

# ECONOMIC OBSERVATIONS ON CITIZEN-SUIT PROVISIONS OF ENVIRONMENTAL LEGISLATION

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The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.<sup>1</sup>

## INTRODUCTION

On January 12, 2000, the United States Supreme Court handed down its decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*<sup>2</sup> The 7-2 opinion, delivered by Justice Ginsburg, marked an important reversal of a decade-long trend toward a strict reading of standing requirements in environmental citizen suits. This strict reading is demonstrated by two cases early in the 1990s, *Lujan v. National Wildlife Federation*<sup>3</sup> and *Lujan v. Defenders of Wildlife*,<sup>4</sup> which marked the first significant restrictions on standing since the Court began its liberal reading of citizen-suit provisions in the late 1960s. The 1997 *Bennett v. Spear*<sup>5</sup> decision, by expanding standing to encompass regulated landowners, essentially reinforced the negative

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1. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (Random House 1937) (1776).

2. 528 U.S. 167 (2000).

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

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

5. 520 U.S. 154 (1997).

effect these two earlier decisions had on enforcement of environmental regulation. More recently, the *Steel Company v. Citizens for a Better Environment*<sup>6</sup> decision confirmed the shift back to a more conservative, Hohfeldian view of standing.<sup>7</sup>

*Laidlaw* is key to the future of citizen suits. Friends of the Earth and other plaintiff-petitioners filed a citizen suit against Laidlaw Environmental Services in 1992, alleging noncompliance with a National Pollutant Discharge Elimination System (NPDES) permit at Laidlaw's wastewater treatment plant in Roebuck, South Carolina. In 1997, the District Court assessed a civil penalty of over \$400,000. On appeal to the Fourth Circuit, the court reasoned that since Laidlaw had come into compliance with its permit before the judgment by the District Court, the case had become moot.<sup>8</sup> The case was appealed to the Supreme Court.

The Court reversed the Fourth Circuit, rejecting Laidlaw's mootness claim. This landmark decision may be expected to encourage future citizen suits.<sup>9</sup> In the majority opinion of the Court, plaintiffs' concern that water was polluted, and a belief that the pollution had reduced the value of their homes was deemed sufficient for injury in fact. No actual damage to the environment was found by the district court.<sup>10</sup> Clearly, with the threshold for a "concrete and particularized" "injury"<sup>11</sup> so lowered, environmental interest groups could hope that the standing rights that were weakened in the 1990s were now being reinstated.

Our task in this paper is to address the central economic issues in

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6. 523 U.S. 83 (1998).

7. The Hohfeldian plaintiff must have a substantial stake in the outcome of the decision, as "one who has been concretely damaged by the defendant's actions and therefore seeks to advance his own interests by litigation." See David M. Ifshin, Note, *Standing to Challenge Exclusionary Land Use Devices in Federal Courts after Warth v. Seldin*, 29 STAN. L. REV. 323, 325 n.15 (1977); see also Michael C. Jensen et al., *Analysis of Alternative Standing Doctrines*, 6 INT'L REV. L. & ECON. 205, 209 (1986). The Hohfeldian doctrine is discussed critically by Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); see also Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

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

9. The mootness doctrine and injury in fact standing, though different, are both undergirded by Article III. In *Laidlaw*, the Fourth Circuit had assumed injury in fact standing because they were convinced that the case had become moot. The Supreme Court, in rejecting the circuit court's assessment of mootness, reexamined the standing issue in light of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

10. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 956 F. Supp. 588, 600 (D.S.C. 1997). See also *infra* note 152 and accompanying text.

11. See *Lujan*, 504 U.S. at 560.

citizen-suit provisions of environmental legislation and the doctrine of standing as it is applied in that context. We make no attempt to address the myriad legal issues inherent in the subject. Likewise, we offer no conjectures about the Court's rationale for its seemingly inconsistent rulings. We leave these things to legal scholars.

Our article is organized as follows. In Part I we discuss the concept of standing as a property right. Part II discusses the payoffs to "private attorneys general" who enforce environmental statutes. We discuss the affect that environmental groups can have on the allocation of property rights by setting court agendas in Part III. Part IV contains our discussion of how citizen suits can be used by firms to raise their rivals' costs. In Part V we address a misapplication of the economics of collective action that purportedly shows that citizen suits overcome obstacles to the expression of majoritarian interests. Part VI briefly discusses the implications of the *Laidlaw* Court's determination that "concern" is sufficient basis for standing and Part VII contains our concluding comments.

