agencies actually caused, or could fix, their complained-of injury (economic harm). A number of business cases against the EPA and the DOI during the 1990s and 2000s failed to satisfy causation and redressability requirements

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[113] *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 887–89 (1990).

[114] Lujan v. Defenders of Wildlife, 504 U.S. 555, 565 (1992).

[115] Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 938 (9th Cir. 2005).

[116] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167, 183–84 (2000).

because the government agency did not have the power to redress plaintiffs' injuries.[117] For instance, in *US Ecology, Inc. v. U.S. Department of the Interior*, a court refused to hear a challenge to a DOI action because, as *Lujan II* describes, "redress depend[ed] on the cooperation of a third party" (California), and the plaintiff failed to demonstrate that California would in fact act so as to redress plaintiff's injury.[118]

The outcome of these cases might be affected by the ruling in *Massachusetts v. EPA* because that case certified standing against an agency for actions that only contributed slightly to the overall injury (damage resulting from global climate change). However, the case also granted "special solicitude" to Massachusetts as a state (not available to business plaintiffs); and even if it did have an effect, it has only had two years to play out. Given the small overall number of cases after *Massachusetts v. EPA*, it is impossible to properly assess its effect.

More modern redressability concerns (potentially inspired by *Lujan II*) have resulted in businesses finding themselves unable to challenge discretionary agency actions,[119] or even any federal agency approvals of state decisions in certain scenarios.[120] These sets of cases represent interesting doctrinal innovations, which are not addressed in post-*Lujan* Supreme Court case law.

Finding no particular doctrinal basis for a change in business case dismissals from any cases after *Lujan I* and *II*, we instead focus our empirical analysis entirely on the effect of the two *Lujan* cases on the difference in constitutional standing dismissals for business plaintiffs. We find that the percentage of regulated-industries claims dismissed due to lack of constitutional standing more than tripled after *Lujan I* from 1.5% to 5.3% (Figure 4). This difference is statistically significant at the 1% level. Moreover, it continues to be statistically significant in a regression where we control for the agency being sued. Finally, unlike for cases brought by advocacy groups, there is no evidence that *Laidlaw* has decreased the percentage of business cases dismissed due to lack of constitutional standing.

3. *The Impact of the Zone-of-Interest Test on Standing Dismissals*

Courts also look to whether claims are within the zone of interest of the statutory section that gives rise to the claim. This requirement poses little threat to claims brought by environmental plaintiffs. Indeed, our data indicate that there has never been a claim brought by environmental advocacy

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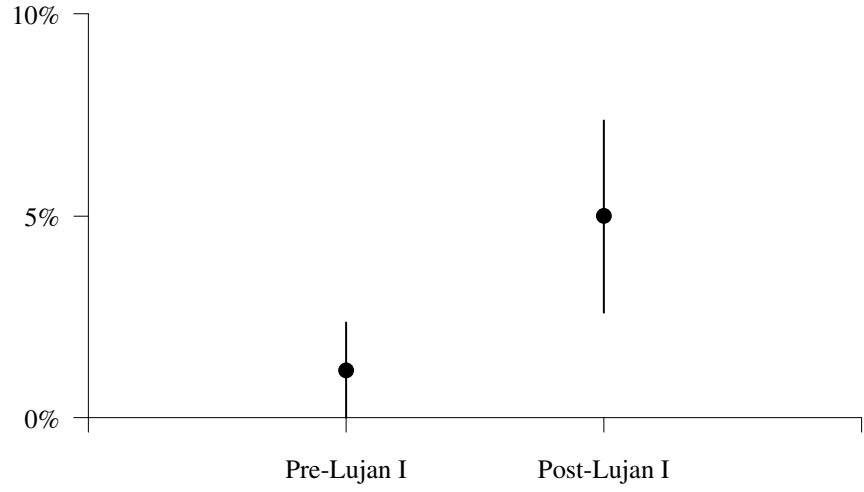
[117] *See, e.g.*, US Ecology, Inc. v. U.S. Dep't of the Interior, 231 F.3d 20, 26 (D.C. Cir. 2000); Duquesne Light Co. v. EPA, 166 F.3d 609, 613 (3d Cir. 1999).

[118] 231 F.3d at 24–25.

[119] *See, e.g.*, N.Y. Coastal P'ship v. U.S. Dep't of the Interior, 341 F.3d 112, 116–17 (2d Cir. 2003); *US Ecology, Inc.*, 231 F.3d at 24–25; Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 876 (10th Cir. 1992).

