STANDING IN THE WAKE OF STATUTES

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In Lujan v. Defenders of Wildlife*, the Supreme Court held that when Congress creates a legal interest to see that the law is followed, the deprivation of that interest, without more, is insufficient to allow a plaintiff to meet Article III's standing requirements.* Lujan *created significant uncertainty about Congress's ability to influence judicial standing inquiries by creating statutory rights, especially in light of Justice Kennedy's concurrence and the majority's footnote seven. This Article argues that Kennedy's concurrence and footnote seven are best explained by recognizing that Congress is institutionally superior to courts in evaluating the gravity of likely harms and the causal chains between statutory violations and those harms—evaluations that may bear on whether a plaintiff has met the injury in fact and traceability elements of Article III standing. The Article takes this explanation further, contending that the structure of statutory provisions that do not create causes of action nonetheless reveal legislators' likely understanding of the significance of certain harms, and the causal connections between those harms and statutory violations. Thus, legislators' understandings should influence judges' standing inquiries. Finally, the Article suggests that courts should rely on the purpose of statutory provisions to determine legislators' understanding, which could guide a judge in evaluating injury in fact and traceability, given that the alternative is the subjective evaluation of the judge without meaningful constraint by relevant legal standards.*

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INTRODUCTION

This Article addresses the role the legislature should play within the current doctrine of constitutional standing when a plaintiff sues to vindicate a right conferred by statute.[1] Constitutional standing is a plaintiff's ticket to the courthouse in every federal case.[2] There are three "irreducible constitutional minimum" elements of standing: (1) injury in fact, which must be "concrete and particularized" and "actual or imminent"; (2) traceability, which is "a causal connection between the injury and the conduct complained of" that is "fairly . . . trace[able] to the challenged action"; and (3) redressability, which means that "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[3] In cases where the injury is alleged to be caused by ongoing conduct, the second and third elements collapse because a court can remedy the injury by enjoining the ongoing conduct. Thus, in most situations, redressability and traceability are two sides of the same coin: the causal nexus between the alleged wrongful conduct and plaintiff's injury.

The scope of congressional power to influence standing has been a source of significant controversy.[4] Prior to the judicial creation of the current doctrine, a plaintiff had standing if he could demonstrate a deprivation of a legal interest—that is, an interest recognized at common law or otherwise granted by statute.[5] By creating statutory causes of action, Congress essentially provided standing for

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1. This Article addresses standing in any action premised on statutory conferral of a benefit. It may address standing questions that arise in a constitutional claim when the claim asserts that a statutory benefit has been denied in contravention of the Constitution. *See, e.g.*, *infra*, notes 139–43 and accompanying text (discussing *Linda R.S.*, which involved an equal protection clause challenge to Texas courts' interpretation that the State's child support statute did not to apply to illegitimate children).

2. Warth v. Seldin, 422 U.S. 490, 498 (1975).

3. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (internal citation omitted).

4. Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1050–52 (2009) (describing the debate between Liberals and Conservatives about Congress's role in standing inquiries).

5. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, (1992) (describing the evolution of the Supreme Court's standing doctrine from the "legal interest" to the "injury in fact" test).

persons to invoke the power of federal courts to the extent that Congress deemed warranted. In 1970, in an attempt to level the playing field for beneficiaries of regulatory statutes, the Supreme Court expanded the interests that give rise to standing to include injuries in fact caused by an alleged violation.[6] Although the Court initially did not indicate that the injury-in-fact doctrine might limit the legal interest test, shortly after announcing that doctrine, the Court used it to deny standing to those who seemed to have legal interests that were statutorily protected.[7] Ever since, the injury-in-fact doctrine has spawned a host of scholarly criticism of the injury in fact formulation of standing.

Much of this critical scholarship on standing law advocates changes to fundamental aspects of standing law doctrine.[8] Some scholars call for abandoning the traditional standing analysis,[9] while some suggest a simplified approach to standing,[10] and still others suggest adding to the doctrine's three essential elements.[11] But it seems highly unlikely that the Court will abandon or fundamentally modify its standing doctrine anytime soon.

This Article pursues a line of scholarship that tries to make sense of the judicial opinions that apply the injury-in-fact formulation of standing. In particular, it focuses on the extent to which current law leaves Congress a significant role in influencing judicial determinations of standing elements.[12] Like other scholarship in this line, this Article addresses the extent to which statutory influence fits within the framework presented in *Lujan v. Defenders of Wildlife*.[13]

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6. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151–52 (1970); *see also* Sunstein, *supra* note 5, at 183–85.

7. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 736 (1972).

8. *See* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 177 (2011).

9. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).

10. *See, e.g.*, Sunstein, *supra* note 5, at 166–67.

11. *See, e.g.*, Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's the Structure of Standing*, 65 ALA. L. REV. 289, 328 (2013) (suggesting incorporating into the current injury-in-fact inquiry "whether the harm befell the plaintiff by happenstance.").

12. The authors do not express any opinion in this Article about whether it would be better to abandon current standing doctrine, which has been greatly criticized for allowing the courts to convert passive virtues into passive aggression. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999) (finding support for the proposition that "judges provide [standing] to individuals who seek to further the political and ideological agendas of judges"); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 669 (2004) (concluding after empirical study that federal courts of appeal decide standing cases based on ideology when there are insufficient precedents and judicial oversight to make a threat of reversal substantial); Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine*, 100 NW. L. REV. 517, 520 (2006) ("The most likely explanation for standing rules is a doctrinal attempt to influence the ideology of future lower court decisions."). Rather, this Article limits its inquiry into Congress's legitimate role within the core of current standing doctrine.

13. 504 U.S. 555 (1992).

Although others have analyzed this important question, we believe that the existing scholarship has not paid close enough attention to the contours of the various *Lujan* opinions and subsequent Supreme Court opinions analyzing the relationship of statutory rights and structure to the standing inquiry. Specifically, this Article argues that Congress can influence standing analysis in several ways: (1) explicitly, through carefully crafted statutes that create causes of action to protect an identified interest; (2) implicitly, by creating procedural rights from which courts can infer congressional recognition of the causal connection between a plaintiff's concrete interest and the denial of that procedure; (3) through the Court's determination of Congress's recognition of actual harms or causal connections from statutory structure or other circumstantial evidence; and (4) by judicial construction of statutory purpose as an indication of how the enacting Congress likely would have evaluated injuries and causal connections.

Central to our argument is the notion that Congress cannot create standing, but that it can recognize interests and thereby influence judicial evaluation of whether an interest is sufficiently concrete and immediate to justify standing. Standing is predicated on actual injury to the plaintiff. As the Court in *Lujan* noted, "[statutory] broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."[14] Therefore, this Article contends that although Congress cannot ignore Article III standing limitations, it has the power to elevate the status of legally cognizable concrete injuries "that were previously inadequate in law."[15]

Part I of this Article lays out a normative argument in favor of allowing Congress to recognize actual harms as injury-in-fact, and connections between statutory and regulatory violations and such injury as adequately traceable. Part II describes the majority holding in *Lujan*, which views standing law as limiting Congress's prerogatives to authorize plaintiffs to use federal courts to remedy injuries that courts would otherwise find insufficient to satisfy standing criteria. Part III discusses Justice Kennedy's concurrence in *Lujan*, and explains how it supports the thesis of this Article that Congress can influence standing by explicitly recognizing actual harms and causal connections. Part IV examines Justice Scalia's footnote seven in *Lujan*, and explores the implications of procedural rights as a means for Congress implicitly to influence standing. Part V discusses how the structure of statutory provisions and other circumstantial evidence can imply Congress's recognition of harms and causal connections on standing. Part VI suggests that it is often appropriate for judges to go beyond statutory text and structure—that is, to consider statutory purpose as derived from context—as part of their inquiries into standing. Judges can then discern

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14. *Id*. at 578 (internal citation omitted); *see also* Warth v. Seldin, 422 U.S. 490, 501 (1975) (stating that although "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules . . . [Article] III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself.").

15. *Lujan*, 504 U.S. at 578.

legislators' understanding of the significance of potential injuries and the likelihood of causal connections in evaluating standing in particular cases.

I. NORMATIVE ARGUMENTS FOR CONGRESS'S ROLE IN STANDING

A. Congress's Institutional Superiority

Standing often depends on attributes of the injury alleged that are better evaluated by Congress than by the judiciary. The Court has made clear that a plaintiff cannot utilize the federal courts to redress an ideological objection to prohibited conduct: The desire to see the law followed is never an injury in fact.[16] For injuries that are too abstract or trivial, however, one might question whether a desire to see the law followed, rather than the injury remedied, truly drove the plaintiff to sue. This uncertainty might help explain the doctrinal requirement that injuries-in-fact be sufficiently concrete and palpable in order to support standing.

