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I. Introduction

As governments increasingly have recognized that durable solutions to environmental problems require international approaches, efforts at international cooperation have proliferated. Today, cross-border pollution, global climate change, and species loss form part of a long list of environmental ills that put a premium on coordination between states. Moreover, as the regulatory decisions of one state increasingly affect others via the price of traded goods and international capital flows, environmental problems formerly viewed as purely domestic have taken on global significance.[1]

Recognition of the transnational character of these problems has found its way into the opinions of the Supreme Court of the United States. The Court's 2007 decision in *Massachusetts v.* EPA invoked the history of multilateral efforts to combat climate change and assessed the significance of U.S. automobile emissions as a share of total global emissions of carbon dioxide. The Court concluded that the U.S. automobile industry made a "meaningful contribution" to global greenhouse gas concentrations and, ultimately, that this was sufficient for the petitioners - a coalition of states and environmental groups that sought to force the EPA to regulate carbon dioxide under the Clean Air Act - to establish standing to sue.[2] Chief Justice Roberts, writing for himself and three other dissenters, likewise considered the global character of climate change, yet the conclusions he drew were starkly different.[3] For these dissenters, the need for international coordination tended to defeat the plaintiffs' standing: Because U.S. emissions cuts might not be matched by other countries - because, in other

* J.D., 2009, Harvard Law School.

1. *See* Neil Gormley, Online Student Note, *Safeguarding National Environmental Regulation in a Liberalized World: Beyond the Trade Promotion Act of* 2002, HARV. L. & POL'Y REV. 2-3 (2008), *available at* http://www.hlpronline.com/Gormley_Student_Note.pdf.

2. 549 U.S. 497 (2007).

3. *Id.* at 535 (Roberts, C.J. dissenting).

words, efforts at coordination may fail - the plaintiffs could not establish that a judicial remedy would redress their injuries.[4] In effect, these justices insist that climate change and other global environmental problems are nonjusticiable.[5] That is, they are questions for the political branches, not the judiciary.[6]

Even though the ineffectiveness of unilateral efforts was a major component of the Chief Justice's dissent, little notice has been paid - in *Massachusetts v.* EPA, or elsewhere - to the effect that standing doctrine may have on the ability of the United States to coordinate effectively with other nations in dealing with climate change and other global environmental problems. This paper sets out to explore the possibility that domestic judicial enforcement of global environmental agreements tends to strengthen efforts at international coordination, and thereby suggests a deep irony in Chief Justice Roberts' argument. For the Chief Justice, the absence of international coordination defeats standing. But a strict doctrine of standing may itself hinder international coordination.[7]

The argument proceeds in three parts. I begin by summarizing the current state of constitutional standing doctrine as it relates to environmental problems, and identify the risk that strict standing requirements will decrease the prospects for effective enforcement of environmental laws. I then explore the link between citizen suits and compliance with international environmental agreements, and suggest that doctrinal developments that restrict citizen enforcement - including but perhaps not limited to new standing obstacles - will hinder compliance. Finally, I argue that the availability of domestic enforcement will bolster the credibility of U.S. commitments, ultimately strengthening the U.S. government's hand in international negotiations.

II. Standing at a Crossroads

The core requirements of standing, as articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*,[8] are derived from the "case or controversy" requirement of Article III of the Constitution, and as such are now generally assumed to be beyond the power of Congress to modify by

4. *Id.* at 544-46 (Roberts, C.J., dissenting).

5. *Id.* at 536 (Roberts, C.J., dissenting).

6. *Id.*

7. The petitioners themselves pointed out a similar circularity in the dissenters' reasoning, suggesting that a favorable outcome in their lawsuit would increase the likelihood of emissions regulation by China and India. *See id.* at 544. My argument about standing, I will attempt to show, implicates questions of institutional design that are both more durable and relevant to a wider range of international problems.

8. 504 U.S. 555 (1992).

statute.[9] The Constitution requires that a plaintiff allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[10] Thus, Article III standing is commonly understood to have three mandatory components: injury in fact, causation, and redressability.

The doctrine of standing is intended to preserve the adversarial nature of the litigation process "by assuring . . . that the parties before the court have an actual, as opposed to professed, stake in the outcome."[11] *Lujan*, however, resurrects private law notions of injury that are not only ancillary to the stated goal of ensuring vigorous prosecution of lawsuits, but also are largely incompatible with the modern statutory approach to environmental regulation.[12] Fundamentally, this incompatibility derives from the fact that modern environmental law sets out to regulate the few in order to vindicate the interest of the many in preservation of a public good - a clean environment. The *Lujan* approach to standing tends to prevent the intended beneficiaries of environmental regulation - citizens generally - from enforcing these statutorily created rights.[13] It does so in at least three ways.

First, *Lujan* defines the necessary injury in such a way that the values that environmental litigation generally seeks to protect are difficult to conceptualize as injuries. Whereas earlier decisions had focused the standing inquiry on whether the plaintiff had suffered a legal wrong,[14] *Association of Data Processing Serv. Orgs. v. Camp*[15] opened the door for the reinsertion of a factual conception of injury from the common law. *Lujan* tied this factual inquiry more closely to private law notions: a constitutionally sufficient "injury-in-fact" must be "concrete and particularized" and must "affect the plaintiff in a personal and individual way."[16]

The difficulty that meeting this concreteness requirement poses for environmental plaintiffs is evident from even a cursory examination of the cases that have reached the Supreme Court. Though the Supreme Court

9. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article* III, 91 MICH. L. REV. 163, 166 (1992).

10. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

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

12. *See generally*, Robert V. Percival, *Greening the Constitution - Harmonizing Environmental and Constitutional Values*, 32 ENVTL L. 809 (2002).

13. Justice Scalia's majority opinion warned expressly that standing served to exclude beneficiaries of regulation more readily than the subjects of it. *Lujan*, 504 U.S. at 562 ("Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.").

14. *See* Percival, *supra* note 12 at 827-28.