[120] *See, e.g.*, Mirant Potomac River, LLC v. EPA, 577 F.3d 223, 230 (4th Cir. 2009); Indus. Envtl. Ass'n v. Browner, No. 97-71117, 2000 WL 689518, at *2 (9th Cir. May 26, 2000); *Duquesne Light Co.*, 166 F.3d at 613.



This graph shows the dismissal rates before and after Lujan I *in cases brought by regulated industries. The dots show the dismissal rates, and the solid lines show 95% confidence intervals.*

groups that was dismissed because it failed to meet the zone-of-interest test. However, the zone-of-interest test presents a special challenge for business plaintiffs. After all, environmental statutes "are intended for the protection of the environment, not for the protection of persons deemed responsible for the consequences of having polluted the environment."[121]

Fortunately for business plaintiffs, most environmental statutes seek to balance economic impacts with protecting the environment. Moreover, many environmental laws have citizen suit provisions that "extend[ ] standing to the outer boundaries set by the 'case or controversy' requirement of Article III of the Constitution."[122] But NEPA does not include any provisions regarding protecting the economic interests of affected parties. In the Ninth Circuit, "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA."[123]

We find that the strict zone-of-interest rules for businesses bringing NEPA claims often cause these cases to be dismissed due to lack of prudential standing. In fact, approximately 13% of businesses' NEPA claims are dismissed under the zone-of-interest test, compared to less than 1% of claims brought by businesses under other statutes.

For instance, in *Ashley Creek Phosphate Co. v. Norton*,[124] a company with phosphate reserves 250 miles from a proposed phosphate mining pro-

[121] N. Shore Gas Co. v. EPA, 930 F.2d 1239, 1243 (1991).

[122] Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000) (citing Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 16 (1981)).

[123] Silver Dollar Graving Ass'n v. U.S. Fish & Wildlife Serv., No. 07-35612, 2009 WL 166924, at *1 (9th Cir. Jan. 13, 2009) (quoting Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)).

[124] 420 F.3d 934, 937 (9th Cir. 2005).

ject brought suit under NEPA, challenging the failure of the Bureau of Land Management to consider alternative sources of phosphate for a fertilizer plant in preparing an environmental impact statement. The Ninth Circuit held that the company's claim did not satisfy the zone-of-interest test because its purely financial interests were not within the zone of interests protected by the NEPA provision.[125] Similarly, in *Western Radio Services Co. v. Espy*, a radio company challenged the issuance of a radio tower permit to a competitor, alleging that the tower would cause signal interference problems.[126] The Ninth Circuit dismissed the claim under the zone-of-interest test since economic injuries are not what "NEPA aims to redress."[127]

The high likelihood of dismissal for these cases is particularly important since the number of NEPA claims brought by businesses is increasing over time. Prior to *Lujan I*, only 3.9% of business claims had NEPA-related issues. After *Lujan I*, more than 10% of business claims were brought under NEPA-related issues. Since 2000, the number of NEPA claims has climbed even more—to more than 13% of the total number of cases brought by regulated industries.

III. Why Is the Dismissal Rate for Business Cases Increasing?

As detailed above, the resolution of environmentalist cases largely followed Supreme Court doctrine, with a significant increase in standing dismissals following *Lujan I* and *Lujan II* initially hampering environmentalists' ability to bring claims against government agencies. However, environmental groups were able to persuade the Supreme Court that its *Lujan* ruling went too far in subsequent cases, most notably *Laidlaw*. This ruling, combined with environmental groups' increasing ability to find bases for standing among their membership, resulted in the return of standing doctrine exclusions roughly to their pre-*Lujan* level; a result predicted by several scholars espousing the conventional wisdom, and confirmed by our analysis. However, the flip side of that equation, that the *Lujan* cases did not affect business interests' ability to demonstrate standing, does not pass scrutiny. In its place, we suggest a number of alternate conclusions about *Lujan*, its progeny, and application of standing law in the court system generally.