Some injuries, such as physical injuries and loss of property, are sufficiently palpable, so there is no doubt about whether the plaintiff has suffered them. In some cases, however, the Court has allowed plaintiffs who allege injuries that are not easily verified to sue in federal courts. For example, the Court has allowed plaintiffs to sue for affronts to their aesthetic sensibilities.[17] It has suggested that even emotional injuries, such as fear or stigma, may suffice as injury in fact.[18] For cases involving these less tangible injuries, the Court has to answer two questions: First, is the nature of the injury grave enough to warrant allowing the harmed person to invoke the courts to redress the injury? Second, because the injury cannot be directly verified, is it reasonable to believe that a person in the plaintiff's position would actually suffer such injury in response to the alleged wrongful act?

In many cases, Congress will be better at answering these questions than the courts because there is no objective scale by which to measure whether a particular kind of injury is sufficiently concrete and significant to warrant invoking

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16. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."); *Lujan*, 504 U.S. at 573 (rejecting violation of "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law" as injury in fact); Allen v. Wright, 468 U.S. 737, 754 (1984). *See also* Sunstein, *supra* note 5, at 188–89 (characterizing the Court as "classifying some harms as injuries in fact and other harms as purely ideological").

17. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686–88 (1973); Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (dicta stating that aesthetic harm can be injury in fact).

18. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 184–85 (2000) (finding fear to be injury in fact); *Allen*, 468 U.S. at 755 (dicta stating that stigma "is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing").

a judicial remedy.[19] That sufficiency depends on an assessment of the impact that a person who is injured by the violation is likely to perceive. The assessment essentially involves an informed value judgment.[20] Congress is institutionally better situated than courts to make such a determination because its members are both closer to the people and more accountable to the polity generally than are judges, who regard these questions through the lens of a closed record created by a formal judicial process.[21]

Moreover, courts are, by their very nature, bound to legal judgment, which suggests that they tread on suspect ground when they override value judgments made by the political branches of government.[22] When questions cannot be resolved by objective means, it is ultimately up to the elected representatives of the people to resolve them.[23] In these instances, "federal judges—who have no constituency—have a duty to respect legitimate policy choices of those who do."[24] As Justice Scalia noted, albeit in a somewhat different context, "there is no right answer to how many injuries are worth how much cost. It is essentially something you vote on and not analyze."[25] From this, one can surmise that even Scalia, the strongest proponent of limiting congressional influence over standing, cannot

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19. *See* Fletcher, *supra* note 9, at 231–33 (arguing that, conceptually, injury in fact is incapable of distinguishing between plaintiffs who honestly allege some injury); Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WISC. L. REV. 897, 926–29 (defining injury as a "setback to a person's interest" but then noting that "the task of determining what interests matter is a subjective one—perhaps hopelessly so"); Sunstein, *supra* note 5, at 188–89 (determining what counts as injury in fact is a value-laden judgment). *See also* Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1194 (2014) ("[A]dequate factual injury is the touchstone of the Court's standing analysis—except when it isn't."). In short, there is no acceptable metric for what a judge will find sufficiently concrete. *Cf.* Lin, *supra*, at 938 (concluding that the concept of harm for standing is not entirely subjective but depends on community norms).

20. *See* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1155 (1993) ("[T]he injury determination necessarily entails an exploration of what we wish to recognize as harm.").

21. *Cf.* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 938 (2013) (suggesting that the Court should defer to Congress's determinations in equal protection cases because the Court's "doctrine requires judgments that Congress is better suited to make"); Note, *A Chevron for the House and Senate: Deferring to Post-Enactment Congressional Resolutions That Interpret Ambiguous Statutes*, 124 HARV. L. REV. 1507, 1510 (2011) (The superior political accountability of the houses of Congress gives "each . . . a comparative institutional advantage over courts in making democratic value judgments").

22. Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 159 (2012).

23. *Id.* at 193.

24. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626 (1996).

25. Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 196 (1986).

easily disavow Congress's superior capacity to evaluate the gravity of alleged injuries.[26]

In addition, standing depends on traceability and redressability, which in the usual case depends on the likelihood that the alleged wrongful conduct caused the injury. When that likelihood is evaluated based on the probability of harm to individuals who fall within a broad class potentially affected by the wrongful conduct, the inquiry is no longer one about the particular party to the proceeding. It becomes an inquiry of "legislative fact" (i.e., facts of a general nature about how people perceive and are likely to react to specific events or stimuli).[27] As the label suggests, Congress enjoys an institutional advantage over courts in that inquiry.[28]

The expansive fact-finding mechanisms of the legislature render Congress better equipped to identify these causal connections, which depend on such factors as technical effects of violations of the law and likely third-party reactions to those violations. Congress enjoys superior information gathering capabilities.[29] It has the authority to demand information from those with expertise about general causal relations and is not limited to the facts that particular parties were able to marshal and introduce into the record. Congress, unlike the judiciary, is not "shackled by the temporal and reactive nature of litigation."[30] The legislature is not limited by time constraints, prohibitions on information-gathering techniques (such as *ex*

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26. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (noting that the gravity of a harm that a person shares with a large segment of the populous "is a fair subject for democratic debate in which he may persuade the rest of us"). Justice Scalia's objection to Congress influencing standing is grounded in his view that the role of courts is "protecting individuals and minorities against impositions of the majority." *Id.* Despite Scalia's attempts to demonstrate that the Court's role has historically been so understood, his assertion that Article III precludes Congress from authorizing courts to protect against harms shared widely by the public where Congress has created a cause of action is questionable at best. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459–500 (1965).

27. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) ("[T]he facts which inform [an agency's] legislative judgment may conveniently be denominated legislative facts").

28. *See* Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 7 (1986) ("Unlike legislators and unlike administrative rulemakers, courts are often inadequately informed about democratic desires . . . . [C]ourts often have inadequate legislative facts, that is, the facts that bear on the court's choices about law and policy."); Phillip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 38 (1969) ("[T]he Court . . . lacks machinery for gathering the wide range of facts and opinions that should inform the judgment of a prime policymaker."); *but cf.* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1179–81 (2000) (noting that Congress has superior capabilities for legislative fact finding, but may lack sufficient motivation to find such facts accurately).

29. Kate T. Spelman, *Revising Judicial Review of Legislative Findings of Scientific and Medical "Fact": A Modified Due Process Approach*, 64 N.Y.U. ANN. SURV. AM. L. 837, 857–59 (2009).

30. Devins, *supra* note 28, at 1180.

parte communications), stare decisis, or the ways parties frame a case.[31] Indeed, Congress's fact-finding resources are vast compared to the Court's; they include more funds, staff, and procedures devoted to information gathering.[32] Moreover, "[t]he greater number of members and their varied backgrounds and experience make it virtually certain that the typical legislature will command wider knowledge and keener appreciation of current social and economic conditions than will the typical court."[33] As Professor Bill Buzbee points out, "[f]rom a comparative institutional analysis perspective, courts are simply unsuited to evaluate independently either general legislative judgments about statutory goals and process or the significance of particular legal breaches and associated litigation."[34] In sum, evaluating the gravity of injury and its connection to statutory violation involves both findings of legislative fact, at which Congress is more adept than courts, and determining the desirability of value-laden trade-offs, which must rely on the democratic accountability of Congress.

B. Defense of Imputing Congressional Understanding

It is one thing to assert Congress's superiority in evaluating injuries and causal chains that give rise to standing; it is another to assert that imputation of such understanding based on statutes Congress enacts should influence judicial standing inquiries. In virtually no statute does Congress explicitly evaluate the gravity of injuries that might be caused by statutory violations or the causal connections between such violations and those injuries. As will become clear from our discussion that follows, we infer legislators' likely understanding of the significance of injuries and causal connections from the statutory provisions they enact. Thus, our arguments for having courts credit statutory influence on standing essentially mimic those that purposivist interpreters use to attribute meaning to statutory provisions.

For the purposivist,[35] "[t]he Court's job is . . . to determine the background policy at which Congress was driving, and then to read the statute to carry out that purpose."[36] Purposivists look beyond statutory text to the context in which the legislation was enacted, including legislative history in its broadest

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31. *Id.* at 1179–80.

32. *Id.* at 1178–79.

33. Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 209 (1971).

34. William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 279–80 (2001).

35. Purposivism is usually contrasted with Textualism, which seeks to find the best public meaning of the words of a statute at the time it was enacted. For a discussion of the distinctions between Textualism and Purposivism, as they are currently invoked, see generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM L. REV. 70 (2006)

36. John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 19–20 (2014).

sense.[37] They may also consider changes in circumstances that would suggest how a legislator who supported the purpose of the statute would apply it in a context that Congress may not have considered.[38] The same techniques may be used to determine how legislators' would evaluate the significance of harms against which the statute protects or the causal connections between statutory violations and those harms in a context that goes beyond what the statute envisioned.

We must be candid, however, that surmising legislators' likely understanding of the significance of injuries and causal nexus supposes a "reasonable legislator" for whom statutory provisions aim to achieve a coherent goal.[39] Essentially, our construction of legislative understanding reflects how a judge envisions legislators would have understood these factors had those voting for the statute actually considered them. Hence, we cannot justify use of purposivist inference by arguing that the understandings it reveals necessarily represent a legislative consensus about the elements of standing. Like purposivist interpretation, our approach reflects a sharing of determinations of policy between the legislature and the interpreting judge.[40] Nonetheless, we believe that the use of purposivist techniques is especially defensible when guiding judges' standing inquiries.