15. 397 U.S. 150, 151 (1970),

16. *Lujan*, 504 U.S. at 560.

conceded in *Sierra Club v. Morton*[17] that aesthetic injuries may be sufficient to satisfy Article III, the Court has repeatedly raised the bar for establishing that an aesthetic injury is sufficiently concrete. Thus, in *Lujan v. National Wildlife Foundation*, the Court held that recreating in the vicinity of affected public lands is insufficient to establish a concrete injury where the public lands at issue are expansive.[18] *Lujan v. Defenders of Wildlife* highlighted these difficulties in the context of environmental harms that cross national borders. There, the injury was not sufficiently concrete because plaintiffs who worked with endangered species in Egypt that would be wiped out by flooding had not specified when exactly they next planned on visiting them.[19] Holdings like this one prompt the question: What possible interest could be served by a requirement that environmental groups purchase plane tickets before bringing suit? The lines that the court draws between aesthetic injuries that count and aesthetic injuries that do not seem to have little if anything to do with the ostensible goal of safeguarding the adversarial process, and a great deal more to do with vestigial notions of what would have constituted injury at common law.

The second obstacle that *Lujan* presents to the effective vindication of environmental claims is the requirement that injury in fact be, not just concrete, but actual or imminent.[20] Limiting standing to actual or imminent environmental harms is deeply at odds with core rationales of environmental regulation. Environmental concerns often involve long time horizons, nonlinear feedback, catastrophic and irreversible harms, and high degrees of uncertainty.[21] When standing excludes claims under environmental statutes until environmental harms are actual or imminent, the potential for the judiciary to play an important role in the enforcement of environmental laws is seriously undermined.[22] These concerns apply with equal or greater force when the environmental problem at issue is one of international scope. When the environmental harms are not local, but global, the disconnect between the regulated action and the felt harm tends to be greater, both temporally and geographically.[23] Moreover, global markets allocate environmental goods and services in such a way that even localized environmental catastrophes will tend to occur simultaneously,

17. 405 U.S. 727 (1972).

18. 497 U.S. 871, 886-89 (1990).

19. *Lujan*, 504 U.S. at 559.

20. *Id.* at 560.

21. *See generally* Robert Nadeau, THE ENVIRONMENTAL ENDGAME (Rutgers Univ. Press 2006).

22. Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494 (2008), emphasizes this incongruity in arguing for an approach to standing that is more consonant with the precautionary principle.

23. Climate change is an obvious example. *See* Evan Mills, *Insurance in a Climate of Change*, SCIENCE, August 2005, at 1040-44.

rather than in successive, and thus cautionary, crises.[24] The environmental harms that international environmental agreements are most likely to be concerned with, therefore, are perhaps the least likely to qualify as actual or imminent.

The second and third prongs of the test for Article III standing - causation and redressability - may also pose problems for plaintiffs seeking to vindicate environmental claims. When dealing with complex environmental phenomena, lines of causation can be extremely difficult to prove. If plaintiffs were required to establish that particular instances of non-enforcement of laws, for example, were causally linked to the concrete harms that they rely on to establish injury in fact, large numbers of citizen suits would never make it out of the gate. But the treatment of these requirements in environmental cases is somewhat confused, primarily because of the relaxation of these requirements for so-called "procedural injuries."[25] As Justice Kennedy explained in his concurrence, "Congress has the power to [articulate] chains of causation that will give rise to a case or controversy where none existed before."[26] But in *Lujan*, as elsewhere, it was unclear whether failure to consult under the Endangered Species Act constituted a "procedural injury" and, if not, why not. A majority of the Court joined Justice Scalia's assertion that the plaintiffs were required to establish causation and redressability, but only a plurality concluded that they failed in doing so. The imprecisely defined exception for procedural injuries is further evidence of the atavism of *Lujan*'s approach to constitutional standing: the exception is an implicit recognition that private law notions of injury and causation are fundamentally incompatible with Congress's approach to environmental regulation.

There is additional uncertainty surrounding the requirement that an injury not be generalized or widespread. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, the Court explained, "we have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure."[27] The Court subsequently clarified that, at least where a suit concerns a procedural injury, "the fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes."[28] Given the tentative phrasing of the conclusion, however, and the fact that it does

24. HERMAN DALY, BEYOND GROWTH 164-66 (1996).

25. Justice Scalia's enigmatic "footnote 7" concedes that standing requirements are loosened for procedural injuries, but makes not attempt to define the term. *Lujan*, 504 U.S. at 573 n. 7.

26. *Id.* at 580.

27. 438 U.S. 59, 80 (1978).

28. *Federal Election Commission v. Akins*, 524 U.S. 11, 24 (1998).

appear to be in some tension with the requirement that an injury in fact be "particularized" and "personal," some uncertainty persisted as to whether diffuse harms are enough to satisfy Article III standing. What does seem clear is that courts are still free to decline to exercise jurisdiction, on prudential grounds, in such circumstances.[29] Given that environmental harms, especially when they stem from problems of global scope, are often highly diffuse,[30] it is clear that the resolution of this question bears closely on the enforceability of environmental laws.

This was, broadly speaking, the state of standing doctrine when *Massachusetts v.* EPA was decided. In that opinion, the four dissenters hewed close to *Lujan* in applying a very strict test for standing. They argued that petitioners lacked standing for several independently sufficient reasons: the global scope of climate change defeated the requirement of particularized injury; the uncertainty surrounding predictions of rising sea levels rendered the claimed injury "conjecture"; and automobile emissions standards would not redress the asserted injury, because the contribution of U.S. autos to global concentrations of greenhouse gases was too small.[31]

As noted, a majority of five justices disagreed, holding there that the state of Massachusetts had established standing based on the global-warming-induced injuries that it alleged.[32] So did *Massachusetts v.* EPA signal a sea change in the law of standing? Three years later, several key questions remain unanswered.