A. Doctrinal Explanations

One possible explanation for the surge in standing-based dismissals of business plaintiffs focuses on the impact of *Lujan II*. As we have highlighted above, the *Lujan II* decision carries particularly significant weight in the judicial system, and has reintroduced standing doctrine as a major part of

[125] *See id.* at 939–45.
[126] 79 F.3d 896, 899 (9th Cir. 1996).
[127] *Id.* at 903.

constitutional law and practice. Thus, it is possible that *Lujan II* signaled to judges that they should start looking more closely at standing. Prior to *Lujan II*, many judges may have scarcely even looked at the standing of business plaintiffs. In a world where standing was a relatively minor procedural bar, it probably did not merit the attention of litigants. However, in dividing the world between objects and beneficiaries of regulation, Scalia may have failed to account for numerous other parties indirectly affected by regulations, whose claims suddenly became more tenuous. The question of environmental interests establishing injury in fact was already in the public domain; the question of establishing causation and redressability had not yet been heavily discussed.

Given the wide variety of standing dismissals, and the relatively small overall number of cases that were dismissed, it is impossible to run a statistical analysis to support this theory. However, a number of doctrinal innovations starting in the early 1990s have uniformly played to the detriment of attenuated business claims.

One general development that has affected a number of business cases has been a newfound reluctance by courts to confer standing in cases challenging agency actions where the agency had discretion regarding how to act. In these cases, injury, causation, and redressability can all be in doubt.

First, there may be no injury because the agency discretion removes the plaintiff's right to a particular outcome.[128] This is laid out most clearly in *Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Service*, where a court denied standing to an industry's claim against the Forest Service for refusing to open up public lands for public bidding.[129] In that case, the Forest Service's discretion over whether to authorize leasing led the court to conclude that the plaintiff had no "right" to bid for leases, and thus no injury in fact. Similarly, in *New York Coastal Partnership, Inc. v. U.S. Department of the Interior*, a court refused to grant standing to plaintiffs attempting to force an agency to undertake discretionary duties.[130]

Second, there may be no injury because government discretion removes the court's ability to redress the plaintiff's complaint. This can be seen particularly in the context of state implementation plans (SIPs) under the Clean Air Act where states generally have discretion to implement many aspects of that Act. As a result, the EPA may only have limited power to change the regulatory standards that are alleged to injure a given plaintiff. For instance, in *Duquesne Light Co. v. EPA*, a court refused to hear a challenge to the EPA's approval of a Pennsylvania SIP because the elements of Pennsylvania's plan went beyond the EPA minimum, and the EPA "only has

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[128] *See* Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv., No. 00-35349, 2001 WL 470022, at *1 (9th Cir. May 3, 2001) ("Because the statute gives the Forest Service this discretionary power, IPAA has no 'right' to bid for leases on any Forest Service land or to compel the Forest Service to authorize leasing of its land for mineral exploration.").

[129] *Id.*

[130] 341 F.3d 112, 116–17 (2d Cir. 2003).

power to disallow state plans that fail to be stringent enough."[131] Ten years later, another court referred to the same limitation in throwing out a challenge to the EPA's approval of a Virginia SIP, because the plaintiffs were harmed by measures above and beyond the EPA-mandated minimum.[132] This issue has also arisen under other statutes that allow for broad discretion. In *Ash Creek Mining Co. v. Lujan*, a coal mining company challenged a granting of coal reserves, over which it had expected to gain mining rights, to a private party.[133] The court leaned on the redressability prong of the standing inquiry, refusing to certify standing because even if this grant were taken back, there was no guarantee that the DOI would give mining rights to that plaintiff. There have been few such cases since 1990; but there were none before then.

One general development that may have made it more difficult for businesses to obtain standing is the growing stringency of competitor standing norms for businesses raising claims in the D.C. Circuit.[134] Before *Lujan II*, competitor standing was quite broad. In *Investment Co. Institute v. FDIC*, a court granted standing to mutual funds that objected to regulations allowing banks to begin to enter the securities market, even though plaintiffs had shown no actual activities here by banks.[135] Similarly, in *Associated Gas Distributors v. FERC*, in-state gas providers were granted standing to challenge regulations that removed a barrier to interstate gas providers to use the same pipelines, because "the challenged action authorizes allegedly illegal transactions that have the . . . potential to compete with the petitioners' own sales."[136] The court went on to emphasize that petitioners "need not wait for specific, allegedly illegal transactions to hurt them competitively" before suing.[137]

