

A *Massachusetts v. EPA* Meditation

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In *Massachusetts et al v. Environmental Protection Agency* (“*Mass. v. EPA*”),¹ the Supreme Court confirmed the observation of Professor Althouse that historically it has not tended to “matter so much how many doctrines stand in the way of litigation. What really matters is the degree of incentive that courts feel with respect to taking on a particular sort of case. If there is strong incentive, no number of doctrines will prevent access....”² As a purely descriptive matter of the behavior of the Supreme Court, it is hard to argue the point; the degree of incentive that five members of the court felt with respect to something which “may be a ‘crisis,’ even ‘the most pressing environmental problem of our time’”³ was evidently high enough to brush recklessly past serious threshold concerns.⁴

My purpose in this essay is to figure out how and where (or perhaps more to the point, *if*) *Mass. v. EPA* fits into the framework of the Supreme Court’s post-*Lujan* standing jurisprudence. Most commentary critical of the court’s finding that plaintiffs had standing to bring this litigation has tended to focus on whether the injury in fact asserted by plaintiffs was too diffuse to confer standing,⁵ but I want to take a rather different tack. The thesis of this essay is that even stipulating that Massachusetts has established an injury in fact, the relief it requests cannot redress that injury.

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¹ *Massachusetts et al v. Environmental Protection Agency*, 549 U.S. ___; 127 S. Ct. 1438 (2007) (hereinafter “*Mass. v. EPA*”).

² Ann Althouse, *A Response to Professor Woolhandler’s “Treaties, Self-Execution, and the Public Law Litigation Model,”* 42 VA. J. INT’L L. 789, 798 (2002).

³ *Mass. v. EPA*, 127 S. Ct. 1463 (slip op. at 1) (Roberts, C.J., dissenting) (quoting Pet. for Cert. 26, 22)

⁴ Cf. *Hamdan v. Rumsfeld*, 126 S. Ct. at 2749 (2006).

⁵ Most weighty among which, of course, is the Chief Justice’s observation that *Lujan* requires that the alleged injury must be “concrete and particularized,” ... [but] [t]he very concept of global warming seems inconsistent with this particularization requirement. Global warming is a phenomenon harmful to humanity at large, and the redress petitioners seek is focused no more on them than on the public generally — it is literally to change the atmosphere around the world.

Mass. v. EPA, 127 S. Ct. at 1467 (slip op. at 7) (Roberts, C.J., dissenting) (internal quotation marks and citation omitted).

I. Revisiting *Lujan*

“The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves ‘both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.’”⁶ The Supreme Court’s 1992 decision in *Lujan v. Defenders of Wildlife*⁷ is the cornerstone of modern Article III standing analysis, and might be taken to represent the culmination of “[t]he struggle to come up with a formula for delimiting who may sue that stop[s] short of permitting almost anyone to sue about anything...”⁸ It reemphasizes that “the core component of standing is an essential and unchanging part of the case or controversy requirement of Article III”⁹; to possess it, “[t]he plaintiff must show that the conduct of which he complains has caused him to suffer an injury in fact that a favorable judgment will redress.”¹⁰ In sum, *Lujan* makes clear that the

“irreducible constitutional minimum” of standing requires: (1) that the plaintiff have suffered an “injury in fact” – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.¹¹

It is the third prong of this test that this essay focuses on: a plaintiff must demonstrate “a likelihood that the[ir] injury will be redressed by a favorable decision, by which we mean that the ‘prospect of obtaining relief from the injury as a result of a favorable ruling’ is not ‘too speculative.’”¹² Moreover, it is not enough that a favorable ruling *may* redress an injury – rather, there must be a “‘substantial likelihood’ that the requested relief will remedy *the alleged injury in fact.*”¹³ Or as the Chief Justice’s dissent in the instant case sharpens the point, “[w]hat must be likely to be redressed is the particular injury in fact” asserted in the litigation.¹⁴

Since it was decided in 1992, twenty-seven opinions for the Supreme Court have cited *Lujan*.¹⁵ Those cases can be broken down into three groups: cases where standing *was*

⁶ Kowalski v. Tesmer, 543 U.S. 125, 128 (2004) (Slip op. at 2-3) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁸ Althouse, *supra* note 2, at 791 (quoting Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976) (internal quotation marks omitted)).

⁹ *Lujan*, 504 U.S. at 560.

¹⁰ Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 12 (2004) (internal quotation marks omitted).

¹¹ *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

¹² *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 663-4 (1993) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

¹³ *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 45 (1976)) (emphasis added).

¹⁴ *Mass. v. EPA*, 127 S. Ct. at 1470 (slip op. at 12) (Roberts, C.J., dissenting). *Accord Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 107 (1998) (“[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement”).

¹⁵ Not *every* standing opinion since *Lujan* has cited that case, see, e.g., *Franklin v. Massachusetts*, 505 U.S. 788 (1992), but *Lujan* remains the cornerstone of modern standing jurisprudence, and is in any event the precedent that the court rests on in the instant case.

found,¹⁶ cases where it *wasn't*,¹⁷ and a handful of incidental miscellany.¹⁸ This essay does not discuss every case, but it does review those most apt to the issue of redressability.

II. Honor roll: Cases satisfying the *Lujan* test

The cases in which the court *has* discussed *Lujan* and found standing further break down into two groups: a minority where redressability is explicitly discussed (even if briefly), and the majority where it is not but from which we can infer guidance from other aspects of the opinion. I address the latter group first.

A.

1. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*

In *Jacksonville*, the city of Jacksonville maintained an ordinance reserving 10% of city contracts to “business whose ownership was at least 51% ‘minority’ or female.”¹⁹ The plaintiff “alleged that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able,”²⁰ “that Jacksonville's ordinance violated the Equal Protection Clause of the Fourteenth Amendment (both on its face and as applied),”²¹ and sought declaratory and injunctive relief.

As to the injury in fact: The court read its precedents to

stand for the following proposition: When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.” Thus, it found an “‘injury in fact’ in an equal protection case ... [in] the denial of equal treatment resulting from the imposition of the barrier.

¹⁶ See *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, supra note 12; *NOW v. Scheidler*, 510 U.S. 249 (1994); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Lewis v. Casey*, 518 U.S. 343 (1996); *General Motors v. Tracy*, 519 U.S. 278 (1997); *Bennett v. Spear*, supra note 11; *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998); *Friends of The Earth v. Laidlaw Environmental Services (TOC)*, 528 U.S. 167 (2000); *Vermont Agency*, supra note 13; *Utah v. Evans*, 536 U.S. 452 (2002).

¹⁷ See *United States v. Hays*, 515 U.S. 737 (1995); *Raines v. Byrd*, 521 U.S. 811 (1997); *Spencer v. Kemna*, 523 U.S. 1 (1998); *Steel Co.*, supra note 14; *McConnell v. FEC*, 540 U.S. 93 (2003); *DaimlerChrysler v. Cuno*, 126 S. Ct. 2961 (2006); *Lance v. Coffman*, 127 S. Ct. 1194 (2007) (*per curiam*).

¹⁸ See *Missouri v. Jenkins*, 515 U.S. 70 (1995) (cited in passing for an incidental proposition); *Food and Commercial Workers v. Brown Group*, 517 U.S. 544 (1996); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (discussing but ultimately avoiding reaching the standing question by declaring the case moot); *Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726 (1998) (case dismissed as unripe); *Devlin v. Scardelletti*, 536 U.S. 1 (2002) (member of a certified class has standing to challenge settlement); *Elk Grove Unified School Dist. v. Newdow*, supra note 10 (Article III standing question avoided by finding plaintiff failed to meet prudential standing requirements); *Kowalski v. Tesmer*, supra note 6 (Article III standing assumed and case dismissed on prudential standing grounds); *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (cited in passing for an incidental proposition); *Schaffer v. Weast*, 546 U.S. 49 (2005) (cited in passing for the proposition that “we have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims ... [and] [i]n numerous ... areas, we have presumed or held that the default rule applies[,] [including] ... standing”); *MedImmune v. Genentech*, 127 S. Ct. 764 (2007). Decisions I’ve placed in this category largely do not bear sufficiently on the matter at issue in this essay to require extended discussion.

¹⁹ *Jacksonville*, supra note 12, 508 U.S. at 658.

²⁰ *Id.* at 668.

²¹ *Id.* at 659.

Redressability here speaks for itself to the same extent as does causal nexus: the city enacted the ordinance, and if the ordinance were struck down by the courts, the established injury in fact would be entirely redressed.

2. *Adarand Constructors v. Pena*

In *Adarand*, a company of that name placed the low bid to be a subcontractor on a highway construction project, underneath Mountain Gravel & Construction Company, the primary contractor retained by the U.S. Department of Transportation. Federal law required that agencies such as DoT should contract with a clause permitting “additional compensation if it hired subcontractors certified as small businesses controlled by “socially and economically disadvantaged individuals,”²² and the prime contractor’s clause in this case was no exception. Despite Adarand’s low bid, they were not so certified, and following a natural desire to pass “Go” and collect \$200, Mountain Gravel found a company that *was* so certified to award the contract to.