### I. STANDING AS A PROPERTY RIGHT

A small proprietor, however, who knows every part of his little territory, who views it all with the affection which property, especially small property, naturally inspires, and who upon that account takes pleasure not only in cultivating but in adorning it, is generally of all improvers the most industrious, the most intelligent, and the most successful.<sup>12</sup>

A group that is granted standing to sue gains something of value. This gain can be expressed as an acquisition of certain property rights by one group from another. For several decades, the citizen-suit provisions in environmental statutes have granted standing to environmental advocacy groups, while denying similar standing to landowners and other environmental resource owners. This grant of standing is equivalent to awarding advocacy groups some dimension of property rights in the environmental resource. If an advocacy group has standing to sue for the enforcement of regulations affecting a resource owner's property, while the resource owner has no standing to sue for the retraction of those regulations, the advocacy groups have influence over the use of the resource that the resource owner does not have. This "influence over the use" of a resource is equivalent to a degree of property right in that resource.

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12. SMITH, *supra* note 1, at 392.

Similarly, if an advocacy group can claim “injury in fact” for a change in a resource owner’s choice of uses of the resource, the group has standing to sue to enjoin that change. To be able to claim injury in fact, the group must have some right to the use of the resource owner’s property.

A grant of standing to an environmental advocacy group is thus a transfer of property rights from resource owners to environmental interest groups. In *Lujan v. National Wildlife Federation*,<sup>13</sup> *Lujan v. Defenders of Wildlife*,<sup>14</sup> and *Bennett v. Spear*,<sup>15</sup> the transfer of property rights went in the other direction—from environmental interest groups back to landowners. The *Lujan* cases’ limitation of environmental groups’ standing reduces the benefits to those groups and therefore shifts property rights to landowners; *Bennett*’s extension of standing to landowners makes it easier to challenge environmental groups, also shifting relative power and property rights. To better understand the transfer of property rights, it is beneficial to discuss in more precise terms the nature of property rights and exactly what effects citizen suits and legislative action have on these rights.

#### A. *Bundles of Property Rights and Unbundling of Rights*

Property rights come in bundles. A landowner may have the right to graze cattle or build a subdivision or drill for oil on his land. These rights, and many more, are held as a bundle by the landowner, but other individuals or groups may hold certain other rights. A landowner may have the right to raise cattle or engage in other activities on his property, but he may not have the right to destroy the habitat of certain endangered species living on the property. A homeowner may have the right to live in his house, but he may not have the right to operate a junkyard from his front lawn or paint his house purple.

These rights may be unbundled, to some extent, by the property owner. A land developer who wishes to raise the value of his land may sell only certain bundles of rights to those who buy lots from him. A common method of accomplishing this end with residential property is to sell “covenanted” deeds, which divest the purchaser of rights to use the land in ways that tend to impose negative externalities on neighbors.<sup>16</sup>

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13. 497 U.S. 871 (1990).

14. 504 U.S. 555 (1992).

15. 520 U.S. 154 (1997).

16. Given the preferences of local residents, of course. Some individuals will be willing to

Governmental regulation is another way of unbundling property rights. Regulation may take several rights from the environmental resource owner and either abolish them, turn them over to government, or turn them over to a third party.

As a consequence of the ability to use political resources to generate regulation to control resource use, terrific battles rage over bundles of property rights. Resource owners attempt to keep property rights from being removed from their bundle without acceptable compensation, while interest groups attempt to use the government as an unbundler, or re-arranger of the bundles. That is, interest groups lobby legislatures for regulations that remove rights from the environmental resource owner and abolish them, transfer the rights to the groups themselves, or grant other rights to the group.<sup>17</sup>

In taking a right from an environmental resource owner's bundle of property rights, regulation may transfer the same right or grant a related right to another party. The right taken from the resource owner, however, may not necessarily be granted to another group. For example, a landowner may be forced to refrain from developing a portion of his land, but the interest group that lobbied to stop the development is usually not granted the right to develop that land. Rather, the interest group is often granted a different right—perhaps the right to have the landowner's property managed in a certain manner or maintained for the benefit of a species the interest group wishes to preserve.