Contrast this broad treatment of standing, allowing conjectural and potential injuries to base standing, with the same circuit's post-*Lujan* case law. The first example of this came in *Shell Oil Co. v. FERC*, where Shell Oil failed to establish standing to challenge regulations that would halt the imposition of rate protections on Shell transporters.[138] In that case, although the court acknowledged that Shell's potential injury was "not inconceivable, [it was] unpersuaded that it [was] *imminent*, as it must be under traditional standing analysis."[139] That same year, another D.C. Circuit decision reached a similar conclusion. In *El Paso Natural Gas Co. v. FERC*, a gas company's challenge to regulations granting potential competitive advantages to competitors in Baja California—alleging injuries that were "certainly within the

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[131] 166 F.3d 609, 613; (3d Cir. 1999); *see also* 42 U.S.C. § 7416 (2006).
[132] Mirant Potomac River, LLC v. EPA, 577 F.3d 223, 230 (4th Cir. 2009).
[133] 969 F.2d 868, 876 (10th Cir. 1992).
[134] *See* Christopher Gallu, Jr., *Who Says You Have to Play by the Same Rules: The Competitor Standing Doctrine After* Lujan, 64 GEO. WASH. L. REV. 1205, 1213–14 (1996).
[135] 815 F.2d 1540, 1544–46 (D.C. Cir. 1987).
[136] 899 F.2d 1250, 1259. (D.C. Cir. 1990).
[137] *Id.*
[138] 47 F.3d 1186, 1202 (D.C. Cir. 1995).
[139] *Id.* at 1202.

realm of possibility"[140]—was denied because no specific examples could be shown, and the court thus ruled that such injuries were not imminent. These cases contrast starkly with the pre-*Lujan* cases above, and demonstrate clearly "that *Lujan's* holding will require that competitive standing rest on more than the possibility of competitive vulnerability."[141] Competitive standing doctrine was not a major basis for business case dismissal in cases involving pure environmental statutes, mostly because prudential standing concerns eliminate many cases by unregulated businesses asserting economic injuries. However, this shows yet another area where the *Lujan* cases alerted appellate courts to the importance of standing doctrine and thereby restricted standing not only for environmental advocates, but also for pure business interests.

In addition to developing doctrines that have tightened business case standing requirements, courts have also followed *Lujan II*'s example in demanding more specific pleadings. One of the Supreme Court's primary problems with the plaintiffs' case in *Lujan II* was that they had not pled specifically enough: plaintiffs suggested that they might be hurt in the future by traveling to endangered species' habitats abroad, but because they did not yet have plane tickets the Court dismissed them as not being "among the injured."[142] A similar desire for concrete pleadings led to the dismissal of a business claim in *American Forest & Paper Ass'n v. EPA*.[143] In that case, a business coalition challenging EPA regulations covering discharges into sensitive waters under the CWA was dismissed because "absent an allegation that its members currently discharge into sensitive waters, the Association cannot demonstrate that its members are themselves 'among the injured.'"[144] Similarly, in *Crete Carrier Corp. v. EPA*,[145] a group of trucking companies was dismissed in their challenge to a 2004 engine standard because they had not sufficiently demonstrated in their pleadings that an independent consent decree wouldn't apply regardless. Interestingly, although the court conceded that it was "possible" that the plaintiffs might buy noncompliant engines once the consent decree expired in 2005, the court was motivated by the lack of "record evidence to support" this possibility.[146]

B. Partisanship and the Amorphous Definition of Standing

Although individual doctrinal developments help to explain the restriction of standing for business plaintiffs since 1990, a more powerful explanation for doctrinal developments may lie in the nature of the standing inquiry, and in the judiciary at large.

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[140] 50 F.3d 23, 27 (D.C. Cir. 1995).
[141] Gallu, *supra* note 134, at 1214.
[142] Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992).
[143] 154 F.3d 1155 (10th Cir. 1998).
[144] *Id.* at 1159.
[145] 363 F.3d 490 (D.C. Cir. 2004).
[146] *Id.* at 493–94.

1. *The Amorphous Standing Inquiry*

As several scholars discuss, the standing inquiry is, quite simply, a difficult one: "[I]t is not possible to ask, 'is there injury?' without asking, as well 'injury to what?'"[147] The question of what injury is, and what injuries justify grants of standing, can vary widely from person to person, and (in some cases) from case to case.