Perhaps most fundamentally, *Massachusetts v.* EPA throws into sharp relief the mismatch between the types of private law injuries that are cognizable for standing purposes and the nature of modern environmental problems. While scientists and politicians alike are focused on the globe-spanning, macroscopic, and potentially catastrophic harms threatened by climate change, the Supreme Court of the United States is bound by its own doctrine of standing to focus on a few inches of Massachusetts coastline. And the *Massachusetts* decision made no headway in resolving the apparent absurdity. Because Justice Stevens' majority opinion relied on the loss of this property interest to rising oceans (which process it accepted as having already begun), it is hard to see *Massachusetts v.* EPA as a hard case with respect to concreteness of the injury or imminence of the injury. Future environmental plaintiffs, therefore, will be bound by the same old rules.

Less clear is whether *Massachusetts v.* EPA puts to rest concerns that diffuse or widespread injuries fall short of Article III. Stevens declares that

29. *See* Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 28 (2005).

30. *See* Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress of the Environment*, 7 ENVTL. LAW. 321, 331 (2001).

31. 549 U.S. at 540-46 (Roberts, C.J. dissenting).

32. *Id.* at 535.

the fact that "climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation,"[33] but then goes on to explain that the Commonwealth owns "a substantial portion" of the states' coastal property. Subsequent cases could presumably distinguish *Massachusetts v.* EPA where a private plaintiff, unlike the state of Massachusetts, possesses no greater aesthetic or property interest than other members of the public. Nor does *Summers v. Earth Island Institute*, a 2009 decision on the standing of environmental plaintiffs, resolve the question.[34] There, the Court concluded that no plaintiff had alleged an injury that was "concrete," so there was no need to assess whether the injury was "particularized."[35] In any event, the notion of "concreteness" may yet prove sufficiently malleable to accommodate some justices' distaste for standing rooted in widespread injuries.

Where the *Massachusetts v.* EPA majority seems to depart most sharply from the restrictive approach of *Lujan* is in assessing causation and redressability. First, they adopt an expansive reading of the "procedural injury" exception that was alluded to in earlier cases. They accept the general citizen suit provision of the Clean Air Act, § 7607(b)(1), which authorizes suits to compel agency action unlawfully withheld, as a qualifying statutory articulation of a procedural injury[36] - a holding that should have broad application to several environmental statutes. Second, they expansively read the precedents governing the extent to which causation and redressability requirements are relaxed in such cases, declaring that a "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."[37] They go on to make clear that, at least in procedural injury cases, it is enough for standing that the requested relief would constitute an incremental step towards redressing the injury complained of.[38]

All of these moves towards liberalization, however, come with a major caveat: they may be limited to suits by states *parens patriae*. In order - it is widely assumed[39] - to secure a fifth vote in the form of Justice Kennedy, Justice Stevens begins his standing analysis by invoking a case from 1907 concerning a suit by the state of Georgia on behalf of its residents. He concludes that Massachusetts' stake in protecting its "quasi-sovereign

33. *Id.* at 522.

34. 129 S. Ct. 1142 (2009).

35. *Id.*

36. 549 U.S. *at* 517-18.

37. *Id.*

38. *Id.* at 524.

39. *See, e.g.*, Dru Stevenson, *Special Solicitude for State Standing*: Massachusetts v. EPA, 112 PENN. ST. L. REV. 1, 30-31 (2007).

interests" entitles it to "special solicitude" in questions of standing.[40]

The million-dollar question, therefore, is whether the *Massachusetts* approach to standing extends to private plaintiffs, like environmental groups,[41] and, more specifically, whether Justice Kennedy would support such an extension of the holding. The most recent case on the Article III standing of environmental plaintiffs, *Summers v. Earth Island Institute*, sheds no light on that question. There, because the Court determined that the plaintiffs had suffered no concrete injury, it did not reach causation and redressability.[42]

Some have questioned the durability of Kennedy's "defection" to the liberal wing of the Court in *Massachusetts v.* EPA,[43] especially in light of his vote two months later in *National Association of Homebuilders v. Defenders of Wildlife*, a case where a highly restricted reading of the Endangered Species Act was adopted by five justices, Kennedy among them.[44] And his concurrence in *Lujan* is susceptible to widely different interpretations.[45] While Justice Kennedy contemplates a greater role for Congress defining injuries in fact for purposes of Article III standing than does Justice Scalia, the cases to date give little hint of his view of the scope of that Congressional power.[46] Perhaps the conclusion that can most confidently be drawn from *Massachusetts v.* EPA is that "the Justices are even more sharply split over foundational principles of the regulatory state than they were before the addition of the Court's two newest members,"[47] with Justice Kennedy situated somewhere in between the warring camps.

The Supreme Court's approach to standing, therefore, raises serious questions about the viability of a bedrock of U.S. environmental law - the citizen suit. Cass Sunstein concluded in the wake of *Lujan* that "[i]t is now

40. *Massachusetts*, 549 U.S. at 520.

41. *Compare* Andrew Long, *Standing & Consensus: Globalism in* Massachusetts v. EPA, 23 J. ENVTL. L. & LITIG. 73, 115 ("Justice Stevens makes plain that Massachusetts affects Defenders' framework directly and suggests that the new analysis should not be limited to cases involving state petitioners.") *with* Stevenson, *supra* note 32 at 74 ("By conferring special litigation status on the state [Attorneys General], the Court diminished the litigation role of private activist groups by comparison.").

42. 129 S.Ct. at 1151.

43. *See* Robert V. Percival, Massachusetts v. EPA: *Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111, 143-44.

44. 551 U.S. 644 (2007).

45. *See* Sunstein, *supra* note 9 at 201 (calling Kennedy's *Lujan* concurrence "somewhat ambiguous").

46. *See Earth Island*, 129 S.Ct. at 1153 (Kennedy, J., concurring), in which Justice Kennedy suggests obliquely that Congress's power to "identify" concrete interests does not extend to converting "procedural" injuries into "concrete" injuries. These categories, one assumes, would remain for the courts to define.