While groups such as The Nature Conservancy have purchased easements as a means of preserving environmental resources, the method by which many environmental advocacy groups succeed in changing the allocation of property rights is through legislative action. If the desired legislation or regulation is enacted, the advocacy group is then faced with the problem of motivating the bureaucracy charged with implementing and enforcing environmental legislation. This is often done through the courts by filing lawsuits against agencies that do not enforce regulatory law with sufficient vigor.

Everyone has some access to the legislative (and, thereby, the regulatory) process, through voting, lobbying, making campaign contributions, or other political activity. The judicial process is quite dif-

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pay extra to live in areas with many covenanted restrictions, while others will want to live in areas where there are few restrictions. The ability to contract for property rights enhances the social value more than having one set of rules forced upon all.

17. See generally FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997).

ferent, however. Traditionally, access to the courts has been restricted.<sup>18</sup> An advocacy group wishing to ensure the vigorous enforcement of a regulation could find itself denied access due to standing requirements. Citizen-suit provisions have provided environmental interest groups with an avenue into the judicial process. Universal standing grants, made through the legislative process, are thus a device to produce unbundling.<sup>19</sup>

Environmental resource owners, of course, seek to maintain all of the rights in their bundles and to regain others that have been lost to government, environmental interest groups, or other groups. The same courses of action taken by environmental interest groups in unbundling rights are taken by the environmental resource owners in their attempts to reacquire and rebundle these rights.

With *Bennett v. Spear*,<sup>20</sup> it became readily apparent that citizen-suit provisions could be made to work for environmental resource owners as well as against them. *Bennett* enhanced landowners' standing to sue for retention of rights to irrigation water—in other words, standing to sue for the right to keep particular water rights in the bundle of rights pertaining to their property.<sup>21</sup>

#### B. *Unbundling and the Value of Rebundled Property Rights*

The value of a property right, once unbundled, might not only be diminished in value itself, but can diminish the value of related property rights. Certain rights are complementary in consumption, or in a production sense, certain sub-bundles of rights are useful only in fixed or near-fixed proportions. For example, the right to graze cattle on land may be useful to a land owner only if the land owner retains the right to use water flowing across the land to water the cattle. The value of the right to use the open ocean to fish for tuna may be seriously diminished if one does not also hold the right to catch the occasional dolphin. The value of a right to a resource owner may be much greater when taken in conjunction with the other rights he holds than it would be unbundled and held separately by an advocacy group.<sup>22</sup>

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18. See, e.g., *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Muskrat v. United States*, 219 U.S. 346 (1911).

19. They may also produce *rebundling*, as we discuss *infra* Part II.

20. See 520 U.S. 154 (1997).

21. See *id.*

22. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court determined that the abolition of the plaintiff's right to develop two coastal lots had so diminished the value of his property as to constitute a "taking" compensable under the Fifth Amendment. We surmise that certain property rights were complements to others in the bundle. It

We cannot, of course, make the mistake of presuming that all unbundling is welfare reducing. We frequently observe environmental resource owners voluntarily unbundling and selling particular property rights (e.g. easements, covenanted deeds, mineral rights, etc.). These rights may be purchased and held singly, but we often see related rights being removed from their original bundles and re-bundled into a new, more valuable bundle of rights by an individual or firm. Consider the example of a power company that purchases an easement from a landowner, Jones, to construct and maintain transmission lines over a portion of Jones' land. Unless Jones is the only owner of property between the generation facility and the city, the power company will need to acquire similar easements from other landowners. Without a complete set of easements on contiguous parcels of land between the generator and the consumer, an easement on Jones' land is valueless to the power company. When bundled with other easements, however, the easement on Jones' land becomes more valuable to the power company than to Jones, and Jones may be enticed to unbundle and sell that property right to the power company. As long as the transaction is voluntary, we can say that the power company pays the opportunity cost of the right.

### C. *Liberalized Standing and Economic Efficiency*

Jensen et al. have discussed the efficiency consequences of the rebundling that occurs when liberal standing rules provide an effectively unbounded class of plaintiffs access to courts.<sup>23</sup> In brief, liberal standing rules preclude the Coasean bargained solutions that both economize transaction costs and produce efficient resource allocations.<sup>24</sup> When rights are alienable, voluntary exchanges between property owners—exchanges that are based on real factors like tastes and relative scarcity, not judicial decrees—determine how resources will be used.<sup>25</sup> When one property owner violates the rights of an-

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may seem that this conclusion is unnecessary—after all, could not the right to develop itself be worth the amount of the loss in market value? Consider, however, what would happen to the value of Mr. Lucas' property if he had lost the right to bar trespassers, or the right to prevent the military from using it as an artillery practice zone. We can no more say that the right to develop was itself worth the amount of the loss in market value, than we can say that the right to bar trespassers from the land is itself worth the loss were it removed. These rights are complementary in consumption. Taking away Mr. Lucas' right to develop is like removing the radiator from a car—the radiator adds no more value to the car than the alternator, but the loss of either one will make the car completely valueless for its intended purpose.