In particular, identical injuries can be classified differently by different people, allowing for different conclusions on whether such injuries justify jurisdiction. One of Cass Sunstein's most scathing critiques of *Lujan II* comes when he discusses standing characterization issues in *Regents of the University of California v. Bakke*.[148] In that case, the Supreme Court granted standing with a justification that

> even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing . . . . The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race.[149]

Sunstein cried foul, saying that the Court only "found injury, causation, and redressability by the simple doctrinal device of *recharacterizing the injury*."[150] And applying this same technique to *Lujan II*, he recharacterized the injuries in that case as a diminished opportunity to promote their (professional and aesthetic) interests to bring it in line with the holding.[151]

Another telling example comes in an analysis of Scalia's treatment of procedural injuries. To justify *Lujan II*, Scalia was forced to distinguish other cases that have been granted standing based on statutory interests. To do so, he defined those prior cases as merely recognizing already-existing de facto injuries that were made litigable by the relevant statute.[152] These de facto injuries include loss of the "benefits of interracial association,"[153] which could arguably be compared with loss of the "benefits of interspecies association" claimed by plaintiffs in *Lujan II*. Thus, as Sunstein did with *Bakke*, a conceivable redefinition of harm appears to undermine the Supreme Court's logic.

Sunstein and Nichol are not the only academics to make this point. An analysis by Maxwell Stearns notes that "various standing requirements (most notably injury in fact, but more recently including redressability) have proved sufficiently malleable, indeed manipulable, as to justify seemingly

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[147] Nichol, *supra* note 87, at 202.
[148] 438 U.S. 265 (1978).
[149] *Id.* at 280–81 n.14.
[150] Sunstein, *supra* note 37, at 203.
[151] *See id.* at 204–05.
[152] Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992); s*ee also* Nichol, *supra* note 87, at 203.
[153] Havens Realty Corp. v. Coleman, 455 U.S. 363, 363 (1982).

inconsistent outcomes."[154] A key example here comes from a comparison of *Laidlaw* injuries with *Lujan* injuries. The plaintiffs in both suffered no personal or direct injury, but rather were focused on violations that had not yet been proven to cause actual environmental harms. Given this "absence of any discernible environmental harm, the claimed injuries could credibly be categorized as psychological, and the underlying litigation as ideologically motivated."[155] This case, as many others, thus became a tug of war over whose conception of harm would win out. In *Laidlaw*, Scalia lost this tug of war.

The prudential standing inquiry has also lent itself to multiple interpretations. For example, in *Bennett v. Spear*, the Ninth Circuit[156] and the Supreme Court[157] (led by Scalia) came to very different conclusions in applying the zone-of-interest test. In this case, two irrigation districts and two ranchers challenged a Fisheries and Wildlife Service (FWS) decision under the ESA, using its citizen suit provision to challenge environmental actions. A majority-Democratic panel[158] on the Ninth Circuit found that the industry plaintiffs failed to satisfy the zone-of-interest requirement because "[a]s *Lujan* makes clear, Congress may not permit suits by those who fail to satisfy the constitutionally-mandated standing requirements . . . [so] suits under the ESA . . . are clearly not available to 'any person' in the broadest possible sense of that term."[159] Thus, the court held, "[O]nly plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA."[160] However, the Supreme Court disagreed. Justice Scalia's majority opinion held that "there is no textual basis for saying that its [citizen-suit provision's] expansion of standing requirements applies to environmentalists alone."[161] As a result, Justice Scalia argued that the Ninth Circuit had "erred in concluding that petitioners lacked standing under the zone-of-interests test to bring their claims under the ESA's citizen-suit provision."[162] Ironically, Scalia relied on *Trafficante v. Metropolitan Life Insuarnce Co.*, which had allowed nontraditional standing for environmentalists in another context, in writing the *Bennett* opinion, thereby showing a willingness to adopt liberal arguments to protect business interests in certain cases.[163]

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[154] Stearns, *supra* note 60, at 323.
[155] *Id.* at 386.
[156] Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1994), *rev'd sub nom.* Bennett v. Spear, 520 U.S. 154 (1997).
[157] Bennett v. Spear, 520 U.S. 154 (1997).
[158] Judges Canby and Reinhardt were both appointed by President Carter.
[159] *Plenert*, 63 F.3d at 918 n.4.
[160] *Id.* at 919.
[161] *Bennett*, 520 U.S. at 166.
[162] *Id.*
[163] Stearns, *supra* note 60, at 370-71.