Various aspects of imputing legislative purpose are, in some sense, convenient oversimplifications. Such oversimplifications lie at the heart of several critiques of purposivism by proponents of alternative schools of statutory interpretation. One critique challenges purposivism's assumption that a single purpose motivates a statutory provision.[41] Contrary to the legal process view,[42] legislation is a process of bargaining between members of Congress who may have

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37. *See* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1648 (2014) [hereinafter *Rethinking Legislative Intent*] ("[P]urposivists seem to be willing to look for statutory evidence of purpose based on all sorts of evidence that Congress may or may not have had before it—regulations, advisory committee reports").

38. *See* Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 23 (2009) (identifying "translation theory . . . as a version of purposivism that tries to map original understandings onto changed circumstances by boosting the level of generality at which those understandings are defined").

39. *Cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (when interpreting a statute a judge should assume that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably").

40. *See* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation Of Powers*, 99 GEO. L.J. 1119, 1169 (2011).

41. *See* Nourse, *Rethinking Legislative Intent*, *supra* note 37, at 1623.

42. Purposivism derives, in large part, from the work of the legal process theorists Hart and Sacks, who contended that an interpreter should decide what purpose should be attributed to any relevant provision of a statute and then should interpret those words "so as to carry out the purpose as best it can." HART & SACKS, *supra* note 39, at 1374.

different goals.[43] Thus, statutes often involve an explicit balance of purposes, and the furtherance of one will often undermine another.[44] Even if the legislative process does not explicitly identify competing purposes, there is always the competing purpose of cost. Pursuing any purpose single-mindedly will quickly lead to unacceptable deprivation of resources from other crucial needs of society.[45] For this reason, the workability of purposivism requires judges to identify a purpose that incorporates some limiting principle. Yet, any limiting principle depends on the level of generality at which purposivism operates—the more specifically the judicially chosen purpose relates to the particular statutory text at issue, the more likely it is to incorporate limits that constrain judicial interpretation.[46] Traditional purposivism, however, provides little constraint on judges when choosing the level of generality of the statutory purpose and hence on the ability of judges to sway interpretive outcomes to their preferences.[47]

But recognizing an injury as sufficiently grave in nature and likely to result from a statutory violation does not pose the same line drawing problems as defining how far a statutory purpose extends. Allowing individuals to sue in federal court to protect an interest does not commit the court regarding the extent to which the statute protects that interest. In other words, finding an implicit or constructive congressional understanding that an injury warrants judicial protection does not preclude the court from determining that the statute implements a balance between competing interests or from interpreting or applying the statute contrary to the plaintiff's interest.

In addition, the lack of alternative means to constrain judicial discretion with respect to congressional understandings regarding injuries and causal connections makes purposivist techniques less objectionable for standing inquiries than for questions of statutory interpretation. In the interpretation context, textualist critics of purposivism complain that legislative history is too easily manipulated by members of Congress to support interpretations that do not reflect bargains actually made to obtain passage of the legislation.[48] Textualists also

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43. *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992) ("legislation usually results from bargaining among numerous parties having a wider diversity of purposes"); Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1209 (2007) ("[P]roponents of legislation typically must compromise with the moderates whose support is necessary to create a majority coalition.").

44. *See* Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467, 482 (2014).

45. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 541 (1983) ("No matter how good the end in view, achievement of the end will have some cost, and at some point the cost will begin to exceed the benefits.").

46. *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 404–05 (2012) (describing the generality problem posed by purposivist statutory interpretation).

47. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 151–53.

48. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 376–77 (2012); John F. Manning, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1538 n.119 (2014) (quoting from Exxon

criticize judicial reliance on legislative history as too malleable to constrain judges from imposing their own preferences.[49] Textualists propose, instead, reliance on objective rules for decoding the meaning of statutory text, which they claim provide greater constraint against such judicial abuse.[50]

Statutory text, however, rarely evaluates the potential harms caused by statutory or regulatory violations directly. Thus, except in those rare cases where Congress includes a provision that expressly communicates an understanding about the significance of the potential injury or causal connections stemming from such violations, there is no alternative for evaluating such understanding superior to purposivist techniques. When evaluating those elements of standing, the alternative to those techniques is unguided subjective judgment by individual judges.[51] A judge might try to justify her judgment about whether a plaintiff in particular circumstances has demonstrated standing by comparison with other cases or analogy to other injuries. But, under current standing doctrine, there are no well-accepted standards that govern whether the elements of standing have been adequately satisfied. This may be why standing doctrine has been criticized for being extremely susceptible to judicial manipulation, whether deliberate or unconscious.[52]

Given this alternative, asking judges to relate their standing inquiry to the mischief at which a statutory provision seems aimed, although not outcome determinative, will provide a more meaningful yardstick for evaluating determinations with respect to the elements of standing.[53] That is, the nature of the

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Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005)). *See also* Seidenfeld, *supra* note 44, at 478–79.

49. *See, e.g.*, SCALIA & GARNER, *supra* note 48, at 377–78. *See also* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30 (2006) ("[T]extualists demonstrated that [traditional] purposivist judges were imposing their own purposes, rather than implementing Congress's."). *But see* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 551(2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (arguing that empirical evidence refutes claims that textualism constrains judges more than does purposivism)).

50. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and The Canons: Part II*, 66 STAN. L. REV. 725, 784 (2014); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 15–16 (2001).

51. *See* Re, *supra* note 19, at 1195 & 1195 nn. 20–23; Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 305, 315 (2002) ("What is missing [from the Court's standing doctrine], in the end, is a formula to explain when the Court applies a demanding injury standard and when it is apt to be ignored."). *See also* Fletcher, *supra* note 9, at 231 (criticizing the injury in fact requirement as incoherent because it seeks a neutral answer to a question that requires a normative structure).

52. *See supra* note 12 (citing examples of such criticism).

53. Framed in terms of Fletcher's critique, imaginative reconstruction can provide the normative framework for evaluating whether the plaintiff-alleged injury is

matter at which a statute is aimed would provide more objective criteria to evaluate standing decisions than the purely subjective "I know it when I see it" standard that judges implicitly invoke. In addition, referring to the mischief that the statute seems to target will result in standing determinations that fit more coherently with the perceived purposes of the statute that the plaintiff claims the defendant violated. That is, by using statutory text, structure, and purpose to impute a legislative evaluation of injuries and their causal connections to statutory violations, judges will deflect criticism for using their own sensibilities to decide standing issues in a manner that undermines the interests that the statute seems structured to protect.

II. THE *LUJAN* MAJORITY & THE IMPORTANCE OF ARTICLE II

In *Lujan v. Defenders of Wildlife*, the Supreme Court tied standing law to the President's power to enforce the law.[54] *Lujan* involved a challenge to a rule, promulgated by the Secretary of the Interior, interpreting the Endangered Species Act of 1973 to require consultation only for actions taken in the United States or on the high seas.[55] The plaintiffs alleged that the lack of consultation with respect to foreign activities increased the rate of extinction of endangered species.[56] Specifically, the Court focused on two members of the plaintiff organization who alleged that they intended to return to habitats of particular endangered species, and that the rule reduced the likelihood of them seeing members of those species.[57] The Court held that the plaintiffs failed to allege a concrete injury and demonstrate redressability.[58]

Of particular interest with respect to Congress's ability to influence standing, *Lujan* declined to grant the plaintiffs standing based on the citizen-suit provision of the statute.[59] Prior to *Lujan*, Professor (now Judge) William Fletcher's critique of standing provided the most academically accepted alternative to the current doctrine's requirements of injury in fact, traceability, and redressability.[60] Fletcher concluded that the case or controversy requirement should be satisfied as long as Congress provided a cause of action that authorized a particular plaintiff to

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sufficient to warrant granting him access to federal courts. *See* Fletcher, *supra* note 9, at 229–34.

54. 504 U.S. 555, 577 (1992).

55. *Id.* at 557–58.

56. *Id*. at 562.

57. *Id*. at 563.

58. *Id*. at 562–68.

59. *Id*. at 576 ("Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches.").

60. In the words of Heather Elliott, "[Fletcher's] *The Structure of Standing* has become an ever more incisive critique of standing doctrine. It has been cited hundreds of times by scholars and courts, including the Supreme Court itself. It has been called 'simply the best thing ever written on "standing." Heather Elliott, *The Structure of Standing at 25: Introduction to the Symposium*, 65 ALA. L. REV. 269, 270–71 (2013).

sue.[61] The *Lujan* Court, however, reasoned that allowing citizens to enforce the law usurps the power of the executive branch and interferes with the Take Care Clause of Article II.[62] Although the Court grounded its ultimate analysis in Article III, by considering the President's enforcement prerogatives the *Lujan* majority rationale can be understood as viewing Article II as a limit on Congress's ability to enact statutes that influence standing.[63] *Lujan* pointed out that rendering standing coterminous with a cause of action, as Fletcher advocated, would essentially allow Congress to deputize private citizens to enforce the law.[64] As a result, this rendering would undermine the role of the executive branch to see that the law is faithfully executed and to prosecute violations of it.[65]

The Court's holding regarding the relation of standing doctrine to Article II limited the effect of citizen-suit provisions to creating a cause of action that a plaintiff may assert only if she meets the requirements of standing. This holding is central to the focus of this Article because it serves as a limitation on Congress's ability to influence standing. The emphasis on a concrete injury-in-fact, as opposed to an injury to a legal interest, ensures that the plaintiff cannot simply enforce the law, but must attempt to vindicate her personal interest. This emphasis shapes the remainder of this Article's analysis.