23. See generally Jensen et al., *supra* note 7.

24. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

25. See Jensen et al., *supra* note 7, at 206.

other, say by emitting pollutants that damage the property of the other, the damaged property owner generally would have standing to bring suit under the common law of nuisance in order to gain relief and/or compensation. As a consequence, the individual who produces harm has incentive to bargain with parties who might suffer damage to gain permission for discharging pollutants (if the value of the right to discharge exceeds the value of damages caused by discharge) or to stop emitting pollutants (if the value of damages exceeds the value of the right to discharge).

On the other hand, when standing is universal, such bargained solutions are ruled out. An agreement with the originally damaged parties granting permission to emit is of little value if any "concerned" citizen has standing to sue. In effect, universal standing destroys the alienability of emission rights.<sup>26</sup> As Jensen et al. note, "liberalizations of standing block the transfer of resources from less valuable to more valuable uses."<sup>27</sup> With liberalized standing, the welfare-enhancing, voluntary unbundling of specific rights for rebundling by another party is constrained by the possibility of intervention and nullification of the agreement by a "concerned" citizen. Suppose a firm seeks to acquire a set of easements for its water pollution discharge from all potentially damaged downstream parties. Any increases in value that might occur through these contracts are foreclosed because of the insurmountable transaction costs of contracting with the millions of potential plaintiffs.

## II. PAYOFFS TO PRIVATE ENFORCERS OF ENVIRONMENTAL STATUTES

As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society

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26. *See id.* at 207.

27. *Id.* at 205; *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111 (1972).

that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. *I have never known much good done by those who affected to trade for the public good.*<sup>28</sup>

It is tempting to assume that environmental advocacy groups are interested in enforcing environmental regulations for ideological or public-interest reasons. However, when we are concerned with the standing issue and citizen-suit provisions, this approach may oversimplify the motives of these groups. Even if environmentalists are ideologically motivated, i.e., they wish to maximize environmental purity, they are still subject to budget constraints. Obtaining pecuniary rewards by helping to unbundle and rebundle property rights allows for expanded activities in other areas. Economic incentives do matter even if environmentalists are motivated primarily by altruism (i.e. environmental purity).<sup>29</sup>

As Greve shows, there can be financial returns for filing citizen suits, and environmental advocacy groups have not neglected the economic rents that broadened standing makes possible.<sup>30</sup> In fact, the revenues that citizen-suit provisions have made possible for environmental advocacy groups can be so substantial that the provisions may be considered “an off-budget entitlement program for the environmental movement.”<sup>31</sup>

Though settlements obtained by citizen suits filed against private firms are ostensibly structured to avoid providing a profit motive to citizen enforcers, there are two elements common in these settlements that can produce a pecuniary reward to citizen suits. The first element is the set of “credit” programs, which amount to payments to environmental organizations; the second is the above-cost reimbursement of attorneys’ fees. We argue that environmental law is written in such a way that a cartel of environmental advocacy groups is formed and maintained through citizen suits.

#### A. *Citizen Suits and Enforcement of Regulation*

1. Optimal Enforcement, Bounty Hunting, and Citizen Suits  
Regulation, because of the high cost of writing precise law, usu-

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28. SMITH, *supra* note 1, at 423 (emphasis added).

29. See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 363 (1990).

30. See *id.* at 341.

31. See *id.*

ally results in inadvertent restraints on innocent or beneficial activities. Budget constraints and political pressures act as a check on the enforcement of regulatory law by government enforcers.<sup>32</sup> This can produce an optimal level of enforcement. As with drug law enforcement, achieving zero illegal activity is suboptimal because too many scarce resources would need to be diverted from other, marginally more beneficial, uses. Governments will prosecute egregious violations, but pursuing the less significant offenses does not create enough environmental benefit to justify the use of limited funds and runs the risk of upsetting voters. However, private enforcers of environmental law are unresponsive to political pressures, and have no reason to avoid exceeding the optimal level of enforcement. Because private enforcers may go after every type of offense (even paperwork violations in which environmental damage is minimal), they may over-enforce the law, diverting too many resources from other uses. While politicians or state bureaucrats who implement or enforce laws detrimental to the community would suffer loss of position or funding, private interest groups may lobby for increased regulation or file citizen suits without paying the same price.