2. *The Role of Ideology in the Federal Judiciary*

Given the flexibility of standing doctrine, many scholars have argued that ideology plays a significant role in judges' decisions.[164] Seen in this light, the more stringent standing doctrine that emerged from *Lujan I* and *Lujan II* could be seen as a new procedural weapon that gave judges a new tool for eliminating cases they did not like. Both Democratic and Republican judges increased their rate of standing dismissals in the wake of these decisions. However, it appears that even more than it did for Republican judges in environmentalist-brought cases, *Lujan II* gave a new procedural weapon to Democratic judges seeking to preclude review of pro-environmental regulations. Moreover, it allowed them to dismiss these cases with very little threat of Supreme Court review: the Supreme Court has never granted certiorari to review a circuit court's dismissal of business plaintiffs due to lack of standing.[165] In contrast, since 1976, the Supreme Court has reviewed at least six environmental cases brought by business interests where an appellate panel found against them on the merits.[166]

We further evaluated the role of judicial ideology through a multivariate regression model.[167] This regression model allowed us to statistically control for the possibility that the differences we observed above are due to spurious factors, such as changes in the agency being sued. This analysis was done looking at two distinct periods: that up to 1992 (with the seminal *Lujan II* case) and that covering the eighteen years since 1992 that we analyzed.[168]

We found that the doctrinal malleability in standing doctrine for business cases appears to have led to a partisan split in the outcome of standing cases for business plaintiffs. Prior to *Lujan II*, appellate panels with Democratic and Republican majorities dismissed almost exactly the same percentage of business cases due to lack of standing: both Democratic and Republican panels dismissed roughly 2.5% of business cases due to standing. After *Lujan II*, Republican panels kept their rate of standing dismissals relatively unchanged. The percentage dismissed did increase from 2.6% to 4.3%, but this difference is not statistically significant. In contrast, Demo-

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[164] *See, e.g.*, Richard J. Pierce, *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

[165] Analysis by authors.

[166] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); Thomas v. Outboard Marine Corp., 479 U.S. 1002 (1986); EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64 (1980); Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980); E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977); Union Elec. Co. v. EPA, 427 U.S. 246 (1976).

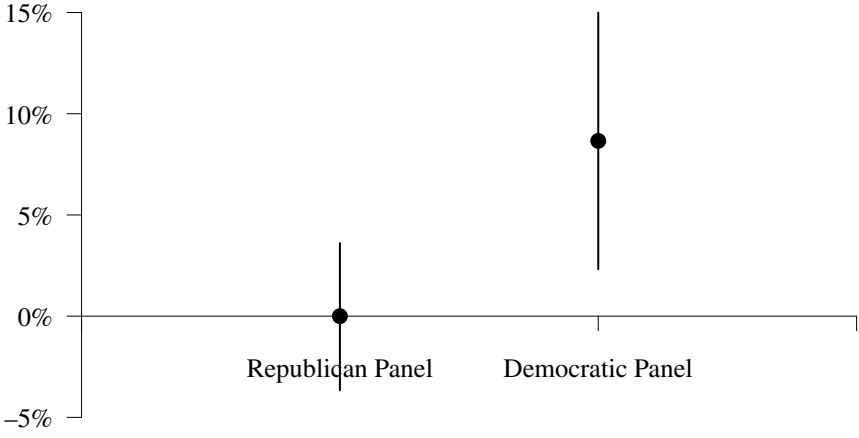
[167] We ran a logistic regression model that took this form:

$\Pr(y_i=1) = \text{logit}^{-1}(B_0 + \beta_1 * lujan_i + \kappa_{agency}, \sigma^2)$, where β_1 is the increase in standing dismissals after *Lujan I* and κ_{agency} is a random effect for the principal agency being sued.

[168] This necessarily combines the effects of *Lujan II* with those of *Laidlaw* and progeny, and so some doctrinal effects are muted in this analysis. However, the partisan effects we describe below were not significantly affected by *Laidlaw*.

cratic panels more than quadrupled the percentage of business cases they dismissed due to lack of standing, from 2.2% to 11.8%.[169]

After controlling for the agency being sued, we found even less change among Republican judges: there was virtually no change following *Lujan II* in the probability that Republican panels dismissed business cases. However, the Democratic trend remained, with the probability that a Democratic panel dismissed a business case due to lack of standing increasing by nine percentage points after *Lujan II* (Figure 5).