Adarand decided that this was an uneven playing field, and that the law mandating DoT’s contracting “discriminate[d] on the basis of race in violation of the Federal Government’s Fifth Amendment obligation not to deny anyone equal protection of the laws.”²³ They requested “declaratory and injunctive relief against any *future* use of subcontractor compensation clauses.”²⁴

The Supreme Court noted that Adarand’s desired redress was for forward-looking injuries, not for the specific injury it had sustained in losing out on Mountain Gravel’s largesse. That is, Adarand sought injunctive relief against impending injury not damages for past injury, and the court was concerned to ensure that there was a certainly impending injury in fact. It was satisfied in this regard:

Adarand’s general manager said in a deposition that his company bids on every guardrail project in Colorado. ... [S]tatistics from the years 1983 through 1990 indicate that the [DoT] lets on average one and one half contracts per year that [Adarand might bid on and that therefore] could injure Adarand in the manner it alleges here. Nothing in the record suggests that the [DoT] has altered the frequency with which it lets contracts that include guardrail work. And the record indicates that Adarand often must compete for contracts against companies certified as small disadvantaged businesses. ... [T]he evidence in this case indicates that the [DoT] is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses[.]²⁵

²² *Adarand*, supra note 16, 515 U.S. at 205.

²³ *Id.* at 205-6. For sake of argument, I set aside in this essay my traditional grouse that the Fifth Amendment provides no such thing; the “equal protection component” of Fifth Amendment due process asserted by the Supreme Court in *Bolling v. Sharpe* 347 U.S. 497 (1954), is well-recognized and need not be addressed here.

²⁴ *Id.* at 210 (emphasis in original).

²⁵ *Id.* at 212 (citations omitted).

Here, too, the court didn't mention redressability, but there's scarcely the need: if the injury in fact accepted by the court was that Adarand was likely to lose future contracts because it is set at a disadvantage by an unconstitutionally discriminatory regulation, it should be plain that the relief sought would redress that harm. True, Adarand might not *win* every contract, but the injury was not the loss of a specific contract: the injury was having to compete for contracts on an uneven playing field.

3. *General Motors v. Tracy*

I find the facts of *Tracy* to be dizzying,²⁶ but as far as we need concern ourselves here, they are these. GM purchased natural gas outside Ohio, to which it “took title ... at delivery to the receiving pipeline outside the state,” then “transport[ed]” it to GM’s manufacturing plants in Ohio, for consumption as a means of heating said facilities.²⁷ Ohio’s tax commissioner assessed a usage tax on GM under a statute imposing a use tax on, inter alia, the “consumption of tangible personal property”²⁸; the statute exempted “acquisitions ‘which, if made in Ohio, would be a sale not subject to’” said usage tax.²⁹ GM filed suit, alleging, inter alia, “that the commissioner’s application of this exemption statute violates the [dormant] Commerce ... Clause[.]”³⁰ The Supreme Court of Ohio argued that:

On close inspection, GM actually argues that the commissioner's application burdens out of state vendors of natural gas. However, GM is not a member of that class and lacks standing to challenge the constitutionality of this application on that basis[.]³¹

The Supreme Court of the United States disagreed:

The Supreme Court of Ohio held GMC to be without standing to raise this Commerce Clause challenge because the company is not one of the sellers said to suffer discrimination under the challenged tax laws. But cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a state ultimately discriminates, and *customers of that class may also be injured ... where the customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out of state producers and marketers*. Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III.³²

Again, explicit discussion of redressability is missing in the Supreme Court’s *Tracy* opinion, but Justice Souter makes very clear that GM’s injury in fact, so far as its commerce clause argument is concerned, is its ongoing liability for increased taxes. Thus,

²⁶ Relatively speaking, of course – cf. the positively vertiginous *Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397 (2007).

²⁷ *General Motors Corp. v. Tracy*, 73 OHIO ST.3d 29, 652 N.E. 2d 188, 189 (1995)

²⁸ *Tracy*, 652 N.E. 2d at 189

²⁹ *Ibid.* (quoting OHIO R.C. 5741.02(C)(2)).

³⁰ *Ibid.*

³¹ *Id.* at 190.

³² *Tracy*, supra note 16, 519 U.S. at 286 (emphasis added).

even more clearly than in *Jacksonville* and *Adarand*, were GM to prevail on the merits, the state could not levy the increased tax rate on it, remedying the asserted injury in fact.

4. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*

In *Vermont Agency*, as a threshold matter, the court had to resolve a certain degree of tension between the fairly strict requirements of Article III standing identified in *Lujan*, on the one hand, and the venerable *qui tam* action on the other.³³ Stevens brought a *qui tam* action under the False Claims Act (“FCA”), asserting that his former employer, the Vermont Agency of Natural Resources, (“VANR”), had “overstated the amount of time spent by its employees on the federally funded projects, thereby inducing the Government to disburse more grant money than [VANR] was entitled to receive.”³⁴

Stevens asserted (and the court did not doubt) that VANR’s actions inflicted an injury in fact on the United States, which his suit was intended to remedy.³⁵ The problem for Stevens, however, was that “[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party.”³⁶ The court bridged the gap with doctrine and history: “adequate basis for the relator’s suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.”³⁷ Although conceding that the court had “never expressly recognized ‘representational standing’ on the part of assignees,” the court noted that it has “routinely entertained ... suits [by assignees]”³⁸; in view of this, and *a fortiori* given the long and venerable history of *qui tam* actions in the Anglo-American legal tradition,³⁹ the court found “no room for doubt that a *qui tam* relator under the FCA has Article III standing.”⁴⁰

If all this seems like so much jurisprudential jujitsu,⁴¹ the important point here isn’t whether the reader agrees with the court’s finding that Stevens satisfied *Lujan*’s injury in fact prong. I’ve already stipulated for purposes of this essay that Massachusetts has established an injury in fact in the instant case; my focus is *redressability*, not *injury*. Thus, for our purposes here, what matters is whether Stevens’ lawsuit would redress the injury in fact that was accepted by the court. The court accepted that the United States’ injury was Stevens’ injury for purposes of his FCA *qui tam* action, so to the extent that Stevens could expect to recover damages should he prevail on the merits, his claim plainly satisfied *Lujan*’s redressability prong.

³³ See *The Supreme Court, 1999 Term – Leading Cases*, 114 HARV. L. REV. 329, 336 (2000) (suggesting that recent standing doctrine is “inconsistent” with, *inter alia*, *qui tam* suits).

³⁴ *Vermont Agency*, supra note 13, 529 U.S. at 770.

³⁵ *Id.* at 771.

³⁶ *Ibid.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (emphasis in *Vermont Agency*)).

³⁷ *Id.* at 773.

³⁸ *Ibid.* (emphasis added).

³⁹ Which “originated around the end of the 13th century,” the court tells us. *Id.* at 774.

⁴⁰ *Id.* at 778.

⁴¹ *Kansas v. Crane*, 534 U.S. 407, 425 (2002) (Scalia, J., dissenting).

B.

The following cases require somewhat more extended exposition.

1. *Bennett v. Spear*

The Endangered Species Act (“ESA”) requires the Secretary of the Interior (“Secretary”) to maintain an endangered species list, and requires each federal agency to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence” of species on the Secretary’s list “or result in the destruction or adverse modification of [the] habitat[s] of such species which is determined by the Secretary ... to be critical.”⁴²

If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service [(“Service”)], as delegate of the Secretary, after which the Service must provide the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat. If the Service concludes that the proposed action will “jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat],” the Biological Opinion must outline any “reasonable and prudent alternatives” that the Service believes will avoid that consequence.⁴³

The Klamath Project, a network of waterways comprised of lakes, rivers, dams and irrigation canals, is or was administered by the Bureau of Reclamation (“Bureau”), which falls under the Secretary’s jurisdiction. In 1992, the Bureau notified the Service that it believed continuing to operate the project might affect two species of fish that had gained “endangered” status in 1988. The Biological Opinion subsequently issued by the Service agreed with the Bureau’s concerns, and as was required by the statute, identified “reasonable and prudent alternatives” that the Service believed would allow the endangered fish to dodge the bullet, including “the maintenance of minimum water levels on Clear Lake and Gerber reservoirs. The Bureau later notified the Service that it intended to operate the project in compliance with the Biological Opinion.”⁴⁴

“[T]wo Oregon irrigation districts that receive[d] Klamath Project water and the operators of two ranches within those districts” filed suit against the director and regional director of the Service and the Secretary of the Interior.⁴⁵ The Biological Opinion’s purported “reasonable and prudent alternative[.]” of imposing minimum water levels on two reservoirs, they argued, violated various sections of the ESA and the Administrative Procedure Act. The plaintiffs claimed to use the project’s myriad waterways for “recreational, aesthetic and commercial purposes, as well as for their primary sources of irrigation water,” uses that would be “irreparably damaged” by the restrictions on water delivery entailed in the Biological Opinion’s recommendations⁴⁶; they requested

⁴² Bennett, supra note 11, 520 U.S. at 158.

⁴³ Ibid.

⁴⁴ Id. at 159.

⁴⁵ Ibid.