III. JUSTICE KENNEDY'S *LUJAN* CONCURRENCE

Congress's role in recognizing the harms and chains of causation that give rise to standing is supported by Justice Kennedy's concurrence in *Lujan*.[66] This concurrence is extremely significant because both Justices Kennedy and Souter, who joined the concurrence, supported Justice Scalia's majority opinion. Their votes were necessary for Scalia's opinion to garner majority status. Thus, Kennedy's concurrence reflects the position of the median voter on the Court[67] and, for that reason, arguably is the law with respect to Congress's ability to identify injury that satisfies standing.[68] Moreover, the majority in *Massachusetts v. EPA*, states that congressional "authorization [of this type of judicial challenge] is

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61. Fletcher, *supra* note 9, at 229.

62. *Lujan*, 504 U.S. at 577 ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to take Care that the Laws be faithfully executed, Art. II, § 3.").

63. *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 831–32 (2009).

64. *Lujan*, 504 U.S. at 577–78.

65. *Id.* at 577.

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

67. Buzbee, *supra* note 34, at 257–60 (noting that Justices Kennedy and Souter joined Part IV of the majority opinion but added "observations" that qualify the majority opinion).

68. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (announcing what is essentially the median voter rule for determining the holding of a split court); Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87, 94–96 (2002) (describing the Marks rule and its relation to the median voter criterion).

of critical importance to the standing inquiry,"[69] and then proceeds to quote critical language from Kennedy's *Lujan* concurrence.[70] This suggests that the Court has accepted Kennedy's concurrence as the prevailing law. Thus, determining the concurrence's precise meaning is of utmost importance.

Justice Kennedy's language in *Lujan* is ambiguous yet illustrative. There is a tension between his professed understanding of Congress's role and the precise words he uses. He begins describing his understanding of injury-in-fact by noting the importance of concreteness and imminence.[71] He then proceeds to discuss his view of Congress's ability to influence standing inquiries. He explicitly states that, in light of the increasing complexity and reach of government programs and policies, Congress has a role "in the articulation of new rights of action that do not have clear analogs in common law tradition."[72] He continues by asserting that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[73] But he concludes by placing a limit on that congressional role, requiring that "[i]n exercising this power . . . Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[74]

Much of the confusion about Justice Kennedy's opinion lies in its statement that Congress can define injuries, because Kennedy joined in the majority opinion, which foreclosed congressionally created standing. But a more careful reading of Kennedy's entire concurrence helps resolve this seeming contradiction. First, Kennedy does not understand the majority to hold that Congress cannot play the role he outlines.[75] He tries to resolve the seeming inconsistency between his opinion and the *Lujan* majority with crucial language that reinforces the importance of a concrete injury and discusses the limitations on Congress's power:

> The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the

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69. 549 U.S. 497, 516 (2007). *See also* William Buzbee et al., *Access to Courts after* Massachusetts v. EPA: *Who Has Been Left Standing?* 37 ENVTL. L. REP. (ENVTL. LAW INST.) 10692, 10697 (Sept. 2007).

70. *Massachusetts,* 549 U.S. at 516–17.

71. "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" 504 U.S. at 580 (Kennedy, J., concurring) (quoting L.A. v. Lyons, 461 U.S. 95, 101–02 (1983)).

72. *Id.*

73. *Id.*

74. *Id.*

75. After asserting Congress's power to define injuries and articulate chains of causation, Justice Kennedy wrote: "I do not read the Court's opinion to suggest a contrary view." *Id.*

> behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. . . . [T]he party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[76]

The underlying message seems clear—abstract injuries are outside the scope of Congress's ability to give rise to standing—yet Congress has some role in identifying injuries that are sufficient to support standing. This still leaves unanswered several crucial questions: What does it mean to define new injuries? And what is the outer limit of Congress's power to do so?

Scholars have attempted to clarify this matter, albeit not in a particularly convincing manner. One approach reads Justice Kennedy's concurrence as granting Congress broad powers to create standing, as long as Congress does so through carefully drafted legislation.[77] We term this approach the "express legislation" interpretation of Kennedy's concurrence, and believe that it reflects the historical understanding that denial of a legal right is the essence of injury sufficient for standing.[78] The express legislation interpretation essentially relies on the fact that the injury-in-fact test was meant to liberalize standing, not to deny Congress a power it historically had exercised.[79] Congress's legislative power includes the "authority to create rights of action by statute by defining injuries and causal relationships" between prohibited conduct and those injuries.[80] And because those causes of action create legal rights, the express legislation interpretation reasons that, in the Endangered Species Act ("ESA"), Congress could grant standing to citizens by "identify[ing] or creat[ing] a general public interest in endangered species, and provid[ing] explicitly that the deprivation of that interest constitutes an injury that a federal court must vindicate at the behest of any citizen."[81] In other words, historically, Congress has had the statutory authority to create legal protection for nonconcrete injuries. It also essentially had the authority

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76. *Id.* at 580–81.

77. *See* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1181 (1993); Sunstein, *supra* note 5, at 202.

78. *See supra* notes 5–7 and accompanying text.

79. *See* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 73–74 (1984) (noting that one goal of the injury in fact doctrine was to "liberalize access to the federal courts").

80. Pierce, *supra* note 77, at 1180–81.

81. *Id.* at 1181.

to create standing based on the deprivation of that legal protection, as long as the statute was sufficiently explicit about to whom it provided such protections.

Moreover, Congress has historically been permitted to "create quite novel property interests."[82] Under the express legislation interpretation, therefore, the constitutional flaw in the *Lujan* plaintiffs' assertion of standing was that "[the] plaintiffs had no property right under the ESA, because Congress failed explicitly to define the relevant injury when it provided for citizen suits."[83] This broad construction of the concurrence relies chiefly on Justice Kennedy's statement that Congress can define new injuries and articulate new chains of causation. Ultimately, however, the express legislation theory is problematic because it fails to take into account Kennedy's explicit rejection of the possibility of abstract injuries giving rise to standing, even at the "behest of Congress."[84]

Another interpretation of Justice Kennedy's concurrence, which we term the "minimal effect" approach, reads his opinion as stopping short of providing any meaningful distinction from Justice Scalia's majority opinion or any novel idea about the standing doctrine. Under this theory, "Kennedy's sentence about being able to create a case or controversy where none existed before is simply his way of repeating the truism that the Court has stated for years—that Congress may create new rights, the violation of which might well constitute concrete injury-in-fact *as judged by the Court*."[85] Under the minimal effect approach, because it is the Court, not Congress, that decides what injuries are concrete, Congress's role in standing is no greater than that of a party to the case—it can merely identify injuries that the Court might find sufficient to support standing.[86] Any ability to "upgrade" factually diffuse injuries that would otherwise be inadequate to confer standing is marginal. Intangible harms would still be insufficient to establish standing, regardless of any contrary statements that Congress includes in the statute.[87] Professor Heather Elliott has opined that the Court is likely to adopt the minimal effects approach,[88] concluding that "Congress's power is to convert de facto into de jure and nothing more."[89] Although this approach is correct in acknowledging that Kennedy's concurrence is not an endorsement of congressionally created standing, it shortchanges the important institutional role Congress has in recognizing actual harms that give rise to standing.

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82. Sunstein, *supra* note 5, at 235–36.

83. *Id.* at 234.

84. Lujan v. Defs. of Wildlife, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring).

85. Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 218 (2012) (emphasis added).

86. Of course, unlike parties to the case, Congress can create a cause of action.

87. Re, *supra* note 19, at 1233.

88. Elliott reasons that the Court has not been receptive to deference to Congressional findings of fact in other contexts that affect separation of powers, and that the Court hinted in Summers v. Earth Island Inst., 555 U.S. 488, 496–97 (2009), that it would not allow Congress to recognize injuries that the Court did not find to be concrete as sufficient to support standing. Elliott, *supra* note 8, at 186–94.

89. *Id.* at 194.

Although each of these theories is supported by some part of Justice Kennedy's concurrence, that opinion is best viewed as a whole and in the context of the majority opinion. Our reading of Kennedy's concurrence explores Congress's ability to influence standing while explicitly assuming that that ability is neither plenary nor null. We further read Kennedy's concurrence as acknowledging that Congress has the power to recognize actual harms and causal connections and, thereby, can give rise to standing for injuries that the Court might otherwise find attenuated or insufficiently concrete.