47. Percival, *supra* note 43, at 112.

apparently the law that Article III forbids Congress from granting standing to 'citizens' to bring suit."[48]

At the very least, as we have seen, these developments in standing doctrine will make the burdens on citizens and environmental groups more onerous. I will argue in Part II that standing doctrine may someday present insuperable obstacles to citizen suit enforcement with respect to international environmental problems that are yet to be comprehensively addressed under U.S. law.

The growing doctrinal obstacles to the enforcement of federal environmental law via citizen suit are not, of course, strictly confined to Article III standing. A wide range of justiciability doctrines deter and weaken environmental citizen suits, including the Administrative Procedure Act's bar on "programmatic" challenges to agency action, announced in L*ujan v. National Wildlife Federation*,[49] and the arcane distinctions in N*orton v.* SUWA between agency "action" and agency "inaction" for purposes of determining whether the APA permits suit.[50]

Perhaps the most prominent of these developments is the Court's 2008 decision in W*inter v.* NRDC, which raised the bar for even successful environmental plaintiffs to obtain injunctive relief.[51] In W*inter*, the Court decided that the balance of the equities and the public interest weighed against granting a preliminary injunction to environmental groups seeking to force the Navy to comply with the National Environmental Policy Act.[52] Particularly in the way it characterized the harms to be balanced in that inquiry - considering the *risk* of a national security incident but holding the environmental plaintiffs to a standard of actual, documented, past harm to wildlife - the Court took an approach to balancing that seemed systematically to disadvantage environmental plaintiffs.

Interestingly, there were echoes of the Court's environmental standing jurisprudence in its balancing-of-the-harms analysis in W*inter*. Though NEPA is a procedural statute, the court did not consider or weigh any procedural harms on the side of the environmental plaintiffs, focusing instead on the types of harms that environmental plaintiffs traditionally have had to rely on to establish standing - individualized scientific, recreational and aesthetic harms.[53] At oral argument, Justice Scalia went so far as to evoke explicitly the requirements of Article III standing in the

48. Sunstein, *supra* note 9, at 166.
49. 497 U.S. 871 (1990).
50. 542 U.S. 55 (2004).
51. 129 S.Ct. 365 (2008)
52. I*d*. at 378.
53. I*d*. at 377.

discussion of what harms count for purposes of equitable injunctions.[54] Thus W*inter* may yet provide a new opening for reinserting common law conceptions of injury into these complex regulatory disputes.[55]

Perhaps most significantly, W*inter* also announced that a district court would abuse its discretion in granting an injunction to the environmental groups even if they ultimately prevailed on the merits.[56] W*inter* thus appears to represent another significant obstacle in the path of environmental groups trying to force executive compliance with the law.

Importantly, however, the decisions in N*ational* W*ildlife* F*ederation*, N*orton v*. SUWA and W*inters* are not constitutional. Given sufficient political will, Congress can smooth those obstacles to environmental citizen suits by amending the Administrative Procedure Act and Federal Rule of Civil Procedure 65(a), governing preliminary injunctions. Because the core of Article III standing doctrine is, by contrast, beyond the capacity of Congress to alter by statute, standing decisions are likely to impose the steepest costs in enforcement of environmental law in the future.

This cost to effective enforcement should be borne in mind as courts decide whether to embark down any of the several avenues that exist for reconciling Article III standing and environmental citizen suits. First, courts can opt to extend the M*assachusetts* approach to causation and redressability to all plaintiffs, rather than confining it to states. They also might accommodate citizen suits by indulging in some slight of hand concerning the nature of the injury that is required. Courts have shown themselves willing, in the past, to sidestep standing difficulties by simply redefining the injury.[57] Thus, in L*aidlaw*, a "reasonable fear" of illness stemming from toxic emissions was enough to confer standing.[58] A generous application of the "reasonable fear" approach could go a long way towards getting

54. Transcript of Oral Argument at 24; *see generally* Christopher Kendall, D*angerous* W*aters*? T*he* F*uture of* I*rreparable* H*arm* U*nder* NEPA *after* Winter v. NRDC, 39 ENVTL. L. REP. NEWS & ANALYSIS 11109 (2009).

55. Justice Breyer's concurring opinion, by contrast, recognized that NEPA is concerned with safeguarding an important procedural value - that informed weighing of environmental consequences precede major government actions. S*ee* W*inter*, 129 S.Ct. at 383. See also the more extensive discussion of importance of considering procedural harms in equitable balancing in an opinion written by then Judge Breyer of the 1st Circuit,M*assachusetts v*. W*att*, 716 F.2d 946, 947 (1st Cir. 1983).

56. W*inter*, 129 S. Ct. at 381.

57. Cass Sunstein analogizes to R*egents of the* U*niversity of* C*alifornia v*. B*akke*, 438 U.S. 265 (1978), where an applicant to a medical program could not establish that affirmative action was the reason for his rejection. The Court ruled that he had standing by recharacterizing his injury as denial of a chance to compete on an equal footing with other applicants. Sunstein, *supra* note 9, at 203-04. To some extent, of course, this begged the question whether the affirmative action program was unlawful in the first place.

58. F*riends of the* E*arth v*. L*aidlaw* E*nvtl*. S*erv*,. 528 U.S. 167 (2000).

environmental groups into court. Finally, the most accommodating way forward, by far, would be to recognize the power of Congress to define injuries and articulate chains of causation free from the constraints of the common law.

III. The Problem of Compliance

The ability of citizens to access courts in order to compel executive compliance with environmental laws may have important repercussions on the international plane, because domestic enforcement bears on one of the most fundamental questions in the design of international environmental agreements - why do states comply with their commitments?