⁴⁶ Id. at 160.

declaratory and injunctive relief “in an effort to compel the government to withdraw portions of the biological opinion. Their complaint [also] allege[d] that there [wa]s no evidence to support the [Biological] [O]pinion’s conclusion that the longterm operation of the Klamath project will adversely affect” the endangered fish at issue.⁴⁷

The District Court found that plaintiffs flunked prudential standing requirements, and the Ninth Circuit affirmed. On appeal, the Supreme Court determined that the plaintiffs met prudential requirements and turned to Article III standing. For reasons that need not detain us, the court cited the injury in fact in the plaintiffs’ allegations that, *inter alia*, “they currently receive irrigation water from Clear Lake, that the Bureau ‘will abide by the restrictions imposed by the Biological Opinion,’ and that ‘[t]he restrictions on lake levels imposed in the Biological Opinion adversely affect [petitioners] by substantially reducing the quantity of available irrigation water.’”⁴⁸

What of the causal nexus and redressability? The government laid siege to these prongs, contending that “any injury suffered by [the plaintiffs] [wa]s neither ‘fairly traceable’ to the Service’s Biological Opinion, nor ‘redressable’ by a favorable judicial ruling, because the ‘action agency’ (the Bureau) retains ultimate responsibility for determining whether and how a proposed action shall go forward.”⁴⁹ In the government’s view, “[i]f the petitioners ha[d] suffered injury, ... the proximate cause of their harm [wa]s an (as yet unidentified) decision by the Bureau regarding the volume of water allocated to petitioners, not the biological opinion itself.”⁵⁰ The court didn’t buy this, reasoning that “‘fairly tracable’ does not require the defendant’s actions to be ‘the very last step in the chain of causation.’”⁵¹ While it would be true that the independent action of a third party not before the court would not satisfy this prong, that does not exclude injury proximately caused by the plaintiff but prompted “by determinative or coercive effect upon the action of someone else.”⁵²

The court concluded that the Biological Opinion is advisory in theory but conclusive in fact, exerting a “powerful coercive effect on the action agency.”⁵³ While “[t]he action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, ... it does so at its own peril,”⁵⁴ a fact not lost on the Service.⁵⁵ In view of the foregoing, the court found it “not difficult to conclude that petitioners have met their burden ... of alleging that their injury is ‘fairly traceable’ to the Service’s Biological

⁴⁷ *Bennett v. Plenert*, 63 F. 3d 915, __ (1995); see also *Bennett*, 520 U.S. at 159:

In [Plaintiff’s] view, the Bureau “‘has been following essentially the same procedures for storing and releasing water from Clear Lake and Gerber reservoirs throughout the twentieth century,’ that “[t]here is no scientifically or commercially available evidence indicating that the populations of endangered suckers in Clear Lake and Gerber reservoirs have declined, are declining, or will decline as a result” of the Bureau’s operation of the Klamath Project, that “[t]here is no commercially or scientifically available evidence indicating that the restrictions on lake levels imposed in the Biological Opinion will have any beneficial effect on the ... populations of suckers in Clear Lake and Gerber reservoir.”

⁴⁸ *Bennett*, 520 U.S. at 160.

⁴⁹ *Id.* at 168.

⁵⁰ *Ibid.* (quoting Brief for Respondents 22) (internal quotation marks omitted).

⁵¹ *Id.* at 169.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Id.* at 170; the court does mean peril, for the agency and its employees, since “for “any person” who knowingly “takes” an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.”

⁵⁵ See *ibid.* (“The Service itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions”).

Opinion and that it will ‘likely’ be redressed – i.e., the Bureau will not impose ... [the proposed] water level restrictions – if the Biological Opinion is set aside.”⁵⁶

In sum, then: the injury in fact was the reduction in available water, the injury could be traced to conduct carried out under the defendants’ auspices, and a reduction in water supply – at least in consequence of events within defendants’ power – was “[un]likely” to occur if the proposed conduct was enjoined.

2. *Federal Election Comm'n v. Akins*

Among many other things, the Federal Election Campaign Act “imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act’s definition of a ‘political committee’”⁵⁷; that definition has a “broad[] scope,” sweeping within its meaning “‘any committee, club, association or other group of persons which receives’ more than \$1,000 in ‘contributions’ or ‘which makes’ more than \$1,000 in ‘expenditures’ in any given year.”⁵⁸ But while broad, the definition is not “universally encompassing.”⁵⁹

The Federal Elections Commission determined that the American Israel Public Affairs Committee (“AIPAC”) was not encompassed by the Act’s definition of a “political committee,” and therefore “refused to require AIPAC to make disclosures regarding its membership, contributions, and expenditures” that FECA would require if it was. The plaintiffs in the *Akins* litigation were “a group of voters with views often opposed to those of AIPAC,”⁶⁰ who sought to “persuade the FEC to treat AIPAC as a ‘political committee,’” with the effect that AIPAC would have to make the afore-mentioned disclosures as to membership, contributions, and expenditures. “They asked the FEC to find that AIPAC had violated the Act, and, among other things, to order AIPAC to make public the information that FECA demands of a ‘political committee.’” The FEC refused; they found that “AIPAC was fundamentally an issue-oriented lobbying organization, not a campaign-related organization,” and reasoning that because the Act’s definition of “political committee” reached only organizations whose “major purpose” was the nomination or election of candidates, concluded that “AIPAC fell outside the definition of a ‘political committee’” and dismissed the plaintiff’s complaint.⁶¹

The plaintiffs took the matter to court, pursuant to “an unusual statutory provision which permits a complainant to bring to federal court an agency’s refusal to institute enforcement proceeding, challenging the Commission’s interpretation of the term ‘political committee.’”⁶² They

⁵⁶ Id. at 171.

⁵⁷ *Akins*, supra note 16, 524 U.S. at 14.

⁵⁸ Id. at 15 (quoting 2 U.S.C. § 431(4)(A)) (emphasis in *Akins*)

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* More specifically, plaintiffs were “former ambassadors, congressmen, or government officials. They [were] registered voters and ‘politically active persons who ... oppose[d] AIPAC views on U.S. foreign policy in the Middle East’ and who ‘compete[d] with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public.’” *Akins v. FEC*, 101 F.3d 731, 733-4 (D.C. Cir. 1997) (*en banc*).

⁶¹ *Akins*, 524 U.S. at 18.

⁶² *Akins*, 101 F.3d at __ (citation omitted).

allege[d] that the FEC’s major purpose standard [wa]s contrary to law and that the Commission’s findings, reasons, and investigation were insufficient to support its conclusion that there is no probable cause to believe that AIPAC’s campaign-related activities were at such a level as to make them a major purpose of the organization.⁶³

But the District Court concluded that at minimum, the FEC’s conclusion was a reasonable interpretation of the statute, and therefore entitled to *Chevron* deference.⁶⁴ A panel of the D.C. Circuit affirmed; “[t]he en banc Court of Appeals reversed, however, on the ground that the FEC’s ‘major purpose’ test improperly interpreted the Act’s definition of a ‘political committee.’”⁶⁵

On appeal to the Supreme Court, the court, rebuffed the government’s argument that plaintiffs lacked Article III standing. Focusing on the injury prong of *Lujan*, the court characterized the plaintiffs’ injury as “their inability to obtain information – lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures – that, on respondents’ view of the law, the statute requires that AIPAC make public.”⁶⁶ As to the other prongs of *Lujan*, the Court concluded that:

[Plaintiffs] have also satisfied the remaining two constitutional standing requirements. The harm asserted is “fairly traceable” to the FEC’s decision about which respondents complain. Of course, as the FEC points out, it is possible that even had the FEC agreed with respondents’ view of the law, it would still have decided in the exercise of its discretion not to require AIPAC to produce the information. But that fact does not destroy Article III “causation,” for we cannot know that that the FEC would have exercised its prosecutorial discretion in this way. Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency’s action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason. Thus respondents’ “injury in fact” is “fairly traceable” to the FEC’s decision not to issue its complaint, even though the FEC might reach the same result exercising its discretionary powers lawfully. For similar reasons, the courts in this case can “redress” respondents’ “injury in fact.”⁶⁷

In sum, then: the injury suffered by plaintiffs was their inability to obtain information, this was a direct consequence of the FEC’s refusal to consider AIPAC a “political

⁶³ *Akins v. FEC*, 66 F.3d 348, 350 (D.C. Cir. 1995)

⁶⁴ *Akins*, 101 F.3d at 735.

⁶⁵ *Akins*, 524 U.S. at 18.

⁶⁶ *Id.* at 21. The court cited *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989) for the proposition that the “Court has previously held that a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute” (cf. *Steel Co.*, discussed *infra* pp. ___-___), and asserted that “the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.” *Akins*, 524 U.S. at 24-5. The reader is again reminded to accept at face value, if only *arguendo* for our purposes here, the court’s determination of injury.

⁶⁷ *Id.* at 25 (citations omitted).

committee,” and the litigation would likely redress that injury by forcing the FEC to reconsider its decision.