Three factors support the conclusion that Justice Kennedy understands that Congress has the authority to recognize actual harms that give rise to standing but not to create purely legal interests whose deprivation would do so. First, Kennedy's concurrence made a clear effort to go beyond the majority to demarcate some congressional power with respect to standing.[90] Although the use of terms "define and articulate" may be imprecise, the main point of Kennedy's concurrence clarified that Congress can influence whether a particular matter rises to the level of case or controversy. Second, Kennedy's opinion repeatedly emphasized the importance of concreteness for injury in fact.[91] Thus, Kennedy's proposed role for Congress is tempered by his insistence that it is beyond the scope of Congress's authority to render a suit to protect nonconcrete interests justiciable. This clear distinction between the abstract and the concrete was further underscored when Kennedy joined the majority opinion's Article II rationale that prohibits Congress from deputizing private parties to enforce the law.[92] Hence, Kennedy's concurrence provides a complement rather than a substitute for Justice Scalia's majority opinion. Third, Kennedy's post-*Lujan* opinions continue to point to a limited power of Congress to recognize injuries and causal chains that otherwise would be insufficient to support standing. For example, in his concurrence in *Summers v. Earth Island Institute,* Kennedy poignantly points out that "[n]othing in the statute at issue here . . . indicates Congress intended to identify or confer some interest separate and apart from a procedural right."[93]

The textual support in Justice Kennedy's concurrence is bolstered by our normative argument that Congress is institutionally superior at assessing the degree of injuries that are foreseeable from statutory violations.[94] In fact, Kennedy's concurrence can be seen as a guide to how Congress's institutional superiority should play out in particular cases. It essentially directs the courts to defer to understandings about impacts from statutory violations that can be discerned from the causes of action a statute provides.

The following example illustrates an injury that we believe would suffice to establish a plaintiff's standing under our reading of Justice Kennedy's *Lujan* concurrence, but not under the Scalia majority opinion. Suppose that Congress had included a provision in the ESA authorizing zookeepers to sue to protect

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90. *See supra* notes 74–77 and accompanying text.
91. *See supra* note 76 and accompanying text.
92. *See supra* notes 61–67 and accompanying text.
93. Summers v. Earth Island Inst., 555 U.S. 488, 501 (2009).
94. *See supra* Section I.A.

endangered species with which they worked in captivity. Suppose further that the statute explicitly recognized that zookeepers need captured wild animals to keep captive stocks from being genetically inbred. In that hypothetical scenario, Congress would have identified that the injury applies to a specified class of people—zookeepers. Second, Congress would also have articulated the chain of causation between the injury and the class of persons entitled to bring suit—the loss of a species would hinder zookeepers' ability to maintain viable captive populations. Third, the injury would be to an interest that exists independently of any rights granted by the statute. As such, Congress would have identified an actual injury and not merely expressed a desire to see the law enforced. This hypothetical provision would, therefore, seem directly to meet Kennedy's requirements for Congress to grant standing. Moreover, this example is most interesting because the *Lujan* majority states, "It goes beyond the limit [of plausibility] . . . to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection."[95] Thus, the precise interest that would give rise to standing under this statute was explicitly held to be insufficient by the *Lujan* majority.

We also believe that standing is normatively appropriate in this hypothetical scenario. As discussed earlier, whether the effect on a zookeeper from the loss of wild stock to replenish captive genetics is sufficiently palpable to comprise injury in fact comes down to a value judgment. There is no right or wrong answer, and no objective standard for evaluating whether the injury to zookeepers is sufficient. Congress is better able than the courts to answer this question because it is more in tune with the ultimate values of the people and because it is institutionally better able to determine the likely effect of this loss of wild stock.

In sum, Justice Kennedy's concurrence illustrates an important avenue by which Congress can influence standing, even under current doctrine. It recognizes Justice Scalia's point that the executive is responsible for executing the law and that Congress cannot deputize private citizens to do so. But, it goes beyond the majority by recognizing that Congress has a role in identifying injuries and causal connections sufficient to meet the Court's standing requirements.

IV. *LUJAN*'S FOOTNOTE SEVEN

Although Justice Kennedy's *Lujan* concurrence suggests the need for Congress to explicitly recognize concrete injuries and chains of causation, Justice Scalia's majority opinion suggests that congressional creation of general procedural rights, without more, can affect the judicial inquiry into standing. In footnote seven of the majority, Scalia opines that a person "who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[96] Although footnote seven does not explain why such rights might affect the standing inquiry,

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95. Lujan v. Defs. of Wildlife, 504 U.S. 555, 567 (1992).
96. *Id.* at 573 n.7.

we posit that the best explanation hinges on Congress having implicitly recognized causal connections and the imminence of any concrete injury at issue by providing procedural rights.

Just as Justice Kennedy's concurrence has prompted a variety of interpretations, so has Justice Scalia's footnote seven. A broad reading of the footnote would lower a plaintiff's burden to show traceability and redressability generally, and might even relieve a plaintiff of making any showing of these elements at all.[97] This reading, however, is hard to square with the entirety of Scalia's majority opinion, which rejects standing with respect to some injuries that the plaintiff alleged because those injuries were not redressable.[98] Additionally, reading footnote seven as an invitation for courts to relax traceability/redressability to an extreme extent creates tension with the rest of the majority opinion because a plaintiff with a procedural right could obtain standing by alleging an immediate and concrete injury whose relation to the defendant's wrongful act was far-fetched. Essentially, this would convert a procedural right and a citizen suit provision into virtually guaranteed standing.

The very nature of what footnote seven means by "a procedural right" is also an issue. For example, in *Massachusetts v. EPA*, the Court considered a citizen suit provision to be a procedural right and relied on footnote seven to reduce the plaintiff's burden of showing the traceability of the alleged injury to the impacts of the EPA's failure to address the effect of automobile carbon emissions on climate change.[99] This stretch of the procedural right to which footnote seven refers is in tension with the entirety of the *Lujan* majority, which explicitly rejects the notion that a procedural right can be transformed into an interest that constitutes injury-in-fact.[100] Instead, footnote seven is better read to reflect the idea that courts should give deference in their standing inquiries to Congress's determination that a *procedure with which an agency is required to comply before acting* is important to prevent potential concrete impacts that the action would threaten. This reading is both consistent with the majority holding and normatively sensible because it avoids courts having to draw arbitrary lines that other interpretations necessitate.

In analyzing the meaning of footnote seven, it is imperative to note at the outset that it refers to procedural rights, not procedural injuries. The majority rejects the notion that statutory violations rise to the level of injuries because they are not concrete, actual harms. Recognizing purely procedural violations as injuries would undermine Article II's Take Care Clause because it would essentially deputize private entities that have no concrete interest at stake to sue to force compliance with legally mandated procedures.[101] Procedural rights, however,

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97. *See* Bruce Morris, *How Footnote 7 in* Lujan *II May Expand Standing for Procedural Injuries*, 9 NAT. RESOURCES & ENV'T 75, 75 (Winter, 1995).

98. *Lujan*, 504 U.S. at 568.

99. Massachusetts v. E.P.A., 549 U.S. 497, 517 (2007).

100. 504 U.S. at 576.

101. Justice Scalia rejects the idea that "the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself,

can affect how courts evaluate whether a plaintiff has sufficiently pleaded the usual standing requirements of injury-in-fact, traceability, and redressability.

Footnote seven gives an example of how a procedural right would alter the usual standing inquiry. It considers the proposed building of a dam that requires an environmental impact statement ("EIS") before construction commences. The footnote explicitly states that a person living adjacent to the proposed construction site will not be denied standing because "he cannot establish with any certainty that the [EIS] will cause the license to be withheld or altered."[102] This statement, in combination with Justice Scalia's earlier mention of relaxed redressability and immediacy standards, has led some scholars to suggest that all that is needed for standing, with respect to procedural rights, is a showing of a concrete injury.[103] Once again, this suggestion contrasts with the rest of the majority's opinion in *Lujan*, which denied plaintiffs standing partly because of the lack of redressability.

Although all agree that footnote seven does not excuse a plaintiff from meeting the concrete injury requirement, what remains ambiguous is the degree to which the redressability and immediacy requirements are relaxed.[104] Some scholars have grappled with the question of the Court's authority to relax or lower the standards of redressability given that Article III mandates both injury-in-fact and redressability as prerequisites for standing.[105] Professor Cass Sunstein has argued that the very notion that the Court can relax the redressability standard suggests that it is really an irrelevant requirement.[106] Although we agree with Professor Sunstein's assessment of Congress's role in creating procedural rights

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without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)." *Id.* at 573 n.8.

102. *Id*. at 572 n.7.

103. Morris, *supra* note 97, at 75 (stating that even when redressability cannot be shown, "a citizen who can articulate a concrete, particularized interest within the protection of the statute should be able to establish standing to challenge violations of the statutory procedure"). *See also* William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 803 (1997) (stating "[t]he lesson of *Defenders*' footnote[] seven . . . seemed to be that no certainty or even probability of changed outcomes is necessary when a plaintiff with a threatened concrete interest complains of a procedural irregularity").