International environmental problems require deep cooperation among states. Given the prevalence of physical, economic, and psychological externalities associated with environmentally harmful practices, cooperation is necessary to the realization of the mutual benefits of common solutions.[59] Negotiated agreements, of course, only facilitate cooperation if states comply with them. Furthermore, expectations about compliance will often constrain the depth of the commitments that states are willing to make - that is, the extent to which they are willing to depart from the course that they would have taken in the absence of cooperation. Just as in private contract situations, states need to be able to rely on credible commitments by other states, especially when the contemplated activities are highly reciprocal. A state party may not be willing to embark on a path of costly pollution control, for example, without highly credible commitments from peer states that they will make the same sacrifices. David Victor blames the shallowness of international environmental law generally on the failure of efforts to develop effective compliance mechanisms.[60]

The risk of defection in the environmental context is generally quite high. Because of scientific and economic uncertainty, the costs and benefits of cooperation are difficult to predict and assess ex ante. Moreover, this uncertainty is magnified by the long duration of cooperation that is often necessary to deal effectively with serious environmental problems.

Similarly, political economy models predict that compliance with environmental commitments will be inconsistent.[61] The costs of

59. For a basic game theoretic discussion of payoff configurations and international cooperation, *see* KENNETH A. OYE, EXPLAINING COOPERATION UNDER ANARCHY: HYPOTHESES AND STRATEGIES 6-9 (1985).

60. David Victor, *Enforcing International Law: Implications for an Effective Global Warming Regime*, 10 DUKE ENVTL. L. & POL'Y F. 147, 148 (1999-2000).

61. *See generally* Joseph R. Bial, Daniel Houser & Gary D. Libecap, *Public Choice Issues in Collective Action: Constituent Group Pressures and International Global Warming Regulation*, International Center for Economic Research Working Paper, June 20, 2000.

environmental regulation are typically highly concentrated, so that regulated sectors - industry groups in particular - have strong incentives to oppose compliance over time. The benefits of regulation, by contrast, are typically diffuse. Beneficiaries face higher transaction costs in organizing in favor of compliance, and high levels of political mobilization may be unsustainable over the long term. As Sunstein argues, the fact that environmental commitments are concluded at all often has to do with the "availability heuristic."[62] By this reasoning, environmental regulation has more widespread appeal when environmental harms are more "cognitively available" - when vivid and salient examples are present in the popular consciousness. As the cognitive availability of environmental harms fades, popular support for costly regulatory measures - and thus for compliance with environmental agreements that compel such measures - tends to fade as well.

Given these challenges, how can the advocates of international environmental cooperation ensure compliance with negotiated agreements? A wide variety of explanations have been advanced to explain observed compliance. They need not be viewed as mutually exclusive; more likely, each of these mechanisms contributes in some respect to state compliance. The leading explanations include the reputational costs of defection,[63] the perceived fairness and legitimacy of negotiated agreements,[64] social learning,[65] and administrative capacity-building, both bilateral and multilateral.[66] Transnational legal process theorists, such as Harold Koh and Anne Marie Slaughter, predict greater compliance stemming from interactions - direct and indirect - between the legal institutions, broadly understood, of different countries.[67]

Other theorists are far less sanguine about the prospects for compliance with international agreements in the face of changing conditions. Goldsmith and Posner have famously argued that the discipline

62. Cass Sunstein, *The Availability Heuristic, Intuitive Cost-Benefit Analysis, and Climate Change*, John M. Olin Law & Economics Program at the University of Chicago, Working Paper No. 263, at 5-7 (2005).

63. *See, e.g.*, George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. Legal Stud. S95 (2002); ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984).

64. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

65. Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1400-01 (1999).

66. H. K. Jacobson & Edith Brown Weiss, *Compliance with International Environmental Accords*. 1 GLOBAL GOVERNANCE 119 (1995).

67. *See, e.g.*, Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L. L. 1103 (2000); *see also* Jennifer Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003).

of international law mistakes correlation for causation.[68] They argue that the behaviors that international lawyers take to be manifestations of *opinio juris* are actually no more than states acting in their own interests. Pursuit of the national interest, they suggest, happens to produce consistent behaviors, at most times and in most places, which are mistaken for legal norms. Relatedly, David Victor and Kal Raustiala have questioned whether international *law* - as opposed to international political processes, culminating in so-called "soft law" - contributes meaningfully to compliance.[69] They point to several instances of highly effective environmental cooperation among states on the basis of non-legally binding agreements, and reason that nations may be more likely to agree to robust monitoring regimes when the commitments at stake are not legally binding.

The accounts of compliance with international law that accord the most weight to direct enforceability of commitments in domestic legal systems are liberal theories, which focus on the distinctive domestic institutions of so-called "liberal states." Thus, according to David Victor, there are certain states - liberal democracies - "in which internal public pressure [and] robust legal systems make it possible to enforce international commitments from the inside (ground-up) rather than the outside (top-down)."[70]

None of these, however, pays much heed to the potential for domestic courts to play a role in escaping the compliance dilemma. Even liberal theories tend to focus instead on interest groups and on the operations of the political branches.[71] Victor identified the existence of independent judiciaries as one of three factors explaining heightened compliance with international obligations by liberal states, but left the idea unexplored. He emphasized that "[m]ore work is needed to unravel [the] conditions under which they are most effective."[72]

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68. Jack Goldsmith & Eric Posner, A *Theory of Customary International Law*, Chicago Working Paper in Law and Economics 63, 69-70 (1999).

69. David G. Victor, *The Use and Effectiveness of Nonbinding Instruments in the Management of Complex International Environmental Problems*, 91 AM. SOC'Y INT'L L. PROC. 241, 246 (1997); Kal Raustiala & David G. Victor, *Conclusions*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 659 (David G. Victor et al. eds.) (1998).

70. Victor, *supra* note 60 at 148.

71. Peter F. Cowhey, *Domestic Institutions and the Credibility of International Commitments: Japan and the United States*, *in* THEORY AND STRUCTURE IN INTERNATIONAL POLITICAL ECONOMY 399 (Charles Lipson & Benjamin J Cohen, eds.) (1999), is an effort to explain U.S. commitment with international obligations in terms of domestic institutions, but no mention is made of the role of the judiciary. Kal Raustiala, *Domestic Institutions and International Regulatory Cooperation Comparative Responses to the Convention on Biological Diversity*, WORLD POLITICS 482 (1997), similarly excludes courts from its institutional analysis.