3. *Friends of The Earth v. Laidlaw Environmental Services (TOC)*

The Clean Water Act (“CWA”) permits “a person or persons having an interest which is or may be adversely affected” by a discharge of pollutants into a body of water, provided that the would-be plaintiff give sixty days notice “of the alleged violation to the EPA, the State in which the alleged violation occurred, and the alleged violator ... to [give] the alleged violator ... an opportunity to bring itself into complete compliance with the Act and thus ... render unnecessary a citizen suit.”⁶⁸ In 1986, Laidlaw Environmental Services (“Laidlaw”) took over operation of a hazardous waste incinerator, and shortly thereafter obtained a permit under the CWA “authorizing the company to discharge treated water into the North Tyger River ... limit[ing] ... Laidlaw’s discharge of[,] [*inter alia*,] ... mercury, an extremely toxic pollutant. The permit also regulated the flow, temperature, toxicity, and pH of the effluent from the facility, and imposed monitoring and reporting obligations.”⁶⁹

In 1992, several associations under the banner of Friends of the Earth (“FOE”) filed a citizen suit against Laidlaw, “alleging ongoing violations by Laidlaw of an NPDES permit and seeking imposition of monetary penalties as well as declaratory and injunctive relief and attorneys’ fees and costs.”⁷⁰ Laidlaw moved immediately for summary judgment, insisting that FOE lacked standing; the district court didn’t buy it, and on later appeal following a bench trial, the Fourth Circuit avoided the standing question by finding that the case had become moot.⁷¹

The Supreme Court reversed the Fourth Circuit’s conclusion as to mootness, and was thus “oblig[ed] to assure [itself] that FOE had Article III standing at the outset of the litigation.”⁷² Although the district court had found “that there had been ‘no demonstrated proof of harm to the environment’ from Laidlaw’s mercury discharge violations,”⁷³ the court said that “[t]he relevant showing for purposes of Article III standing, however, is not injury to the *environment* but injury to the *plaintiff*[.] ... [and] [f]ocusing properly on injury to the plaintiff, the District Court found that FOE had demonstrated sufficient injury to establish standing.”⁷⁴ Various members of the plaintiff associations averred in affidavits that they lived near Laidlaw’s facility, that they had previously and/or would like to fish, camp, swim, canoe, walk, hike, birdwatch, picnic and undertake unspecified “recreational

⁶⁸ Laidlaw, *supra* note 16, 528 U.S. at 174-5 (internal quotation marks omitted) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987)).

⁶⁹ *Id.* at 176.

⁷⁰ *Laidlaw Env'tl. Servs. v. Friends of the Earth*, 149 F.3d 303, 305 (4th Cir. 1998).

⁷¹ *Id.* at 306-7. Courts may assume without deciding that standing exists in order to analyze mootness, see *Arizonans for Official English*, *supra* note 18. The court of appeals concluded that the case was moot “[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief,” preserving as the only form of available redress “the civil penalty imposed upon Laidlaw, which would be paid to the United States Treasury.” *Laidlaw*, 149 F.3d at 306. Citing *Steel Co.*, *supra* note 14, the court of appeals said that this was insufficient: “[c]ivil penalties ... cannot redress any injury suffered by a citizen plaintiff.” *Ibid.*

⁷² *Laidlaw*, 528 U.S. at 180. Trying to make sense of *Laidlaw* is a task to which I have never yet proved equal, and renewed attempt to do so has significantly delayed release of this essay. However, I have come to realize that I can get off the hook, so to speak, fairly easily: I need not address the question of whether the Supreme Court decided the case correctly on the whole, because for my purposes herein, since there is no suggestion in *Mass. v. EPA* that the case has become moot, it suffices to discuss only the Court’s finding in *Laidlaw* that plaintiffs had standing at the commencement of that litigation.

⁷³ *Id.* at 181 (quoting 956 F. Supp., at 602).

⁷⁴ *Id.* at 181 (emphases added).

purposes” in or near the river, and that they had once but no longer aspired to buy a house “near the river,” but refrained (and would continue to refrain) from all of these activities out of concern that the water was polluted by Laidlaw’s discharges.⁷⁵ Noting that the court has “held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity,” the court found that these affidavits “adequately documented injury in fact.”⁷⁶

Separate to its challenge of FOE’s standing to seek equitable relief, Laidlaw also argued that FOE lacked standing to seek civil penalties, on the theory that civil penalties, being paid to the government, couldn’t redress the injury. But, the court said,

“all civil penalties have some deterrent effect,” ... [and] Congress has found that civil penalties in Clean Water Act cases ... [both] promote immediate compliance by limiting the defendant’s economic incentive to delay its attainment of permit limits ... [and] deter future violations. ...

... [F]or a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.⁷⁷

As in *Vermont Agency*,⁷⁸ it isn’t necessary for our purposes here that the reader agrees with the court’s conclusion that the plaintiffs established an injury in fact, or with its ultimate disposition of the case.⁷⁹ The relevant point here is that the court accepted certain assertions of injury in fact, and our concern is the relationship of the redress sought to the injury accepted by the court. The injuries suffered were the direct result of changes to the immediate environment caused by the conduct on the defendant, conduct that the plaintiffs hoped to shut down and prevent from recurring.⁸⁰ To the extent that civil penalties can deter violations, they can redress an injury caused by conduct that is “ongoing at the time

⁷⁵ See *id.* at 181-4.

⁷⁶ *Id.* at 183. Having read Justice Ginsburg’s draft, and after pausing to mop the coffee off his monitor, an incredulous Justice Scalia pointed out that even within this focus on the plaintiffs, while

[g]eneral allegations of injury may suffice at the pleading stage, ... at summary judgment plaintiffs must set forth specific facts to support their claims. And where, as here, the case has proceeded to judgment, those specific facts must be supported adequately by the evidence adduced at trial. In this case, the affidavits themselves are woefully short on specific facts, and the vague allegations of injury they do make are undermined by the evidence adduced at trial.

Id. at 198 (Scalia, J., dissenting) (internal citations and quotation marks omitted). The plaintiffs, as Scalia saw it, had not even *begun* to show demonstrable harm to themselves or their interests, “rely[ing] entirely upon unsupported and unexplained affidavit allegations of ‘concern.’” Indeed, every one of the affiants deposed by Laidlaw cast into doubt the (in any event inadequate) proposition that subjective ‘concerns’ actually affected their conduct.” *Ibid.*

⁷⁷ *Id.* at 185-6 (quoting *Hudson v. United States*, 522 U.S. 93, 102 (1997)).

⁷⁸ See *supra*, p.6.

⁷⁹ See *Laidlaw*, 528 U.S. at 198-215 (Scalia, J., dissenting).

⁸⁰ *Laidlaw*, 528 U.S. at 183-4 (“Laidlaw’s discharges, and the affiant members’ reasonable concerns about the effects of those discharges, directly affected those affiants’ recreational, aesthetic, and economic interests”).

of the complaint and that could continue into the future if undeterred.”⁸¹ Thus, even in *Laidlaw*, perhaps the most plaintiff-friendly of the standing cases decided since *Lujan*, the behavior to be affected by the redress accepted as sufficient to accept standing was behavior that *directly* created the injury.

4. *Utah v. Evans*

The United States conducts a decennial census; this provides a variety of useful information, but its Constitutional grounding and principal utility remains the reapportionment of members of the House of Representatives. In the 2000 census, the Census Bureau made use of a technique termed “hot-deck imputation” to “fill[] in certain gaps in its information and resolve[] certain conflicts in the data.”⁸² Difficulties arise when a census respondent fails to return any information, or “if the information supplied is confusing, contradictory, or incomplete”⁸³; in such cases, the Census Bureau “follows up with several personal visits,” but despite all best efforts, sometime “the Bureau will find that it still lacks adequate information or that information provided by those in the field has somehow not been integrated into the master list.”⁸⁴ In such circumstances, as a last resort, “the Bureau may then decide ‘imputation’ represents the most practical way to resolve remaining informational uncertainties.”⁸⁵ The “hot deck” form of imputation infers the missing information by assuming that “the address or unit about which it is uncertain has the same population characteristics as those of a nearby sample or donor address or unit – e.g., its geographically closest neighbor of the same type....”⁸⁶ In short, the Census Bureau assumes that if you don’t respond to it, you’re basically similar to your neighbors. To put it bluntly, it takes its best guess.

This becomes a problem when, as in 2000, this best guess effort has concrete consequences for the reapportionment of representatives. “Imputation increased North Carolina’s population by 0.4% while increasing Utah’s population by only 0.2%,” with the consequence that “North Carolina w[ould] receive one more Representative, and Utah w[ould] receive one less Representative, than if the Bureau had not used imputation but instead had simply filled relevant informational gaps by counting the related number of individuals as zero.”⁸⁷ Utah punched the “litigate” button, seeking an “injunction compelling the census officials to change the official census results.”⁸⁸

That “the lack of the additional congressional Representative”⁸⁹ resulting from the use of imputation was an injury in fact was uncontested; rather, intervenor North Carolina

⁸¹ The court distinguished *Steel Co.*, supra note 14, based on the ongoing nature of violations: “Steel Co. established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit[,] ... [but] [w]e specifically noted in that case that there was no allegation in the complaint of any continuing or imminent violation, ... [and only] held that private plaintiffs ... may not sue to assess penalties for wholly past violations,” leaving open the question of whether citizen suitors might have “standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.” *Laidlaw*, 528 U.S. at 187-8.

⁸² *Utah*, supra note 16, 536 U.S. at 457.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Id.* at 457-8.

⁸⁶ *Id.* at 458 (quoting Brief for Appellants 7-8, 11) (internal quotation marks omitted).

⁸⁷ *Ibid.*

⁸⁸ *Id.* at 459.