The stated intent of citizen-suit provisions may be to increase the effectiveness of regulation by extending enforcement power to those citizens' groups that are closest to the problem. However, Greve's comparison of environmental citizen suits with old-time bounty hunting casts some doubt on the assumed public-interest motives of citizen plaintiffs.<sup>33</sup> Successful private enforcers may receive substantial bounties—rewards for successful prosecution—in two forms: attorneys' fees and credit programs. Greve demonstrates that the effect of citizen-suit requirements is the subsidization of the environmental movement.<sup>34</sup> The citizen-suit provision in the Clean Water Act,<sup>35</sup> in particular, lowered the cost of information to environmental advocacy groups to such an extent that they were able to engage in protracted campaigns that transferred wealth from regulation violators to the advocacy groups.<sup>36</sup>

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32. See William H. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 889 (1975); see also Greve, *supra* note 29, at 344.

33. See Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105 (Michael S. Greve & Fred L. Smith eds., 1992).

34. See Greve, *supra* note 29, at 340.

35. Federal Water Pollution Control (Clean Water) Act 33 U.S.C. § 1365(a) (1994).

36. See Greve, *supra* note 29, at 361.

## 2. Preclusion of Citizen Suits and Enforcement Activity

Because the object of citizen-suit provisions is supposed to be increased levels of enforcement, citizen suits may be filed as long as an enforcement action is not already under way by the relevant agency.<sup>37</sup> That a citizen suit is under way, however, does not necessarily preclude an agency enforcement action.<sup>38</sup> But why allow an agency action to follow a citizen suit and not also the other way around?

The answer has to do with the effect on the rewards to environmental advocacy groups. The system in place allows plaintiffs to be rewarded for discovering and initiating suits based on unpunished, current violations only. Cutting citizen suits short or reducing the allowable penalties if an agency action is initiated would reduce the expected value of citizen suits to these groups. Allowing environmental advocacy groups to sue for past violations after an agency action has commenced would reduce the incentive for environmental groups to seek out current violations. Both parties—the enforcement agency and the advocacy groups—benefit from the structure of the enforcement system. The environmental rule-makers receive a higher level of enforcement, which increases the effect of their rules. Advocacy groups receive substantial transfers in two forms, which are discussed below.

### B. Attorneys' Fees

The first element in settlements that benefits environmental

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37. See, e.g., Clean Water Act 33 U.S.C. § 1365(a)(1) (1994). This can lead to some strange legal situations. Laidlaw Environmental Services asked South Carolina's Department of Health and Environmental Control to file a lawsuit against it, so as to preclude the citizen suit Friends of the Earth and Citizens Local Environmental Action Network had intended to file. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 890 F. Supp. 470 (D.S.C. 1995). There remains some ambiguity about which enforcement actions preclude citizen suits, at least with respect to the Clean Water Act, 33 U.S.C. § 1319(g)(6)(A) (1994) and the Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. § 7604(b)(1)(B) (1994). See Heather L. Clauson, *How Far Should the Bar on Citizen Suits Extend Under 309 of the Clean Water Act?*, 27 ENVTL. L. 967 (1997); Richard J. Pierce, Jr., *Issues Raised by Friends of the Earth v. Laidlaw Environmental Services: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENVTL. L. & POL'Y F. 207 (2001).

38. See *Arkansas Wildlife Fed'n v. ICI Ams., Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) (stating that citizen suits "should not considerably curtail the governing agency's discretion to act in the public interest"). If the citizen suit were under way before the agency action began, the violator can still be held liable, even for the same violations. For example, after the State of New Jersey had levied a fine of \$275,000 against Elf Atochem North America, Inc., the Public Interest Research Group of New Jersey settled with Elf Atochem in a citizen suit for a \$1,017,500 penalty. See Clauson, *supra* note 37, at 981; see also *Public Interest Research Group, Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164 (D.N.J. 1993).