72. Victor, *supra* note 60, at 158.

Oona Hathaway offers empirical support for the hypothesis that domestic legal enforcement contributes meaningfully to compliance with international obligations.[73] After reviewing a range of studies, both qualitative and quantitative, that assess compliance with human rights law, she reaches two conclusions that are relevant here. First, states that boast independent judiciaries, media, and political parties are more likely to join treaties when their human rights practices are good, and are more likely to improve their practices upon joining.[74] In other words, they take their international legal obligations seriously. Second, just as domestic enforcement contributes to international compliance, the existence of "robust domestic rule-of-law institutions" tends to strengthen domestic enforcement.[75] Hathaway concludes, therefore, that work to strengthen local rule of law serves the ultimate goal of compliance with international human rights agreements.[76]

In the environmental context, the compliance-reinforcing potential of domestic enforcement mechanisms is particularly pronounced. In the United States, citizen suits have been tremendously effective at forcing executive compliance, at both the federal and state levels, with the major federal environmental statutes. James May offers this assessment:

> Citizen suits work; they have transformed the environmental movement, and with it, society. Citizen suits have secured compliance by myriad agencies and thousands of polluting facilities, diminished pounds of pollution produced by the billions, and protected hundreds of rare species and thousands of acres of ecologically important land. The foregone monetary value of citizen enforcement has conserved innumerable agency resources and saved taxpayers billions.[77]

Citizen suits are a staple of federal environmental law: nearly every major environmental statute imparts a private right of action to citizens.[78] And nearly 75 percent of all actions to enforce domestic environmental laws take the form of citizen suits.[79] Steps to make the environmental treaty obligations of the executive branch enforceable by citizen suit, therefore, may be expected to improve compliance.

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73. Oona Hathaway, *The New Empiricism in Human Rights: Insights and Implications*, 98 AM. SOC. INT'L. L. PROC. 206 (2004).

74. *Id*. at 208.

75. *Id*. at 210.

76. *Id*.

77. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. SYMP. J. 1, 3-4 (2003).

78. Sunstein, *supra* note 9, at 165-66, n. 11.

79. May, *supra* note 77, at 6-7.

Two overarching approaches to enforcement of international commitments by citizen suit are possible. First, environmental agreements could be made to include more specific, self-executing obligations, from the outset.[80] Alternatively, international agreements could continue to adhere to the model common to the Montreal and Kyoto protocols, whereby states commit to broad quantitative reductions, only now with an additional treaty obligation to provide for private enforcement of subsequent implementing legislation in the domestic legal system. Although this latter option would leave some margin for noncompliance, that margin would be highly circumscribed. Most noncompliance with environmental obligations is not through overt repudiation at the level of the executive or national legislature, but through non-enforcement.[81] Thus, whether international environmental agreements themselves create privately enforceable rights or those provisions are instead inserted later at the time of passage of implementing legislation by the legislature, the availability of citizen suits will greatly diminish the opportunity for states subsequently to renege through inaction on their commitments.[82] The key is to harness the enforcement potential of citizen suits in service of international compliance.

This strategy is further recommended by the fact that domestic courts may be particularly well-suited, in institutional terms, to the task of long-term enforcement in the environmental context. Independent judiciaries are, in part by definition, more insulated from politics than the executive and the legislature, which means that they are also insulated from some of the most dangerous biases of political actors: short-termism, tendency to undervalue low-risk events, and unwillingness to face up to catastrophic risk.[83] Yet, generally speaking, domestic courts are not so insulated from the political tenor of a country so as to fail to perceive the costs of compliance.[84] Hence, they offer a solution to the vexing trade-off between credibility and

80. For more on the problem of self-execution of treaty obligations, see Lucy Reed, *Treaties in* U.S. *Domestic Law*: Medellin v. Texas *in Context*, talk delivered to the Malaysian Chapter of the Asian Society of International Law and the Malaysian Society of International Law (2008), at 3-4.

81. Chantal Thomas, *Trade-Related Labor and Environmental Agreements*?, 5 J. INT'L. ECON. L. 791, 794, (2002).

82. It may be useful to clarify that these recommendations are distinct from proposals to create third-party beneficiaries to international agreements. *See* Avnita Lakhani, *The Role of Citizens and the Future of International Law*: A *Paradigm for a Changing World*, 8 CARDOZO J. CONFLICT RESOL. 159 (2006); Bradley N. Lewis, *Biting Without Teeth*: *The Citizen Submission Process and Environmental Protection*, 155 U. PA. L. REV. 1229 (2007). The former concern the fora in which rights are vindicated, while the latter concern the source or existence of the right.

83. *See generally* William F. Shughart II, *Katrinanomics*: *The Politics and Economics of Disaster Relief*, 127 PUB. CHOICE 31 (2006).

84. For an argument that environmental questions belong in the courts, *see* Nash, *supra* note 22.

flexibility faced by the framers of international agreements in which environmental commitments - with their uncertain long-term costs - are at issue. What a country wants is to be bound when the question is close - so as to be able to make a credible commitment - but not when, from their perspective, circumstances have changed so much as to excuse noncompliance.[85] States are understandably wary of trusting foreign or international authorities to recognize and accommodate such instances of changed circumstances. A domestic institution is more likely to do so, even in cases of true judicial independence, simply by virtue of shared background assumptions that inhere in national identity and culture. Maximizing the extent to which international environmental commitments can make use of domestic legal institutions, therefore, may allow for optimal pre-commitment strategies.