⁸⁹ *Id.* at 461.

asserted that Utah’s litigation failed the redressability prong of *Lujan*. Relying heavily on *Franklin v. Massachusetts*,⁹⁰ the Supreme Court noted that both Franklin and Utah

brought their lawsuits after the census was complete[,] [b]oth claimed that the Census Bureau followed legally improper counting methods[,] [b]oth sought an injunction ordering the Secretary of Commerce to recalculate the numbers and recertify the official result[,] [and] [b]oth reasonably believed that the Secretary’s recertification, as a practical matter, would likely lead to a new, more favorable, apportionment of Representatives.⁹¹

Declaring that North Carolina had not even begun to make a case for overruling *Franklin*, the court noted that as long as the “error is uncovered before new Representatives are actually selected, and its correction translates mechanically into a new apportionment of Representatives without further need for exercise of policy judgment, such mechanical revision makes good sense.”⁹² Redressability means the substantial likelihood that the requested relief will remedy the alleged injury in fact,⁹³ and

Utah’s victory [in this litigation] would bring about the ultimate relief that Utah seeks. Victory would mean a declaration leading, or an injunction requiring, the Secretary to substitute a new “report” for the old one. Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several months would remain prior to the first post-2000 census congressional election. Under these circumstances, it would seem, as in *Franklin*, “substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision....”⁹⁴

Lastly, before moving on, it perhaps bears noting that in *Franklin*, the plaintiff was a private party, while in *Utah*, the plaintiff was a state. And in *Utah*, four members of the *Mass. v. EPA* majority joined an opinion that could “find no significant difference between the plaintiff in *Franklin* and the plaintiff (Utah) here.”⁹⁵

III. Summer School: Cases flunking the *Lujan* test

Cases where the court has *not* found standing are less useful to us here. In the foregoing cases, even where the court did not explicitly deal with redressability, the mere fact that the court accepted plaintiffs had standing allows us to infer usable principles from those cases, but where the court has considered a plaintiff’s standing in view of *Lujan* and found it wanting for lack of an injury in fact, or because the defendant cannot be said to have caused the injury, it’s hard to extract useful principles, and thus extended discussion is not

⁹⁰ *Franklin*, supra note 15.

⁹¹ *Utah*, 536 U.S. at 460-1.

⁹² *Id.* at 462.

⁹³ See supra note 13 and accompanying text.

⁹⁴ *Utah*, 536 U.S. at 463-4 (quoting *Franklin*, 505 U.S. at 803 (opinion of O’Connor, J.)).

⁹⁵ *Id.* at 460.

warranted.⁹⁶ The one case in which the court *explicitly* impaled a plaintiff on the redressability prong of Lujan is *Steel Co. v. Citizens for a Better Environment*, which thus merits discussion here.

The Emergency Planning and Community Right-To-Know Act (“EPCRA”) imposed “reporting requirements compelling users of specified toxic and hazardous chemicals to file annual ‘emergency and hazardous chemical inventory forms’ and ‘toxic chemical release forms.’”⁹⁷ One of its various enforcement provisions is a citizen suit provision, authorizing any person to commence a civil action on their own behalf, seeking civil penalties and injunctive relief against the owner or operator of a facility falling within EPCRA’s

⁹⁶ To briefly sum up: In *United States v. Hays*, supra note 17, plaintiffs “claim[ed] that the State of Louisiana’s congressional districting plan [wa]s ... a ‘racial gerrymander,’ ... [in violation of] the Fourteenth Amendment. But appellees d[id] not live in the district that [wa]s the primary focus of their racial gerrymandering claim,” and the court concluded that plaintiffs had “failed to show that they have suffered the injury our standing doctrine requires.” *Id.* at ___.

In *Raines v. Byrd*, supra note 17, the court “held that members of Congress lacked standing to challenge the Line Item Veto Act. The mere loss of political power asserted by those plaintiffs was not enough to meet the requirements for standing.” Ann Althouse, *The Authoritative Lawsayng Power of the State Supreme Court and the United States Supreme Court*, 61 Md. L. Rev. 508, 545 (2002). The Court re-emphasized that “[t]o meet the standing requirements of Article III, a plaintiff must allege *personal injury* fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Raines*, 521 U.S. at ___ (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasis in *Raines*)), and noted that the one case in which the court had previously found legislator standing involved “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act,” *id.* at ___, whereas the *Raines* plaintiffs alleged only a trivial dilution of their voting power in the aggregate. Because plaintiffs “alleged no injury to themselves as individuals, [and because] the institutional injury they allege is wholly abstract and widely dispersed,” *id.* at ___, and *a fortiori* since plaintiffs not only “have not been authorized to represent their respective Houses of Congress in this action, ... [but in fact] both Houses actively oppose their suit,” *id.* at ___, the court found that the legislators lacked standing.

In *Spencer v. Kemna*, supra note 17, plaintiff had been paroled then re-incarcerated for parole violations. After pursuing state remedies, and “just over six months before the expiration of his 3-year sentence, [Spencer] filed a petition for a writ of habeas corpus” in the local U.S. district court. *Id.* at ___. Before proceedings there could be completed, Spencer’s sentence expired; the District Court, concluded, and the Eighth Circuit affirmed, that in view of Spencer’s release the proceeding was therefore moot. Not so, said the Supreme Court, *id.* at ___, but concluded that Spencer’s suit faced standing problems. While “[a]n incarcerated convict’s (or a parolee’s) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration ... constitutes a concrete injury, ... [o]nce the convict’s sentence has expired, ... some concrete and continuing injury other than the now-ended incarceration or parole - some ‘collateral consequence’ of the conviction-must exist if the suit is to be maintained.” *Id.* at ___. Spencer’s claimed injuries arose from the wrongful termination of his parole status as his injury, but “[t]he reincarceration that he incurred as a result of that action is now over, and cannot be undone. Subsistence of the suit requires, therefore, that continuing ‘collateral consequences’ of the parole revocation be either proven or presumed.” *Id.* at ___. The court “declin[ed] to presume that collateral consequences adequate to meet Article III’s injury-in-fact requirement resulted from petitioner’s parole revocation,” *id.* at ___, and held that all four of the alleged injuries were too speculative to sustain the suit.

DaimlerChrysler v. Cuno, supra note 17, addressed taxpayer standing, which contemplates the question of whether “a federal taxpayer’s interest in the moneys of the Treasury,” *Cuno*, 547 U.S. at ___ (slip op. at 7-8) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 486-7 (1923)), can establish an injury: When “the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes,”⁹⁶ can such an interest, “shared with millions of others[,] ... comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain,”⁹⁶ *Ibid.* (quoting *Frothingham*, supra), rise to the level of an “injury”? It’s well-settled that, with one major exception, See *Flast v. Cohen*, 392 U.S. 83 (1968), it does not, and the court reaffirmed that principle. Worth noting, because our focus here is on redressability, is the court’s observation that in taxpayer standing cases, “establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing.”⁹⁶

Lastly, in *Lance v. Coffman*, supra note 17, four Colorado citizens sued seeking to vindicate what they saw as their rights under the Elections Clause of the Federal Constitution. *Lance*, slip op at 2. In 2003, the legislature of Colorado passed a redistricting plan to supplant a court-drawn redistricting conducted in 2002, but Article V §44 of the Colorado Constitution limited redistricting to once per census. The Attorney General of Colorado sued in state court to prevent the legislature’s redistricting plan from going into effect, claiming it violated §44; the Colorado Supreme Court agreed with the Attorney General, and “further held that this result did not offend the Elections Clause of the United States Constitution.” *Id.* at ___. The *Lance* plaintiffs disagreed with this conclusion and filed suit in federal court. But, noted the Supreme Court in due course, “[t]he only injury plaintiffs allege is that the law - specifically the Elections Clause - has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.” *Lance*, slip op. at 5. Having “assert[ed] no particularized stake in the litigation,” *ibid.*, the plaintiffs failed the injury prong of Lujan.

⁹⁷ *Steel Co.*, supra note 14, 523 U.S. at 86-7 (quoting 42 U. S. C. §§ 11022-11023).

reporting requirements, should that facility fail to meet said reporting requirements.⁹⁸ Persons wishing to commence such an action are required to provide notification sixty days before filing suit to, *inter alios*, the Administrator of the Environmental Protection Agency, providing the EPA with an opportunity to take the lead in remedying the violation employing its formidable “enforcement arsenal,” which includes “criminal, civil, or administrative penalties.”⁹⁹

Citizens for a Better Environment (“CBE”) are or were “an organization that seeks, uses, and acquires data reported under EPCRA,” for the purpose of, *inter alia*, “report[ing] to its members and the public about storage and releases of toxic chemicals into the environment.”¹⁰⁰ In 1995, CBE notified Steel Co., the Administrator of the EPA, and the relevant Illinois authorities, of its intent to sue, “alleging – accurately, as it turns out – that [Steel Co.] had failed since 1988, the first year of EPCRA’s filing deadlines, to complete and to submit the requisite hazardous-chemical inventory and toxic-chemical release forms.”¹⁰¹ After the expiry of the sixty day notification period, during which EPA declined to bring any action against Steel Co., CBE filed suit, seeking

(1) a declaratory judgment that petitioner violated EPCRA; (2) authorization to inspect periodically petitioner’s facility and records (with costs borne by petitioner); (3) an order requiring petitioner to provide respondent copies of all compliance reports submitted to the EPA; (4) an order requiring petitioner to pay civil penalties of \$25,000 per day for each violation of §§11022 and 11023; [and] (5) an award of all respondent’s “costs, in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees, as authorized by Section 326(f) of [EPCRA].”¹⁰²

However, between the time CBE notified the various parties of its intent to sue and the filing of its case, Steel Co. “filed all of the overdue forms with the relevant agencies,” and after CBE filed suit,

promptly filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (6), contending that, because its filings were up to date when the complaint was filed, the court had no jurisdiction to entertain a suit for a present violation; and that, because EPCRA does not allow suit for a purely historical violation, respondent’s allegation of untimeliness in filing was not a claim upon which relief could be granted.¹⁰³

The district court granted Steel Co.’s motion, the court of appeals reversed, and the case found itself in the Supreme Court, where CBE “assert[ed] that [their] ‘right to know about toxic chemical releases and its interests in protecting and improving the environment and the health of its members have been, are being, and will be adversely affected by [Steel

⁹⁸ Id. at 87.