104. Christopher T. Burt, *Procedural Injury Standing After* Lujan v. Defenders of Wildlife, 62 U. CHI. L. REV. 275, 285–86 (1995) (stating that footnote seven is "at best . . . vague and provides little guidance for prospective plaintiffs and the lower courts; at worst, it eviscerates the standing requirements of the Constitution").

105. *Id*.

106. Sunstein has stated, "I think that the Court's . . . [relaxation of redressability standards] exemplifies several of the problems associated with the whole notion of redressability. A procedural right is created, not because it necessarily yields particular outcomes, but because it structures incentives and creates pressures that Congress has deemed important to effective regulation. . . . Congress is attempting not to dictate outcomes but to create procedural guarantees that will produce certain regulatory incentives. Redressability in the conventional sense is irrelevant." Sunstein, *supra* note 5, at 225–26.

and the significance of those rights, we do not think that such relaxation necessarily renders the notion of redressability either irrelevant or unprincipled.

One can tie the denial of a procedural right to a plaintiff's burden to show immediacy and traceability of harm by recognizing what Congress's requirement of procedure implies about its understanding of the likelihood of immediate harm. If Congress mandated a procedure for an agency to follow before acting, then one can surmise that Congress envisioned that the procedure might convince the agency to act differently. Or, to use Professor Sunstein's terminology, the procedure changes agency incentives and, even though it does not dictate outcomes, it can change likely outcomes.[107] For that reason, the government cannot assert that the agency would have made the same decision even if it had followed the procedure. Such an assertion would contradict Congress's implicit understanding that the procedure might have mattered.

Similarly, if Congress mandated that an agency follow the procedure well before the ultimate agency action would cause injury against which the procedure is meant to protect, then Congress must have believed that the harm was sufficiently imminent for the agency to have to consider it now rather than later. But, that implies that the harm is sufficiently imminent for the plaintiff reasonably to worry about it now. Beyond these two observations, however, procedure has no relationship to the immediacy or redressability of the harm. Hence, the relationship of the procedure to the harm justifies relaxing the plaintiff's burden so he need not show either that the procedure would have changed the government decision or that the resulting harm was sufficiently imminent to warrant bothering the court to protect the plaintiff against it. Any relaxation of standing requirements beyond these two points would simply be an arbitrary assertion by a court that, for some unexplained reason, immediacy or traceability of harm is not necessary for standing when Congress happens to have provided a procedural right.

One might object that even the limited relaxation of causal nexus and immediacy that we read footnote seven to support is unwarranted under our rationale of congressional motivation. Congress may have added procedure simply to increase the costs of agency action to discourage such action,[108] or it may have added procedure to provide a fire-alarm system that allows opponents to alert Congress about impending agency action.[109] But, allowing judges to deny plaintiffs' standing merely because of a remote possibility that Congress's motivation for adding procedure was perversely unrelated to improving the agency decision-making process, essentially would permit judges to override legislators' likely understanding of causal connections between procedures and agency outcomes. At the very least, judges should not do so without a persuasive showing

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107. *See id.* ("A procedural right is created, not because it necessarily yields particular outcomes, but because it structures incentives and creates pressures that Congress has deemed important to effective regulation.").

108. *See* Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 402 (1978).

109. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

by a defendant that the particular procedure at issue was motivated by something other than a desire to improve the agency decision-making process. Moreover, we cannot think of a more limited relaxation of redressability and immediacy that would be consistent with footnote seven, especially in light of the hypothetical proposed dam it discusses.

Massachusetts v. EPA provides an example of the Court applying footnote seven to relax redressability requirements in an unjustified and ad hoc manner. *Massachusetts*' first error was its determination that a citizen-suit provision provides a procedural right as that term is used in *Lujan*'s footnote seven. In *Massachusetts*, the Court reasoned that the statutorily provided right to challenge the EPA's denial of a petition asking it to regulate an air pollutant was a procedural right.[110] Although one can undoubtedly characterize the right to sue as a procedural right, it differs in fundamental ways from a right *to have the agency follow a statutorily specified procedure,* which is the kind of procedural right to which footnote seven seems to refer. Indeed, the example of an agency preparing an EIS for a proposed dam in footnote seven makes the distinction regarding the nature of the procedural right at issue abundantly clear.

The *Massachusetts* Court's second error was in relaxing the redressability standard in an unspecified manner not tied in any logical way to the procedural right it found in the statute.[111] Massachusetts did allege a concrete injury—the loss of land along the littoral zone due to a rise in sea level that would result from global warming.[112] The problem was that the petitioners could not predict with any reliability how carbon emissions from motor vehicles would affect the global rise in temperatures. The emission of carbon might account for an imperceptible amount of sea-level rise, and might even be offset by other countries increasing their carbon emissions.[113] And, any loss of coastal land due to failure to reduce

110. 549 U.S. 497, 520 (2007).

111. *Id.* at 517–18. *See also id.* at 540 (Roberts, C.J., dissenting) (claiming that the majority never explained how its "special solicitude" for Massachusetts affected its standing analysis except for "an implicit concession that petitioners cannot establish standing on traditional terms").

112. *Id.* at 521–23.

113. *See id.* at 546 (Roberts, C.J., dissenting) ("The Court contends that regulating domestic motor vehicle emissions will reduce carbon dioxide in the atmosphere, *and therefore* redress Massachusetts's injury. But even if regulation *does* reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it *likely* that the injury in fact—the loss of land—will be redressed.") (emphasis in original); Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 257 (2009) ("the Court . . . characterized Massachusetts' injury as including an inevitable future loss of its coastline, however remote and quantitatively uncertain that loss may be"); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 68 ("[The Court] sustained Massachusetts's right to sue based on fairly generalized and speculative claims of injury and causation.")

motor vehicle carbon emissions would be temporally remote from the denial of the plaintiffs' petition.[114]

The *Massachusetts* Court stated up front that the procedural right warranted relaxing redressability in some unspecified manner. It then proceeded to simply assert that, despite significant uncertainty about whether and how failure to regulate greenhouse gasses would affect the plaintiff's interest, the plaintiff had met its lowered burden of proving redressability.[115] One is left to wonder what the lower burden entailed, let alone why the court thought a lower burden was justified. In *Massachusetts*, the Court did state, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[116] In so stating, the Court seems to recognize that the existence of procedure must defeat a government claim that the agency's decision would have been the same even if the procedure had been followed. The problem is that the *Massachusetts* Court took the further step of holding that somehow the change in the agency decision would protect the plaintiff against injury even though there was no indication that the agency action itself affected the plaintiff in a sufficiently specified manner.[117]

Without properly recognizing the scope of footnote seven's procedural rights and the role that those rights play as an expression of Congress's understanding about the likelihood that an action will occur, any relaxation of redressability and immediacy will necessarily face the problem of arbitrary line drawing. This problem helps explain why the circuit courts have had difficulty in applying footnote seven in a consistent manner.[118] The Ninth and Tenth Circuits have both allowed an unspecified relaxation of traceability/redressability requirements,[119] while the D.C. Circuit has suggested a "substantial probability"

114. The Court recognized that the rise in sea level was a remote risk, albeit one of potentially catastrophic harm. Nonetheless, the Court held that the "risk" would be reduced "if the petitioners received the relief they [sought]," (even though the Court could not assure that the harm would be reduced). 549 U.S. at 526. *See also id.* at 542 (Roberts, C.J., dissenting) ("[A]ccepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless.").

115. *Id.* at 525–26.

116. *Id*. at 518.

117. *Id.* at 544 (Roberts, C.J., dissenting) ("Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards.").

118. Brian J. Gatchel, *Informational and Procedural Standing After* Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75, 99 (1995) (noting a split in the circuits regarding how to apply footnote seven).

119. Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 452 (10th Cir. 1996) (summarizing the Ninth Circuit's test as "[o]nce a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed," and the Tenth Circuit's test as relatively easy for procedural rights plaintiffs to achieve standing if they have a concrete injury); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None*, 35 ENVTL. L. 1, 59–61 (2005) (citing Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 965 (9th Cir. 2003).

test.[120] In *Florida Key Deer v. Stickney*,[121] a district court "found redressability not because the concrete injury could be redressed, here the endangerment of the Key deer, but rather because the procedural injury, not consulting with the [U.S. Fish and Wildlife Service], could be redressed by a court order."[122] Much of the inconsistency in the meaning of footnote seven stems from courts attempting to attribute a level of significance to procedural rights that footnote seven cannot support.

In sum, the best reading of footnote seven recognizes that, by creating procedural rights, Congress expects that procedure matters. If Congress requires an agency to follow a certain procedure before taking an action that would cause some concrete injury to an individual, then the judiciary should defer to Congress's implicit judgment that the procedure was an important step for protecting against such an injury. Under this reading, footnote seven only precludes the agency from arguing that it might have made the same decision had it followed required procedures or that the injury from the action is too temporally remote. Courts should not read footnote seven to lower the constitutional requirements of immediacy and redressability in any other way. Thus, our reading also provides clarity for lower courts regarding what constitutes a procedural right under footnote seven and what factual showing footnote seven excuses a plaintiff from having to make. Most importantly, by identifying the significance of Congress's inclusion of a procedural requirement in a statute, this reading respects Congress's superior institutional capacity to recognize harms and, relatedly, the procedures warranted to protect against those harms.