This graph shows the increase in standing dismissals for Democratic and Republican panels after Lujan II *in cases brought by businesses. The dots show the regression estimates, and the solid lines show 95% confidence intervals.*

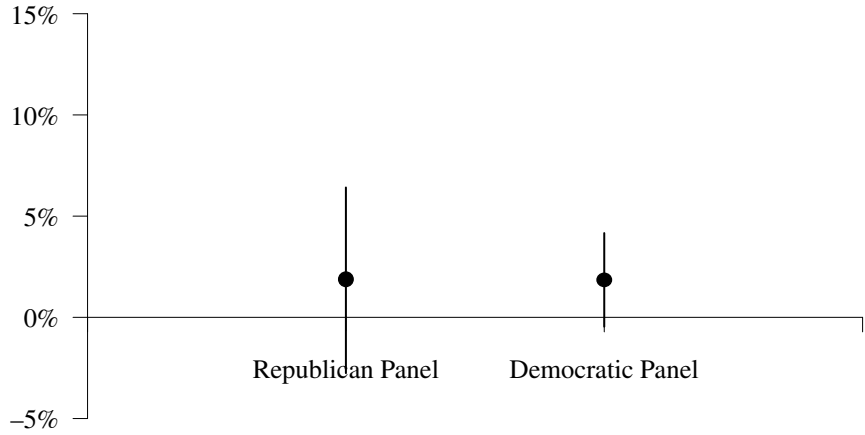
When we looked further at sub-issues, we obtained similar results, with Democratic panels dramatically increasing their dismissal rates in the wake of *Lujan II*, while Republican panels showed no increase whatsoever. The percentage of business cases dismissed by Democratic panels at least partially due to lack of injury increased from 0% to 5%, and the percentage of cases dismissed by Democratic panels at least partially due to failure to show redressability increased from 1% to 5%.[170] In contrast, Republican panels showed no increase in their dismissal rates for either of these sub-issues.

Unlike in business cases, there was little statistical increase in the partisanship of judges for cases brought by environmental advocacy groups. Indeed, the raw percentage of standing dismissals increased by roughly the same amount (1.5 percentage points) for both Democratic and Republican panels. But this change in the rate of standing dismissals is not statistically

[169] Using a simple two-sample t-test with equal variance, we find that this difference is statistically significant at the 1% level. These findings remain robust after statistically controlling for potentially spurious factors such as the agency being sued.

[170] Both of these differences are statistically significant at the 5% level.

significant at the 5% level for either category of panel. After controlling for the agency being sued in a multivariate regression model, we still found no increase in the dismissal rates after *Lujan II* for either Democratic or Republican panels (Figure 6).



This graph shows the increase in standing dismissals for Democratic and Republican panels after Lujan II *in cases brought by environmental advocacy groups. The dots show the regression estimates, and the solid lines show 95% confidence intervals.*

These findings belie the common picture that cases brought by environmentalists are the most ideologically polarized. Overall, there appears to be far more partisan polarization among judges on standing decisions in cases brought by business interests than in cases brought by environmental interests. Moreover, this polarization appears to have grown in the wake of *Lujan I* and *Lujan II*.

Conclusion

Justice Scalia revolutionized standing doctrine when he applied theories he first developed as a legal scholar and made them the law of the land in *Lujan I* and *II*. He particularly used these cases to create a dichotomy in administrative case law between cases brought by entities directly injured by a law's requirement or prohibition and those "complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*."[171] In this paper, we combined modern statistical tools with more traditional doctrinal analysis to assess Justice Scalia's arguments. In so doing, we have developed the first large-scale investigation of standing in environmental law.

[171] Scalia, *supra* note 1, at 894.

We found little empirical support for the conventional wisdom that "[d]irectly regulated parties . . . and those adversely affected by regulatory action although not its addressees" rarely encounter standing difficulties, while "beneficiaries, like the *Lujan* plaintiffs, who seek to make regulatory systems have more bite," have often encountered difficulty establishing standing.[172] Over the past three decades, roughly the same number of cases from each category of plaintiffs were dismissed due to lack of constitutional standing. In fact, including prudential standing, approximately 50% more business cases were dismissed than cases brought by environmental advocacy groups. This is not surprising: regulated industries are much less likely than advocacy groups to satisfy prudential standing requirements under the zone-of-interest test. Indeed, many courts have found that claims under environmental statutes (and especially under NEPA) can only be made based on environmental injuries when their purpose "is to protect the environment, not the economic interests of those adversely affected by agency decisions."[173]

Interestingly, we found that while changes in Supreme Court doctrine had predictable effects on claims brought by environmental advocacy groups, they had less predictable effects in business cases. As expected, we found that *Lujan I* and *Lujan II* caused an increase in standing dismissals for environmental interests, but the dismissal rate declined again after *Laidlaw* to roughly the same rate it had been prior to *Lujan I*. However, somewhat less expectedly, the dismissal rate for business plaintiffs also increased after *Lujan I* and *Lujan II*.