In addition to being highly effective, domestic enforcement of international environmental commitments is likely to be more politically palatable, at the stage of institutional design and ratification, than the alternatives.[86] Existing international agreements in this area are notable for their lack of monitoring, sanctions, and other international oversight mechanisms.[87] In the United States, at least, concerns about loss of national sovereignty to international institutions are highly politically salient, and often carried to irrational, even paranoid, extremes.[88] Thus, political resistance to foreign and international monitoring and sanctions regimes often goes far beyond what one would expect given the simple risk that those institutions will be insufficiently attentive to national interests in hard cases. This resistance means that any achievements in international oversight often come at the expense of the depth of the commitments made.[89] In the environmental context, therefore, provision for domestic judicial enforcement of international commitments may be a Goldilocks solution: just enough precommitment, without the steep political price upfront.

Such a strategy, however, is closely bound up with the difficult questions about standing doctrine that were discussed in Part I. A

85. The concept is analogous to the doctrine of impossibility in the common law of contract.

86. Roger Fisher recognized that "[a] government would rather be told what to do by its own courts than by a foreign or international court." IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 213 (Robert Kogod Goldman, ed.) (1981).

87. Victor, *supra* note 60, at 163.

88. For a taste of these concerns about sovereignty, *see* Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 Cal. L. Rev. 1693, 1694-95 (2008).

89. Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L. L. 581, 609 (2005) (exploring the complex trade-offs between oversight mechanisms, legality, and depth).

hospitable doctrine of standing is among the conditions necessary for making domestic courts an effective tool in ensuring compliance with international environmental agreements. If, instead, standing doctrine continues to constrict the environmental citizen suits that make it into court, these compliance benefits will be commensurately foregone. Ironically, standing doctrine will sweep most broadly in excluding citizen enforcement in a substantive area such as environmental law where the achievement of international cooperation was already highly challenging. In a further irony, the imminence and causation requirements of restrictive standing doctrine will make domestic enforcement most difficult to attain precisely when international institutions are most in need of support from domestic sources of compliance pressure: at the early stages of cooperation to address an incipient environmental problem.

Climate change is the prime example of these risks, but the mismatch between standing doctrine and the substance of international environmental cooperation is institutional; it has the potential to extend far beyond the particular problem of climate change. Other environmental regimes promise even less concrete, more diffuse, and longer-term benefits from regulation. For example, failure of states to heed commitments directed towards preserving biodiversity will often fail to implicate any plaintiffs in particular.[90] What American has an "injury-in-fact," as interpreted by Justice Scalia, when an agency fails to take action to preserve the genetic diversity of obscure insects, plant species, or microorganisms, the *use value* of which to humans is almost nonexistent in the short or medium term?[91] Another highly problematic example is explored by Paul Hawken, Amory Lovins and L. Hunter Lovins in N*atural Capitalism*.[92] Several European countries have made great strides in reducing demand for natural resources and supply of solid waste by imposing responsibility for disposal and other "full life-cycle costs" on the manufacturers of consumer durables and industrial products. But when the environmental goods and services conserved by European states are freely traded, other economies can free-ride off of their efforts. If the United States agreed by treaty to impose similar requirements on manufacturers, what citizens would have standing to challenge executive noncompliance with resulting legislation?

The doctrine of Article III standing has profound and far-reaching consequences for United States participation in international regimes to address the pressing environmental problems of today and tomorrow. If standing doctrine remains restrictive, unpredictable, and immune to

90. For information on the Convention on Biological Diversity, *see* http://www.cbd.int/.

91. S*ee* DAVID PEARCE, ECONOMIC VALUES AND THE NATURAL WORLD (1993).

92. PAUL HAWKEN, ET AL., NATURAL CAPITALISM: THE NEXT INDUSTRIAL REVOLUTION 107-10 (1999).

alteration by Congress, the international environment will pay part of the price.

IV. Credibility as Negotiating Advantage

The course of United States standing doctrine, of course, will not directly influence the enforceability of internationally agreed-upon environmental rules within other countries. Therefore, one might legitimately question the extent to which a change in the domestic law of one state - even that of a hegemonic power - will meaningfully affect the prospects for effective international coordination.[93]

One response to such criticism is that removing one obstacle to greater reliance on domestic enforceability in international environmental regimes is a step in the right direction. As Justice Stevens reasoned in M*assachusetts v.* EPA, that a step is incremental does not defeat its utility.[94] But there also is a separate, stronger response: More robust domestic enforcement will strengthen the hand of the United States in international negotiations, whether or not other countries move in the same direction.

The academic literature surrounding negotiation has a tendency to analyze the concept of credibility in the context of *threats*. That is, in bargaining over the spoils within a zone of possible agreement, the party that is able to tie its own hands or burn its bridges (or create the credible impression of having done so), alters (or obscures) its true bottom line. By threatening to walk away from the table, that party captures a greater share of the mutual benefits from agreement.[95] But as I explain, the capacity to make credible *promises* is also an asset in negotiation.

The weakening of domestic enforcement of environmental law renders less valuable the promises made by U.S. negotiators,[96] by the following chain of causation: More restrictive environmental standing hinders domestic judicial enforcement, which in turn makes defection by the executive more likely, which drives negotiating partners to discount the value of promised actions by the (increased) likelihood of defection, thereby

93. David Victor has made this argument explicitly in the context of climate change: "international cooperation on prices and quantities that is restricted to [liberal] nations is unlikely to slow global warming by much, because those states account for a declining fraction of the emissions that cause global warming." Victor, *supra* note 60, at 148.

94. 549 U.S. at 524.

95. S*ee, e.g.*, W. Howard Wriggins, U*p* F*or* A*uction*: M*alta* B*argains with* G*reat* B*ritain*, 1971, 232-33, *in* THE FIFTY PERCENT SOLUTION: HOW TO BARGAIN SUCCESSFULLY WITH HIJACKERS, STRIKERS, BOSSES, OIL MAGNATES, ARABS, RUSSIANS, AND OTHER WORTHY OPPONENTS IN THIS MODERN WORLD (I.W. Zartman, ed.) (1976).

96. Or, to be precise, it removes a range of highly credible promises from the options available to the American negotiator.

rendering U.S. promises less valuable. As a result, the U.S. is able to get less in exchange for its promises in international environmental negotiations.