V. STRUCTURAL EVIDENCE OF CONGRESSIONAL RECOGNITION OF INJURY AND CAUSAL CHAINS

Through the concurrence and footnote seven, *Lujan* identifies instances in which judges can rely on Congress's explicit and implicit recognition of harms and, thus, shape standing analysis. We contend that the principle underlying these instances can apply even in the absence of a particularized statutory cause of action or procedural right. In the absence of such provisions, courts might still find evidence—from the structure of the statute or the story of its passage—of congressional understanding of the significance of possible injuries in fact and causal chains between injuries and regulatory violations.[123]

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120. Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 669 (D.C. Cir. 1996) ("[U]nless there is a substantial probability . . . that the substantive agency action that disregarded a procedural requirement created a demonstrable risk, or caused a demonstrable increase in an existing risk of injury to the particularized interests of the plaintiff, the plaintiff lacks standing."); *see also* Mank, *supra* note 119, at 45.

121. 864 F.Supp. 1222 (S.D. Fla. 1994).

122. Gatchel, *supra* note 118, at 103.

123. Although this proposition might seem controversial in the standing context, much Constitutional Law doctrine derives from the assumption that statutory structure implies congressional determination of the significance of private entities' conduct. For example, courts defer to Congress's determination under a rational basis standard of review when evaluating whether regulated conduct has a substantial effect on interstate commerce.

The controversy addressed by the Court in *Friends of the Earth v. Laidlaw*[124] provides an illustrative example of how statutory structure can appropriately affect standing. In *Laidlaw*, an environmental group brought suit against a wastewater treatment plant, alleging noncompliance with a National Pollutant Discharge Elimination ("NPDES") permit.[125] The plaintiffs alleged that the defendant's discharge of pollution into the North Tyger River, in violation of its permit, instilled fear in the plaintiffs, who lived near and had previously used the River. Central to the issue of standing was "[t]he reasonableness of [the] fear that led the affiants to respond to [the defendant's] concededly ongoing conduct by refraining from use of the . . . River and surrounding areas."[126] While the court concluded that the members' fears were reasonable, it did not fully explain its analysis.[127] It simply "found nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway."[128]

Instead of employing this fuzzy reasonableness analysis, which is subjective in nature and gives little direction to lower courts,[129] the Court would have stood on firmer ground had it reasoned from the structure of the Clean Water Act ("CWA"). The CWA requires polluters to meet a discharge standard achievable by use of the Best Available Technology ("BAT").[130] The BAT standard requires polluters to reduce pollution discharge even if the water into which they are releasing that pollution contains pollution levels below those that have been shown to threaten human health and the environment. Thus, the BAT standard implicitly recognizes that quantities of pollutants below current health based thresholds "may reasonably be anticipated to pose an unacceptable risk to

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See Gonzales v. Raich, 545 U.S. 1, 22 (2005) ("In assessing the scope of Congress's authority under the Commerce Clause . . . . We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981) ("[W]hen Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational."); *see also*, Sunstein, *supra* note 5, at 230 (suggesting that the Court should review injury in fact determinations using the rational relationship standard that it applies to effects on interstate commerce in commerce clause cases).

124. 528 U.S. 167 (2000).

125. *Id.* at 177.

126. *Id*. at 184.

127. *See* William Buzbee, *The Story of* Laidlaw*, Standing and Citizen Enforcement*, *in* ENVIRONMENTAL LAW STORIES 235 (Richard Lazarus & Oliver Houck, eds., 2005) ("*Laidlaw* . . . manifested deference to legislative judgments, but did not foreclose revival of more judge-centered, common law-like conceptions of harms to survive a standing challenge. How Article II fits into standing analysis remains uncertain.").

128. *Laidlaw*, 528 U.S. at 184. The Court also baldly asserted that "[t]he proposition is entirely reasonable." *Id.* at 184–85.

129. *See* John F. Manning, Note, *Going Back to* SCRAP *in Order to Refine Steel: The Supreme Court Loosens the Modern Constraints on the Doctrine of Standing in* Friends of the Earth, Inc. v. Laidlaw Environmental Services (Toc), Inc., 10 WIDENER J. PUB. L. 215, 234–35 (2001).

130. 33 U.S.C. § 1311 (2012).

human health or the environment."[131] That is the only coherent justification for implementing stringent technological-based standards to reduce discharges when pollution levels do not impose known risks. In essence, by imposing technological-based standards, the CWA manifests congressional recognition that plaintiff's members' fears were reasonable. And, because of Congress's superior institutional capacity to evaluate such fear, the Court should have deferred to this implicit congressional recognition. Thus, our understanding of Congress's role in standing would have given the *Laidlaw* Court a less subjective basis for its determination that fear of pollution in the North Tyger River and its surrounding area was sufficiently concrete and palpable to constitute injury in fact.

An avowed formalist might object that the structure of the statute does not ineluctably lead to the conclusion that Congress recognized the threat from low-level pollution to be a reasonable threat of injury.[132] For example, Congress might have simply desired to subsidize the manufacturers of pollution reduction equipment. We believe, however, that such a response to our argument carries formalism to an indefensible extreme. Unless a statute were to state explicitly the underlying understanding of those who voted for it, which statutes virtually never do, one can always find an alternative explanation of what motivated the passage of the statute. But standing law only requires that the plaintiff show by a preponderance of the evidence that the injury she alleges is sufficiently concrete to constitute injury in fact due to the defendant's alleged wrongful conduct.[133] Therefore, the courts would do best when evaluating standing to ask whether the structure of the statute clearly manifests a likely understanding of those who voted for it. Requiring more than this simply allows a judge to turn judicial passive virtues into passive aggressiveness,[134] dismissing actions simply because she does

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131. H.R. REP. NO. 95-830, at 83 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4424, 4458.

132. But even avowed textualist formalists are willing to consider the overall structure of a statute as well as the context surrounding its enactment to determine statutory meaning. *See* Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467, 478 (2014).

133. *See* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 163 (4th Cir. 2000) (explaining that the elements of standing are not subject to heightened standards of proof). Thus, for example, it is sufficient that a plaintiff use an area that is visibly affected to claim injury to her aesthetic sensibilities, see Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972), even without further proof that she truly finds the sight distasteful. This is not to be confused with the requirement of showing that future injury will actually occur, which seems to require proof that harm is "certainly impending," or a "substantial risk." *See* Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138, 1147, 1150 n.5 (2013). That requirement derives from the fact that injury in fact must not be speculative, rather than from the level of proof by which it must be proven.

134. *Cf.* Mark A. Graber, *The Passive-Aggressive Virtues:* Cohens v. Virginia *and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67–68 (Spring 1995) (first referring to judicial exercise of discretion about whether to hear a case as "passive aggressive").

not find the alleged injury or causal chain sufficiently convincing, or even perhaps because she simply does not like the probable outcome of the case.[135]

Thus, reading the structure of statutes to support likely congressional understandings about injuries and causal chains has the potential to ameliorate accusations of judicial abuse in applying standing doctrine. For example, earlier this Article demonstrated that the Court's determination of standing in *Massachusetts v. EPA* was based on an indefensible reading of *Lujan*'s footnote seven, and appeared to be an assertion of standing by judicial fiat.[136] But we believe that the *Massachusetts* Court reached the correct outcome with regard to the standing inquiry in that case for other reasons.

In particular, our analysis of *Laidlaw* can be applied to *Massachusetts* and would support the conclusion that the state of Massachusetts had standing on analytically firmer ground than the Court's actual rationale. In *Massachusetts*, no one questioned whether the state alleged a concrete injury: loss of land to rising sea level is certainly concrete. And, by the time the case reached the Court, no one seriously questioned whether climate change was occurring or whether it would cause at least some rise in sea level.[137] Massachusetts' standing was vulnerable because of the uncertainty related to the extent to which failure to regulate carbon emissions from mobile sources would contribute to global warming and the concomitant expected rise in sea level.[138] But this potential bar to standing is essentially the same as the one presented by the complaint in *Laidlaw*; although automobile carbon emissions would make some contribution to global warming, it was not clear if that contribution would noticeably affect any loss of coastal land from climate change. The Clean Air Act ("CAA"), however, like the CWA, imposes technology-based standards on air pollutants, even when levels of pollution are below those known to be harmful.[139] Such standards implicitly recognize that it is reasonable to conclude that the effects from a small contribution to pollution levels pose a significant threat, even if we do not currently have the means to verify and quantify that threat. Hence, in *Massachusetts*, the Court should have deferred to this implicit statutory recognition and concluded that, even if plaintiffs could not prove the likely extent of injury with much reliability, it was enough for them to show that lack of regulation would contribute to some pollution that would, in turn, contribute to global warming.

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135. Pierce, *supra* note 12, at 1742–43 ("[J]udges provide access to the courts to individuals who seek to further the political and ideological agendas of judges").