groups is the above-cost reimbursement of attorneys' fees and litigation costs to plaintiff organizations.<sup>39</sup> This reimbursement can be very lucrative for plaintiffs, because rates are based on the "market rate" for for-profit, *private* attorneys, not the rates charged by the public-interest lawyers such plaintiffs typically use. These reimbursements can far exceed the environmental advocacy groups' payments to public-interest lawyers, staff lawyers, and other associated costs.<sup>40</sup>

*Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Laboratories*<sup>41</sup> explicitly endorses the payment of above-cost fees to prevailing parties in environmental suits. The court held that the "community market rate" rule is appropriate for calculating fees awarded to a public-interest law firm in a Clean Water Act suit, even though the firm charged its clients rates dramatically below the market rate. The attorneys' fees were therefore awarded at a rate of \$85-\$185 per hour rather than the firm's billing rate of \$60-\$80 per hour.<sup>42</sup> The circuit court's decision rested primarily on the Supreme Court's holding in *Blum v. Stenson*,<sup>43</sup> in which a non-profit legal aid society was entitled to receive reimbursements based on the market rate even though it did not have a conventional billing rate and would have received no fees from its clients.

Attorneys' fees are, in the aggregate, a much larger proportion of settlements than Treasury fines. A 1983 study revealed that "an amount equivalent to about 400 percent of the penalties paid to the federal Treasury was paid to reimburse environmental groups for their attorneys [sic] fees."<sup>44</sup> This brings us to the second factor that makes citizen suits particularly remunerative for environmental groups—credit programs.

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39. Attorneys' fees may be part of the settlement with a private firm, or, in cases against the U.S. Government, advocacy groups may petition to receive federal compensation for legal costs under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994 & Supp. V 1999); 28 U.S.C. § 2412 (1994 & Supp. V 1999).

40. See generally Greve, *supra* note 29, at 356-359; JONATHAN H. ADLER, ENVIRONMENTALISM AT THE CROSSROADS: GREEN ACTIVISM IN AMERICA (1997).

41. 842 F.2d 1436, 1450 (3d Cir. 1988).

42. See *id.* at 1448.

43. 465 U.S. 886 (1984).

44. William H. Lewis, Jr., *Environmentalists' Authority to Sue Industry for Civil Penalties is Unconstitutional Under the Separation of Powers Doctrine*, 16 ENVTL. L. REP. 10,101, 10,102 (1986).

### C. *Credit Programs and Collusive Arrangements Among Environmental Groups*

The second type of transfer to environmental advocacy groups comes in the form of credit projects. Credit projects, sometimes called “supplemental environmental projects” or “mitigation projects,” may constitute a part of a settlement in lieu of fines. Though the plaintiff organization(s) are generally excluded from the group of recipients, credit programs benefit the environmental movement as a whole. If environmental advocacy groups behave collusively, it is not unreasonable to expect that they would work to one another’s gain in this respect.

For environmental groups as a whole, fines paid to the U.S. Treasury are much less attractive than credit projects. Though an ideologically motivated environmental advocacy group might see deterrence value in punitive fines to the Treasury, such a group would certainly perceive settlement dollars as more likely to benefit the environment if they were disbursed by environmentalists rather than diverted to the government’s general purposes. Therefore, there is an incentive to press for more credit projects in the settlement of environmental suits. This may explain why credit projects are far more common in private settlements than in government settlements, and constitute a much larger proportion of private settlements.<sup>45</sup> Violators have incentives to consent to credit projects for several reasons. They are tax deductible in many cases, have positive public-relations value, and the environmental advocacy group will often negotiate substantial discounts for including credit projects.

Credit projects must represent a large discount over the statutory fines that might be ordered by a court, not only to entice the violators into a cost-reducing settlement, but also because citizen suits do not preclude an enforcement action by a government agency for the same violation(s).<sup>46</sup> Data from private settlements bear this out. Lewis found that over ninety percent of citizen-suit penalties paid by industry in 1983 for violations of the Clean Water Act went to environmental organizations, not to the Treasury.<sup>47</sup> Boyer and Meidinger analyzed twenty-nine cases from January 1983 to May 1985 and found that more than sixty-five percent of the settlements went to environ-

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45. See Greve, *supra* note 29, at 358.