⁹⁹ Ibid.

¹⁰⁰ Id. at 104.

¹⁰¹ Id. at 87-8.

¹⁰² Id. at 105. A sixth, general plea for “any such further relief as the court deems appropriate” is omitted in the main text in view of the court’s dismissive observation that no relief it could envision as “appropriate” under that general request would redress the injury.

¹⁰³ Id. at 18.

Co.’s] actions in failing to provide timely and required information under EPCRA.”¹⁰⁴ Characterizing the claimed injury in fact as Steel Co.’s “failure to provide EPCRA information in a timely fashion, and the lingering effects of that failure,” the Supreme Court assumed without deciding that the asserted injury in fact sufficed to meet the first prong of *Lujan* – as I have done herein vis-à-vis Massachusetts and global warming – and concluded that even so assuming, “[n]one of the specific items of relief sought ... would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent.”¹⁰⁵

The court systematically rejected the notion that each of the six items for relief would redress the injury. A declaratory judgment that Steel Co. violated EPCRA by failing to file its paperwork would be nugatory, because no one questioned or doubted that Steel Co. had done so.¹⁰⁶ Orders authorizing CBE to periodically inspect Steel Co.’s facility and records and requiring Steel Co. to provide CBE with copies of all compliance reports submitted to the EPA are injunctive (and thus prospective) in nature, and while “[i]f [CBE] had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm.” But CBE had not alleged continuing violation, and would have been hard-pressed to do so, and thus, “[n]othing support[ed] the requested injunctive relief except respondent’s generalized interest in deterrence, which is insufficient for purposes of Article III.”¹⁰⁷ And the request for costs incurred “in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees,” while authorized by the statute, cannot possibly by itself support standing, since “[t]he litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself.”¹⁰⁸

Most saliently for our purposes here, the court rejected the requests for “an order requiring petitioner to pay civil penalties of \$25,000 per day for each violation of [EPCRA].” The problem with *that* claim, the court said, was that the civil damages authorized by EPCRA – which happen to be “the *only* damages authorized by EPCRA” (emphasis added) – are payable to the United States Treasury. Only if they were payable to CBE “might [those damages] be viewed as a sort of compensation or redress to [CBE].” In requesting civil penalties, CBE sought

not remediation of its own injury – reimbursement for the costs it incurred as a result of the late filing – but vindication of the rule of law – the “undifferentiated public interest” in faithful execution of EPCRA. This does not suffice. ... Relief that does not remedy the injury suffered [*by the plaintiff*] cannot bootstrap [that] plaintiff into federal court; that is the very essence of the redressability requirement.¹⁰⁹

It’s hard to square this holding with *Mass. v. EPA*’s expansive vision of redressability.

¹⁰⁴ Id. at 104.

¹⁰⁵ Id. at 105-6.

¹⁰⁶ Id. at 106.

¹⁰⁷ Id. at 108-9.

¹⁰⁸ Id. at 107.

¹⁰⁹ Id. at 106.

IV. Re-evaluating *Mass. v. EPA*

To conclude this light-hearted romp through the Supreme Court’s post-*Lujan* standing jurisprudence, we revisit the case that prompted the journey, through the same lens through which we have viewed the foregoing cases.

A.

In 1999, a number of private organizations asked the EPA to begin regulating carbon dioxide emissions from new cars, believing that § 202 of the Clean Air Act provided sufficient statutory authority for EPA to do so. After lengthy consultation and consideration, the EPA concluded in 2003 that “the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change,” and “that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.”¹¹⁰

The same private organizations, joined by several states as intervenors, took the matter to the D.C. Circuit, the case fragmenting the panel. On review, so far as we are concerning ourselves here, the Supreme Court held that the plaintiffs had standing. Despite a prefatory note that would turn back the clock on the understanding of standing some forty years,¹¹¹ the court accepted in principle that “*Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.”¹¹² It is of *no* relevance for our purposes here “that the party seeking review ... [was] a sovereign State and not, as it was in *Lujan*, a private individual.”¹¹³ What interests us here, looking at the case through the lens established in pages above, are (a) what injury, if any, is accepted by the court, and (b) does the requested remedy redress the injury accepted by the court?

The court accepted as injuries such that make those asserted in *Laidlaw* look concrete and particularized by comparison. In general, the court adverted to “the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years....”¹¹⁴ Specific to Massachusetts, the court accepted as an injury in fact that “rising seas have already begun to swallow Massachusetts’ coastal land,”¹¹⁵ and the state therefore faces the “possible loss of roughly 14 acres of land per mile of coastline

¹¹⁰ *Mass. v. EPA*, supra note 1, 127 S. Ct. at 1450 (slip op. at 8).

¹¹¹ The court suggests that the purpose of standing is “[t]o ensure the proper adversarial presentation” of issues. *Id.* at 1453 (slip op. at 14). While that is, of course, one reason for insisting on standing, which harks back to *Baker*, see infra n.145, it is not the animating purpose of the doctrine, see supra p.2; infra p.24.

¹¹² *Mass. v. EPA*, 127 S. Ct. at 1453 (slip op. at 14).

¹¹³ *Id.* at 1454 (slip op. at 15); see discussion supra pp.13-14 (discussing *Utah v. Evans*, wherein Justice Breyer and three other members of the *Mass. v. EPA* majority could find “no significant difference” between a state plaintiff and a private plaintiff in litigation about decennial reapportionment of the United States House of Representatives).

¹¹⁴ *Id.* at 1455 (slip op. at 18) (internal quotation marks omitted).

¹¹⁵ *Id.* at 1456 (slip op. at 19).

by 2100.”¹¹⁶ “Because the Commonwealth owns a substantial portion of the state’s coastal property, it has alleged a particularized injury in its capacity as a landowner.”¹¹⁷

The court also accepted that there was a causal nexus between the injury and the EPA. One of the most effective ways of diluting or expanding a test is to substitute for the crucial word or words of that test another word or words, more or less flexible and more or less restricted in meaning.¹¹⁸ *Newdow* characterized the *Lujan* test as requiring that “[t]he plaintiff must show that the conduct of which he complains has *caused* him to suffer an injury in fact that a favorable judgment will redress,”¹¹⁹ and true to that test, after a section titled “the injury” and prior to a section titled “the remedy” and under the heading “causation,” the court grasps the nettle and avers that “EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming.” It then makes a breathtaking leap: without citation, the court asserts that “[a]t a minimum, ... EPA’s refusal to regulate such emissions *contributes* to Massachusetts’ injuries.”¹²⁰ Contribution is now causation?

At long last, then, we turn to redressability.

“If petitioners rely on loss of land as the Article III injury, ... they must ground the rest of the standing analysis in that specific injury,”¹²¹ including the prong that asks whether “the ‘prospect of obtaining relief from the injury as a result of a favorable ruling’ is not ‘too speculative.’”¹²² In short, in this case, “[t]o establish standing, petitioners must show a causal connection between that specific injury and the lack of new motor vehicle greenhouse gas emission standards, and that the promulgation of such standards would likely redress that injury.”¹²³

¹¹⁶ *Ibid.*, n.20 and accompanying text. But see *id.* at 1467 (slip op. at 8) (Roberts, C.J., dissenting) (noting that the alleged “swallow[ing] [of] Massachusetts’ coastal land” is “pure conjecture”), and *cf.* *McConnell v. FEC*, *supra* note 17, 540 U.S. at 226 (opinion of Rehnquist, J.) (joined by, *inter alios*, Kennedy and Souter, JJ.):

§ 305 [of the Bipartisan Campaign Reform Act] amended the Communications Act’s requirements with respect to the lowest unit charge for broadcasting time. But this price is not available to qualified candidates until 45 days before a primary election or 60 days before a general election. Because [plaintiff] Senator McConnell’s current term does not expire until 2009, [six years hence,] the earliest day he could be affected by § 305 is 45 days before the Republican primary election in 2008. *This alleged injury in fact is too remote temporally to satisfy Article III standing.* See Whitmore, *supra*, at 158 (“A threatened injury must be *certainly impending* to constitute injury in fact” (internal quotation marks and citations omitted)); see also *Los Angeles v. Lyons*, 461 U. S. 95, 102 (1983) (A plaintiff seeking injunctive relief must show he is “‘immediately in danger of sustaining some direct injury’ as [a] result” of the challenged conduct).