This latter finding is somewhat surprising: academic dialogue over environmental standing has generally focused on plaintiffs asserting environmental interests, with relatively little focus on businesses outside of some zone-of-interests analysis. However, we believe that this phenomenon can be explained by a number of factors. Perhaps most importantly, *Lujan*'s more stringent requirements for injury in fact and redressability apply nearly as much to business interests as to environmental interests. Many cases brought by regulated industries actually have weak injury claims, and judges increased their scrutiny of all parties' standing after *Lujan I* and *Lujan II*, so it would make sense that tenuous business claims would face increased scrutiny in the last twenty years. In addition, our findings indicate that the doctrinal malleability in Supreme Court doctrine gave liberal judges an opportunity to deny standing to business interests much more often than prior to *Lujan I*, while conservative judges continued to protect business interests in spite of a clear restriction in standing requirements.

In the end we believe that the Supreme Court will eventually step in to resolve the doctrinal ambiguity in standing law for business plaintiffs seeking to challenge environmental regulations. To date, the Supreme Court has

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[172] MASHAW ET AL., *supra* note 5, at 1101.

[173] Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (quoting Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)).

never explicitly addressed how the factual circumstances for business standing claims vary from claims raised by the beneficiaries of regulation. Moreover, it has never addressed what types of industry claims should be precluded by the requirement that claims fall within the zone of interest of environmental laws, allowing at least one circuit split to develop (on the validity of economic injuries for asserting NEPA violations). Looking forward, we expect this to change: the future of standing law will (and probably should) increasingly focus on the rights of businesses or objects of regulations to bring claims, at least until some core business-relevant questions such as the competitor standing doctrine are satisfactorily resolved.

There are a number of lessons from our analysis for progressive advocates. First, our findings indicate that environmental groups should be confident in their ability to obtain standing for most conventional claims. In the wake of the Supreme Court's *Laidlaw* decision in 2000 that relaxed standing rules for environmental plaintiffs, only about 2% of environmentalists' claims have been dismissed due to lack of standing.

Second, progressives should continue to rigorously challenge the standing of businesses' claims in the appellate courts. Contrary to conventional wisdom, our analysis indicates that business plaintiffs often have weak constitutional standing on both injury and redressability grounds. In addition, business claims under NEPA are vulnerable on prudential standing grounds. In the 9th Circuit, NEPA claims only fall within the statute's zone of interest when the purpose of the claim "is to protect the environment, not the economic interests of those adversely affected by agency decisions."[174]

Third, advocates should prepare for the day that the Supreme Court steps in to clarify standing law for businesses. They should build on the doctrinal analysis in this article to show why particular businesses plaintiffs are often not the appropriate party to bring a claim challenging environmental regulations.

Finally, scholars should develop research agendas to more clearly evaluate the impact of Supreme Court doctrine on progressive litigants. In this article, we have investigated the impact of changes in standing doctrine on environmental advocacy groups. This same type of analysis should be deployed in other areas of the law. For instance, scholars could investigate the impact of changes in justiciability doctrine on civil rights groups. They could also investigate the effect of changes in habeas rules and doctrine on criminal appeals.

More broadly, this study demonstrates the unpredictability of Supreme Court rulings. Justice Scalia achieved part of his stated goal in the *Lujan* cases: by redefining standing requirements, he was able to restrict standing slightly, eliminating a number of environmental claims that he felt had no place in the federal court system. However, he failed to fully enforce his

[174] Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005) (quoting Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)).

preferred dichotomy between business and environmental interests, and appears to have inadvertently hurt business standing.

Our findings show the importance of empirical data when attempting to make a broad generalization about the application of any substantial legal doctrine. Hopefully the empirical results discovered by our analysis (both expected and unexpected) will encourage others to undertake similar analyses, and thus contribute to the development of positive legal research. As our findings demonstrate, empirical legal analysis can uncover surprising trends in the practice of law that pure doctrinal analyses may fail to recognize.