136. *See supra* notes 100–06 and accompanying text.

137. Massachusetts v. EPA, 549 U.S. 497, 521–23 (2007) (stating there is a strong consensus among the scientific community that climate change is linked to rising sea levels).

138. *See id*. at 542–43 (Roberts, C.J., dissenting).

139. 42 U.S.C. § 7412 (2010).

VI. STATUTORY PURPOSE AS EVIDENCE OF CONGRESSIONAL RECOGNITION OF INJURY AND CAUSAL CHAINS

Sometimes, courts can rely on an obvious purpose of a statute to impute a legislative understanding of the gravity of injuries or the likelihood of causal nexus. Although such use of statutory purpose requires consideration of the context of statutory enactment that goes beyond the actual words and structure of the statute, we believe it can provide judicial guidance that is preferable to allowing judges free rein to evaluate the significance of injuries and the likelihood of causal chains on their own, without statutory constraint.

The value of using statutory purpose to guide judicial standing inquiries is illustrated by considering the Supreme Court's decision in *Linda R.S. v. Richard D.*[140] In that case, the plaintiff, Linda R.S., was a mother of an illegitimate child whose father, Richard D., had failed to provide child support. The Texas Criminal Code made it a crime for a father not to provide such support, but the district attorney refused to prosecute Richard D. because the Texas courts had consistently read the child support statute to apply only to the fathers of legitimate children.[141] Linda R.S. sued to have the courts declare the statute as construed by the Texas courts to violate the equal protection clause, and essentially to order the Texas courts to apply the statute to fathers of illegitimate children, essentially subjecting Richard D. to potential prosecution.[142]

The Court found that Linda R.S. did not have standing to bring her claim because the matter was not redressable. The majority reasoned that subjecting Richard D. to the statute would not necessarily induce him to pay child support.[143] Having failed to pay child support, Richard D. was already subject to prosecution under the statute, and, hence, would not gain immunity by paying the support he owed. Essentially, the Court used the fact that Richard was already subject to criminal prosecution to countermand the intuitive proposition that "the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct."[144] The perversity of that holding can be illustrated by imagining what the Court would have done had Linda R.S. been a black child, and the allegations in the case had been that the Texas Supreme Court had construed the statute not to apply to fathers of black children. It is hard to conceive of the Court denying standing in that hypothetical. Yet, the question of whether the Court could redress Linda R.S.'s loss of support payments would have been the same.

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140. 410 U.S. § 614 (1973).

141. *Id.* at 615.

142. *Id.* at 616. The plaintiff also asked the Court to order Richard D. to pay child support. *Id.* at 620 (dissenting opinion). It makes sense that Linda R.S. would not have standing to seek such an order because the order would turn the criminal statute into a civil suit, thereby undermining the district attorney's prosecutorial discretion. But a judicial determination that the statute applied to the father of illegitimate as well as legitimate children would not interfere with the prosecutor's discretion to decide which deadbeat dads to prosecute.

143. *Id.* at 618.

144. *See id.* at 621 (White, J., dissenting).

Although *Linda R.S.* was an equal protection challenge, using statutory purpose to inform the standing inquiry makes sense because the constitutional claim was based on a wrongful denial of financial support that the statute guaranteed to children. Moreover, the fact that the statute at issue was enacted by the Texas legislature rather than Congress does not render this Article's approach to standing irrelevant as long as one accepts that state legislators enjoy the same institutional superiority as Congress does, vis-à-vis the courts.

A purpose-guided inquiry into whether the alleged equal protection violation injured Linda R.S. would have avoided the perverse holding of that case. It is unlikely that Texas adopted its criminal nonsupport statute solely out of some belief that failure to pay child support was heinous enough to justify locking up deadbeat dads. Rather, it is almost certain that this criminal provision was meant, in large part, to encourage fathers to pay child support, thereby relieving the state from bearing full financial responsibility to support children whose fathers had left the family.[145] If one accepts that motivation for the statute, then it is unlikely that a father who failed to pay child support for some time, but who was currently paying it, would face prosecution. Such prosecution would put the father in jail, where he would not be able to earn money to meet his child support obligation, undermining the purpose of the statute. Hence, an astute judge would almost certainly conclude that members of the Texas legislature would have understood the statute as encouraging fathers who had failed to pay child support to do so in the future, contrary to the majority's assertion.

Another case in which consideration of statutory purpose might have led to a different, and almost certainly more justifiable, outcome is *Eastern Kentucky Welfare Rights Org. v. Simon* ("*EKWRO*").[146] In *EKWRO*, the plaintiffs alleged that IRS regulations reducing the care to indigents that hospitals had to provide to obtain nonprofit status would result in hospitals providing less free care to them.[147] Principles of microeconomics suggest that generally hospitals would reduce levels of free care to indigents in response to the removal of economic sanctions for that

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145. There is considerable evidence that legislatures nationwide were considering how to enforce child support payments during the 1960s and 1970s as the number of divorces, separations, desertions, and out-of-wedlock births increased. At issue was the strain on welfare systems supporting children that should have been receiving child support. Irwin Garfinkle, *The Evolution of Child Support Policy*, 11 FOCUS NEWSL. (U. Wis. Madison Inst. for Res. of Poverty), no. 1, 1988 at 11–12. The Texas Criminal Code was enacted in 1973, precisely during this nationwide crisis. Although not contemporaneous, the Texas legislature discussed the growing problem in 1988 stating, "During the 1970's, the number of families headed by women doubled and the number of never-married mothers tripled . . . 55% of the children of single parents live below the poverty line . . . AFDC supports millions of children whose fathers are alive and capable of contributing to their children's upkeep . . . . Less than half of the women with child support awards or agreements receive full payment." COMMONWEALTH OF TEX. J. INTERIM COMM. ON CHILD SUPPORT, MINUTES, 70th Sess., at 3 (1988).

146. 426 U.S. 26 (1976).

147. *Id.* at 33.

reduction.[148] More importantly, when Congress addressed the relevant statutory provisions that defined the conditions for hospitals' nonprofit status, the House initially included a provision removing the condition that hospitals provide any indigent care so long as they meet the other requirements of section 501(c)(3) of the Revenue Code.[149] The Senate, however, removed this provision of the House Bill,[150] and the Senate version was ultimately enacted into law.[151] It does not take much imagination to conclude that maneuvering by the House and Senate was aimed at relieving and then reinstating conditions that would influence the care provided by nonprofit hospitals. Thus the best explanations for this maneuvering implies that Congress understood the Revenue Code's conditioning nonprofit status on the provision of indigent care as inducement to provide such care. Given Congress's institutional capacity to predict likely effects of such conditions, it follows that the IRS's loosening of such requirements likely reduced hospitals' provision of care to the plaintiffs. Thus the *EKWRO* Court's contrary determination flies in the face of the most intelligible congressional understanding of the effect of the condition it imposed on hospitals' nonprofit status.

CONCLUSION

In *Lujan v. Defenders of Wildlife*, the Court held that when Congress creates a legal interest to see that the law is followed, the deprivation of that interest, without further injury, is not sufficient for a plaintiff to meet Article III's standing requirements. *Lujan* created significant uncertainty about Congress's ability to influence judicial standing inquiries by creating statutory rights, especially in light of Justice Kennedy's concurrence and the majority's footnote seven, both of which suggest Congress retains some role regarding such inquiries. This Article has shown that Kennedy's concurrence and footnote seven are best explained by recognizing that Congress is institutionally superior to courts in evaluating the concreteness of likely harms and the causal chains between statutory violations and those harms—evaluations that may bear on whether a plaintiff in a particular case has met the injury in fact and traceability elements of Article III standing.

The Article takes this explanation further by showing that the structure of statutory provisions that do not create causes of action might nonetheless reveal

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148. Essentially, the regulatory change lowered the hospital's price for failing to provide care. Basic price theory predicts that lowering the price of engaging in conduct will increase the overall conduct in the market. *See* MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 12 (1996); *see also* Jonathan Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1312–14 (2013) (noting that plaintiffs in *EKWRO* would suffer a decreased probability of receiving care, and noting that Congress might "recognize that harms in administrative law cases are generally probabilistic or systemic" and favor agency redress of "harms of precisely that sort").

149. H.R. REP. NO. 91-782, at 289–90 (1969) (Conf. Rep.).

150. S. REP. NO. 91-552, at 61 (1969).

151. *See* E. Ky. Welfare Rights Org. v. Schultz, 370 F. Supp. 325, 331–32 (D.D.C. 1973), *rev'd sub nom.* 506 F.2d 1278 (D.C. Cir. 1974), *vacated & dismissed*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976).

legislators' likely understanding about the significance of certain harms and about the closeness of the causal connections between harms and statutory violations. This congressional understanding should influence judges' standing inquiries. Finally, the Article suggests that in the absence of other evidence of Congress's understanding of injuries and causal nexi, courts would do well to rely on statutory purpose in evaluating injury in fact and traceability given that the alternative is judges' subjective evaluation without meaningful constraint by relevant legal standards.