(Emphasis added). To be clear: In *McConnell*, the plaintiff – a professional politician – asserted that he “plan[ned] to run advertisements critical of his opponents in the future.” That is as close to a certainty as one finds in politics, yet because that plaintiff was not due for re-election for another six years, the anticipated injury was “too remote temporally to satisfy Article III standing.” By contrast, in *Mass v. EPA*, Article III standing was satisfied by the “*possible* loss” of circa 0.014% of plaintiff’s land, and that this may *possibly* happen at some point during the next ninety-three years. As the Chief Justice points out, “accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless.” *Mass v. EPA*, 127 S. Ct. at 1467 (slip op at 8-9) (Roberts, C.J., dissenting). Senator McConnell perhaps has reason to feel cheated.

¹¹⁷ *Mass v. EPA*, 127 S. Ct. at 1546 (slip op. at 19-20) (internal quotation marks, citation, and footnote omitted); *id.* at 1466 (slip op. at 5) (Roberts, C.J., dissenting).

¹¹⁸ I borrow liberally, of course, from Justice Black. See *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

¹¹⁹ See *Newdow*, *supra* note 10, at ___.

¹²⁰ *Mass v. EPA*, 127 S. Ct. at 1457 (slip op. at 20) (emphasis added).

¹²¹ *Id.* at 1467 (slip op. at 7) (Roberts, C.J., dissenting).

¹²² *Jacksonville*, *supra* note 12.

¹²³ *Mass v. EPA*, 127 S. Ct. at 1468 (slip op. at 9) (Roberts, C.J., dissenting).

The Chief Justice’s dissent questions whether the relief sought is *likely* to remedy the injury:

What must be *likely* to be redressed is the particular injury in fact ... [which is] is the asserted loss of land. 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.¹²⁴

But why set the bar as high as *likely*? Is it even *fairly plausible* that Massachusetts’ injury will be redressed by the relief sought?

The court dismissively notes that the EPA “maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners’ injuries that the agency cannot be haled into federal court to answer for them.”¹²⁵ Define “significant”! In the court’s view, “[w]hile it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.”¹²⁶ But that, of course, assumes that the EPA has the power even to “take steps to *slow*

¹²⁴ Id. at 1470 (slip op. at 12) (Roberts, C.J., dissenting) (emphasis in original).

¹²⁵ Id. at 1457 (slip op. at 20).

¹²⁶ Id. at 1458 (slip op. at 22) (emphasis in original). The only authority the court cites for this proposition is *Larson v. Valenti*, 456 U.S. 228 (1982). *Larson* does indeed say, as the court notes, that “a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.” Id. at 244 n. 15. However, “[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.” *Cohens v. Virginia*, 19 U.S. 264, 399 (1821). The court’s assumption in *Larson* was that the plaintiffs’ discrete injury (an injury which the dissent did not dispute, see id. at 269 (Rehnquist, J., dissenting)) (“I do not disagree with the Court’s conclusion that the threatened application of the Act to appellees constitutes injury in fact”) “will indeed be *completely* redressed by a favorable decision of this Court.” Id. at 243 (emphasis added). Following Chief Justice Marshall’s maxim, connecting the language from *Larson* cited by the *Mass. v. EPA* court to the particulars of the case in which that view was expressed, requires a digression, but one justified when doing so shows the utility of *Larson* to the *Mass. v. EPA* court as vanishing.

Larson involved a Minnesota statute imposing registration and reporting requirements on charitable organizations wishing to solicit contributions within the State. *Larson*, 456 U.S. at 230-31. “[U]ntil 1978, all ‘religious organizations’ were exempted from the requirements of the Act,” but in 1978, the statute was amended to “include a ‘fifty per cent rule’ in the exemption provision covering religious organizations[,] ... provid[ing] that only those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt from the registration and reporting requirements of the Act.” Id. at 231-2. Prior to the passage of the 1978 amendment, the *Larson* plaintiffs – the “Unification Church” – had fallen within the exemption, but after the amendment’s enactment, Minnesota notified them that they would now be required to register. *Ibid.* The Unification Church went to the Federal courts seeking “a declaration that the Act, on its face and as applied to them through [the 1978 amendment’s] fifty per cent rule, constituted an abridgment of their First Amendment rights of expression and free exercise of religion, as well as a denial of their right to equal protection of the laws, guaranteed by the Fourteenth Amendment,” and both temporary and permanent injunctive relief. Id. at 233-4. The district court issued a preliminary injunction and granted motion for summary judgment for plaintiffs. Id. at 234, 236.

When the case reached the Supreme Court, the plaintiffs were asserted to lack standing on the grounds that “the Unification Church [wa]s not a ‘religious organization’ within the meaning of [the statute], and that the Church therefore would not be entitled to an exemption ... even if the fifty per cent rule were declared unconstitutional.” Id. at 238. The Court rejected the former argument noting that prior to the 1978 amendments, “the Unification Church was not required by the State to register and report under the Act. It was only ... after the addition of the fifty per cent rule to the religious-organization exemption[] that the State first attempted to impose the requirements of the Act upon the Unification Church[,] [a]nd when the State made this attempt, it deliberately chose to do so in express and exclusive reliance upon the newly enacted fifty per cent rule.” Id. at 239. It was

an essential premise of the State’s attempt to require the Unification Church to register under the Act by virtue of the fifty per cent rule ... that the Church is a religious organization. It is logically untenable for the State to take the position that the Church is not such an organization, because that position destroys an essential premise of the exercise of statutory authority at issue in this suit ... The adoption of that premise precludes the position that the Church is not a religious organization.

or *reduce*” global warming to a sufficient extent to redress the petitioner’s injury. As we have seen, redressability means that there must be a “substantial likelihood that the requested relief will *remedy* the alleged injury in fact.”¹²⁷ The most concrete injury accepted by the court is rising sea levels swallowing Massachusetts’ land; the requested relief is for the EPA to “regulate ‘greenhouse gas emissions from new motor vehicles.’”¹²⁸ Assuming this injury suffices, assuming causal nexus, does the relief link up to the injury? The problems for those who would say that it *does* begin with the inconvenient truth that carbon dioxide is not the sole greenhouse gas; methane, chlorofluorocarbons, nitrous oxide and ozone all produce a greenhouse effect.¹²⁹ Thus, the chemical they hope to have regulated already accounts for less than 100% of the alleged cause of their alleged injury. Worse news yet: “Emissions from fossil fuel combustion account for [only] about 65 % of the extra carbon dioxide now found in our atmosphere.”¹³⁰ The court asserts that “the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere ... more than 1.7 billion metric tons in 1999 alone”¹³¹; as a general rule, one should be wary of big impressive-sounding numbers totally unmoored from context, and in this case, the court concedes that this big impressive-sounding number “accounts for more than 6% of worldwide carbon dioxide emissions.” That is a tacit admission that it accounts for less than 7%, which is to say, less than 7% of the 65% accounted for by man-made emissions, i.e. < 4.55%.

What is more, it is far from clear that 4.55% does not represent the ceiling: to all the foregoing,

Id. at 240-1. The Larson court made the statement cited by the Mass. v. EPA court in addressing the latter argument: that there were “independent bases for denying the Church an exemption from the Act,” id. at 241. “[T]hat fact by no means detract[ed] from the palpability of the particular and discrete injury caused to [plaintiffs] by the State’s threatened application of [the reporting requirements],” said the court; while “[t]he Church may indeed be compelled, ultimately, to register under the Act on some ground other than the fifty per cent rule, and while this fact does affect the nature of the relief that can properly be granted to appellees on the present record,” id. at 242, that didn’t destroy standing because since the rule challenged by the Larson plaintiffs “was the sole basis for the State’s attempt to compel [the] registration that gave rise to the present suit, a discrete injury [to plaintiffs] ... will indeed be completely redressed by a favorable decision of this Court.” Id. at 242-3. At a minimum, while the relief requested might not ultimately prevent Minnesota imposing the statute’s requirements on the plaintiffs, it would at *least* give the state the unenviable task “of demonstrating that the Unification Church is not a religious organization within the meaning of the Act - and such a task is surely more burdensome than that of demonstrating that the Church’s proportion of nonmember contributions exceeds fifty per cent.” Id. at 243.

It was in *this* context, referring to *this* kind of partial relief that the court dropped its observation in footnote 15 that a plaintiff “need not show that a favorable decision will relieve his *every* injury” to establish redressability, only that “a favorable decision will relieve a discrete injury to himself.” In sum, the Larson court explicitly tied redressability to the ... will indeed be “*complete*[redress]” of “a discrete injury” to the plaintiffs “by a favorable decision of th[e] Court.” It is hard to see how this supports the Mass. v. EPA court’s assertion that inability of the EPA to completely redress the discrete injury of land lost to rising seas “by no means” left plaintiffs without standing. Larson does not relieve the court of the obligation to be able to provide “completely redress[]” at least “a discrete injury” in order for plaintiffs to have standing – quite the contrary!

¹²⁷ Vermont Agency, supra note 13, 529 U.S. at 771 (emphasis added and internal quotation marks omitted). See supra p. ___.

¹²⁸ Mass v. EPA, 127 S. Ct. at 1449 (slip op. at 6).