Many scholars, however, emphasize the value of flexibility in international agreements, particularly in situations of uncertainty.[97] An advocate of restrictive standing might, in reliance on these analyses, argue that the gain in flexibility to the United States is worth the cost in terms of lost credibility. But the hypothesized L*ujan* apologist would be wrong. Weakened enforcement by the domestic courts serves only to narrow the range of options available to the political branches in the international arena. Whereas a state that is able to make credible promises can calibrate the value of a promise by varying its substantive content as it wishes, a state lacking credibility is limited in what it can (effectively, credibly) promise. In other words, a state in possession of credibility can still enjoy the benefits of flexibility, but the reverse is not true.

Strategies of pre-commitment like domestic enforceability may be particularly useful to hegemonic powers like the United States. Hegemons of course, have a strong interest in preservation of the status quo. While ascendant political forces in the United States have, up to the present, identified the interests of the status quo as in conflict with concerted global action to deal with environmental problems, that position may no longer be tenable. Climate change and other looming ecological crises - not the efforts to deal with them - in fact pose the greater existential threat to the current global order, and American political elites are beginning to understand the need to address them. Thus, the nominees of both major American political parties expressed strong rhetorical support for efforts to deal with climate change in 2008, and a comprehensive cap-and-trade bill passed the House, but not the Senate, in 2009.[98] For a hegemonic power to convince other states to cooperate on its terms, however, it must be able to make credible commitments. Otherwise, the world will remain all too aware of the power of the hegemon to renege after the fact.[99]

The U.S.'s need for credibility on the world stage derives not only from

97. GEORGE W. DOWNS & DAVID M. ROCKE, OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1995). Kal Raustiala suggests that nonlegal "pledges" are an undervalued tool in international relations, in large part because of the flexibility that they offer to states. Raustiala, *supra* note 89, at 591-92.

98. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

99. Peter F. Cowhey argues that this "top dog problem" plagues all great power commitments, but also that the difficulty is particularly intractable in multilateral regimes. *Domestic Institutions and International Commitments*, *in* THEORY AND STRUCTURE IN INTERNATIONAL POLITICAL ECONOMY 400 (Charles Lipson & Benjamin J. Cohen, eds.) (1999).

structural factors. Though America's image in the world has rebounded substantially since the election of President Obama,[100] it was held in much lower esteem just one year ago.[101] And its perceived flouting of international norms was an important contributor to that decline.[102] The Bush administration's salient decisions to opt out of multilateral efforts, including "unsigning" the Rome Statute of the International Criminal Court, withdrawal from the Anti-Ballistic Missile Treaty, and non-participation in the Kyoto process are unlikely to be completely overlooked by global leaders considering long-term reciprocal cooperation with the United States, Obama's recent charm offensives notwithstanding.

The international community is painfully aware of the periodic willingness of the political branches - particularly the executive - in the United States to spurn international obligations when interests so dictate. Many point out, however, that these manifestations of United States "exceptionalism" consisted not in noncompliance - violation of a binding legal norm - but rather in perfectly legal decisions to opt out of international processes.[103] The point is true for what it is worth, but prominent instances of U.S. noncompliance with binding legal norms are, nonetheless, fairly easy to identify.

One of these instances of noncompliance is the requirement of consular notification in the Vienna Convention on Consular Relations.[104] In *Medellin v. Texas*,[105] the Supreme Court held that the state of Texas was not bound to refrain from executing Ernesto Medellin, even though the United States was indisputably in breach of its obligations under that treaty.[106] Domestic considerations of federalism and procedural default, therefore, trumped international compliance, much to the dismay of Mexico and many others in the international community.[107] Domestic procedural law also,

100. *See Confidence in Obama Lifts* U.S. *Image Around the World*, Pew Global Attitudes Project, *available at* http://pewresearch.org/pubs/1289/global-attitudes-survey-2009-obama-lifts-america-image (last visited 2/25/10).

101. *See America's Image Slips, But Allies Share* U.S. *Concerns Over Iran, Hamas*, Pew Global Attitudes Project, *available at* http://pewglobal.org/reports/display.php?PageID=825 (last visited 2/25/10).

102. *See* Nicholas J. Wheeler, *The Bush Doctrine: The Dangers of American Exceptionalism in a Revolutionary Age*, 27 ASIAN PERSP. 183 (2003).

103. *E.g.*, Sabrina Safrin, *The Un-Exceptionalism of* U.S. *Exceptionalism*, 41 VAND. J. TRANSNAT'L. L. 1307, 1313 (2008).

104. *See generally* Reed, *supra* note 80.

105. 552 U.S. 491 (2008)

106. *Id.*

107. *See* Warren Richey, *Showdown Over a Texas Execution*, The Christian Science Monitor, July 31, 2008, *available at* http://www.csmonitor.com/2008/0731/p03s05-usju.html ("It threatens to undercut US standing in the world by suggesting a lack of respect for the ICJ, analysts say.").

arguably, trumped international obligations for some time in the case of the prisoners of the war on terror held at Guantanamo. With respect to those individuals, the protections of the Geneva Conventions were undone - or at least very significantly delayed - by the jurisdictional requirements of U.S. law.[108] Comprehensive treatment of these controversies is beyond the scope of this paper, but the basic point is clear: the U.S.'s prospective negotiating partners are likely to be attentive to the risk that procedural hurdles - like strict standing - will undermine U.S. compliance in the environmental arena as well.

V. Conclusion

Several unresolved questions about Article III standing have important implications for the viability and effectiveness of citizen suits in environmental cases. If courts continue the recent trend of allowing procedural doctrines to restrict these suits, the shift may have important international repercussions which have not yet been fully reckoned with. Most important among these is that the unavailability of domestic enforcement of environmental laws through citizen suits will tend to undermine compliance with international environmental obligations. Both the negotiating position of the United States and the prospects for effective cooperation on the most pressing environmental issues facing humanity will suffer accordingly.

108. *See* Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008).

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