¹²⁹ “[G]reenhouse gases include water vapor, carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), ... ozone (O₃)[.] [and] [s]everal classes of halogenated substances that contain fluorine, chlorine, or bromine.” GREENHOUSE GASSES AND GLOBAL WARMING POTENTIAL VALUES EXCERPT FROM THE INVENTORY OF U.S. GREENHOUSE EMISSIONS AND SINKS: 1990-2000 at 4 (available online at [http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BUM9T/\\$File/ghg_gwp.pdf](http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BUM9T/$File/ghg_gwp.pdf)) (2002). Accord *IPCC Working Group I Contribution to the Fourth Assessment Report of the IPCC*, Second-Order Draft, Ch. 2 (available online at http://www.junkscience.com/draft_AR4/Ch02_SOD_Text_TSU_FINAL.pdf) (while growth in CO₂ “dominates” that of other forcing agents, other agents exist and are also increasing); Executive Order 13423 (Jan. 24, 2007), § 9(e) (available online at <http://www.whitehouse.gov/news/releases/2007/01/20070124-2.html>).

¹³⁰ <http://www.physicalgeography.net/fundamentals/7h.html>.

¹³¹ Mass v. EPA, 127 S. Ct. at 1457 (slip op. at 21).

add the fact that petitioners cannot meaningfully predict what will come of the 80 percent of global greenhouse gas emissions that originate outside the United States. As the Court acknowledges, “developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century,” so the domestic emissions at issue here may become an increasingly marginal portion of global emissions, and any decreases produced by petitioners’ desired standards are likely to be overwhelmed many times over by emissions increases elsewhere in the world.¹³²

How low can this number go? Consider also that plaintiffs sought only EPA *regulation* of “new motor vehicles” – that is, a *reduction*, not *elimination*, of carbon dioxide emissions from a small (if concededly certain to grow) class of all vehicles in operation. How low can the number go and any relief changing that number (even assuming any relief can significantly alter it) still meaningfully count as redressing the particular injury? How little redress counts as redress, and how speculative can it be?

B.

And for that matter – how does all this square with the cases examined earlier in this essay?

In *Jacksonville*, the injury was unequal treatment stemming from a city ordinance, and the plaintiffs sought to have the ordinance declared prospectively unconstitutional; success on the merits would have meant that their injury would have disappeared entirely.¹³³ Similarly in *Adarand*, the injury was an unequal playing field created by a statute that the plaintiffs sought to have declared unconstitutional; there, too, success on the merits seems highly likely to redress that injury.¹³⁴ In *Tracy*, the injury was an enhanced tax burden, and since plaintiffs sought to have the tax declared to be in violation of the Federal Constitution, success on the merits would not only have foreclosed that tax but subsequent taxes like it, making total relief likely.¹³⁵ In *Utah*, the injury was deprivation of an anticipated Representative after an assertedly invalid reapportionment; the court went out of its way to note that since new representatives had not yet been chosen, the reapportionment could be undone, and the injury would be entirely redressed.¹³⁶ In *Vermont Agency*, the plaintiff sought not prospective injunctive relief, but money damages; redress there seemed likely.¹³⁷

In *Bennett*, of course, the plaintiffs couldn’t be assured of a constant supply of water from the Klamath project, but just as the injury in *Adarand* wasn’t the loss of a contract, or the deprivation of certainty of receiving a certain contract, but rather an uneven playing field on which to compete for future contracts, so in *Bennett* the injury wasn’t the possibility of receiving less water, it was that *the proposed agency action* would *reduce* the

¹³² Id. at 1469 (slip op. at 11) (Roberts, C.J., dissenting).

¹³³ See discussion supra, pp.3-4.

¹³⁴ See discussion supra, pp.4-5.

¹³⁵ See discussion supra, pp.5-6.

¹³⁶ See discussion supra, pp.13-14.

¹³⁷ See discussion supra, p.6.

quantity of available water.¹³⁸ That doesn't map easily to *Mass. v. EPA*, because here the injury is supposedly in some very minor, attenuated way the possible effect of an agency failing to act, while in *Bennett*, the proposed remedy was to prevent the action that would directly cause the injury accepted by the court. In *Bennett*, too, redress meant almost total relief from the injury accepted by the court.

In some ways, this case resembles *Akins* – both involve litigants who failed to persuade an agency to undertake a desired action. There as here, plaintiffs asserted an injury stemming from the failure of the agency to act, and sought to have courts push an agency to change its mind. And in *Akins*, as we have seen, the court found plaintiffs had standing. But the cases are easily distinguishable: In *Akins*, the injury accepted by the court was plaintiffs' "inability to obtain information – lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures,"¹³⁹ and the redress sought was to have the FEC reconsider its classification of AIPAC. If the FEC did so, and classified AIPAC as a "political committee," then by the plain terms of the statute, AIPAC would be required to make the disclosures sought by plaintiffs *as a matter of course*.¹⁴⁰ By contrast, in *Mass. v. EPA*, even if plaintiffs succeed in forcing EPA to regulate the tiny fraction of carbon dioxide emissions they seek to have regulated, it approaches the pinnacle of speculation to suggest that such a decision, conditional on any number of independent factors, may or may not prevent Massachusetts' injury from occurring.

Even *Laidlaw* – the previous low water mark of post-*Lujan* standing doctrine – did not go this far, and is easily-distinguished.¹⁴¹ Even if we assume that the allegations of atmospheric carbon dioxide as the principle driver of the injury to be suffered by Massachusetts are comparable to the allegations of dumping toxic waste into the river as causing the injuries suffered by the *Laidlaw* plaintiffs (itself a tenuous proposition), to make the EPA's position in the instant case genuinely comparable to that of the titular *Laidlaw*, the EPA would have to have been *itself* pumping carbon dioxide into the atmosphere, and have the direct and conclusive power to shut down that operation, as we can see that *Laidlaw* did. The plaintiffs in the instant case cannot force EPA to stand *Canute*-like and command the tide of carbon dioxide to roll back from the atmosphere; they have stated a claim for which relief is beyond the power of those from whom they seek it to give. We might also recall *Steel Co.*'s warning that "[r]elief that does not remedy the injury suffered cannot bootstrap the plaintiff into federal court; that is the very essence of the redressability requirement."¹⁴² Here, Massachusetts seeks a highly speculative form of relief, one which may or may not redress an injury that is itself highly speculative – the antithesis of a "substantial likelihood" of the injury's remedy.¹⁴³

Collectively, the cases discussed above demonstrate that *none* of the post-*Lujan* cases have accepted so tenuous and speculative definition of "redress" as the court did in *Mass. v. EPA*. In sum, to call *Mass. v. EPA* the low water mark of the Supreme Court's post-*Lujan*

¹³⁸ See discussion *supra*, pp.7-9.

¹³⁹ *Akins*, *supra* note 16, 524 U.S. at 2.

¹⁴⁰ See discussion *supra* pp.9-11.

¹⁴¹ See discussion *supra*, pp.11-13.

¹⁴² See discussion *supra*, pp.14-17.

¹⁴³ Vermont Agency, *supra* note 13.

standing jurisprudence, particularly in terms of redressability, is an exercise in understatement.

V. Conclusion

“Federal lawsuits are by their nature ... about seeking recompense for personal injuries, not about a public-spirited debate....”¹⁴⁴ Although there are sound pragmatic reasons to insist litigants possess Article III standing,¹⁴⁵ the requirement’s constitutional grounding is in separation of powers: its purpose is to confine the judiciary’s authority to “issues which are appropriate for disposition by judges.”¹⁴⁶ To “maintain[] in practice the necessary partition of power among the several departments, as laid down in the Constitution,” the framers resorted to the expedient that having divided government into three branches, those “several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”¹⁴⁷ The Framers were careful to ensure that the “[j]udicial power could come into play only in matters that were the traditional concern of the courts,” and should not be used to “meddle with matters that require no subtlety to be identified as political issues.”¹⁴⁸ Thus, “the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts,”¹⁴⁹ and “the standing requirements of Article III’s case-or-controversy limitation on federal judicial power[] [are] a fundamental feature in the Constitution’s separation of powers”¹⁵⁰ which enforces that understanding. “Constitutional litigation is legitimate only where there is a real injury and a legal remedy available to redress it. ... [Standing is] not merely a troublesome hurdle to be overcome if possible so as to reach the merits of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers.”¹⁵¹

Thus, in *Steel Co.*, the Supreme Court concluded that “[h]owever desirable prompt resolution of the merits EPCRA question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers. EPCRA will have to await another day.”¹⁵² And for those reasons, so too should have global warming.

¹⁴⁴ Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 672 (2000).

¹⁴⁵ See *Baker v. Carr*, 369 U.S. 186, 204 (1962) (“a personal stake in the outcome of the controversy ... assure[s] that concrete adverseness which sharpens the presentation of issues”); but see *Supreme Court, 1999 term*, supra note 33, at 335 (“As to zealous advocacy, commentators have long noted that it is far from clear that the requirement of ‘injury in fact’ leads to ‘better’ plaintiffs”).

¹⁴⁶ *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).

¹⁴⁷ THE FEDERALIST, No. 51.

¹⁴⁸ *Coleman*, supra note 147 (opinion of Frankfurter, J.).

¹⁴⁹ *Lujan*, supra note 7, 504 U.S. at 559-60.

¹⁵⁰ *Winkler v. Gates*, 481 F. 3d 977, 988 (7th Cir. 2007) (Slip op. at 19-20) (Sykes, J., concurring)

¹⁵¹ *Id.* at 993 (slip op. at 28-9) (Sykes, J., concurring) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982) (internal quotation marks omitted)).

¹⁵² *Steel Co.*, supra note 14, 523 U.S. at 110.