46. See *id.* at 357 n.79.

47. See Lewis, *supra* note 44, at 10,102.

mental organizations.<sup>48</sup> Greve confirmed these findings:

[T]hirty private enforcement actions brought against alleged polluters in Connecticut between 1983 and 1986 were settled for payments in excess of \$1,500,000. Attorney's [sic] fees paid to the Connecticut Fund for the Environment and the NRDC—the two organizations that brought the vast majority of these cases—amounted to \$492,036; \$869,500 was paid to the Open Space Institute, an organization established by the NRDC as a repository for case settlements in Clean Water Act suits. No fines were paid to the Treasury.<sup>49</sup>

Greve notes that outside Connecticut during the same time period, thirty-one cases settled for a total of \$5,136,438, of which \$3,692,050 went to environmental organizations and other non-Treasury groups.<sup>50</sup>

What, then, keeps the settlement from being negotiated down to a credit project of near-zero value? A credit project of \$1 would provide environmental advocacy groups as a whole with more revenues than a very large fine paid to the Treasury. Why do the violators not hold out for a statutory fine payable to the Treasury? There are two reasons. First, violators incur heavy legal costs for continuing their defense. "Holding out" is costly, and the defendant will settle when the marginal reduction in the settlement value from continuing to defend is equal to the marginal cost of continuing litigation. Second, environmental advocacy groups, unlike violators, receive positive returns from continuing litigation. Greve proposes several reasons why this is the case. "First, environmental organizations are 'repeat players.' They have to demonstrate to potential future targets that they are prepared to litigate; otherwise, their leverage in future negotiations will decline."<sup>51</sup> Environmental advocacy groups develop a reputation that, in the long run, would produce a greater willingness on the part of violators to settle. Also, "an ideologically motivated enforcer may assign a positive value to strict law enforcement per se (that is, he may decide to collect a portion of his rent in nonmonetary benefits)."<sup>52</sup> Finally, environmental advocacy groups can attract and keep members who want to see their dollars used to discover and punish those who cause environmental damage. Greve writes, "envi-

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48. See Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *BUFF. L. REV.* 833, 933 n.237 (1985).

49. Greve, *supra* note 29, at 359.

50. See *id.* at 359 n.87.

51. *Id.* at 357 n.79.

52. *Id.*

ronmental organizations maintain their membership base and their reputation in part by projecting an uncompromising attitude. The need to maintain an adversarial posture may make litigation marginally more attractive.”<sup>53</sup>

In short, environmental advocacy groups enjoy a legal advantage over defendants that gives them greater bargaining power in settlement negotiations. Violators do not tend to be “repeat players” to the extent of continually litigating environmental advocacy groups, and face much higher legal expenses since they do not have the benefit of low-cost public-interest attorneys.

#### D. *Environmental Advocacy Groups as a Cartel*

It may be helpful in this context to think of environmental advocacy groups as firms producing a service and behaving in some respects as ordinary for-profit firms behave. Environmental groups produce, among other things, monitoring of environmental quality and enforcement<sup>54</sup> of environmental regulations. This production process is made less costly by the institution of citizen suits that reduce barriers to entry into the courts. Environmental advocacy groups are not bystanders watching their costs fall. Rather, they are actively coordinating their activities<sup>55</sup> to lower their collective costs of enforcement and to increase the amount of enforcement. This does not imply that they do not have altruistic motives for their activities.<sup>56</sup>

Through citizen-suit provisions, the plaintiffs’ costs are lowered (in contrast to the costs that must be incurred in most common law litigation), and through credit projects and above-cost reimbursements of legal fees, the plaintiff’s revenues increase. This two-pronged strategy provides plaintiff organizations with abnormal returns. The cooperation between environmental advocacy groups in mining the citizen-suit provisions for economic rents indicates the presence of a cartel.<sup>57</sup>

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53. *Id.*

54. The term “enforcement” is used loosely here—the environmental groups act (through litigation and other forms of persuasion) to press the government regulatory agencies into stronger enforcement.

55. For example, the major environmental groups, organized as the “Green Group,” meet regularly in Washington, D.C. See ADLER, *supra* note 40, at 98.

56. See Greve, *supra* note 29, at 368.

57. See *id.* at 341. Care must be taken in using the term “cartel” here. Typically, economists define a cartel as an association of firms that explicitly coordinate activities in order to extract monopoly rents, i.e., restrict output and entry so as to raise price above economic cost. See THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 206-211 (Peter Newman

In the absence of a cartel, we would expect to see environmental organizations competing away more resources in expensive membership drives, bids for foundation grants, races for the best environmental projects and enforcement suits,<sup>58</sup> and competition for other revenue sources. A cartel can reduce these costs, restrict potential entrants into the environmental advocacy market, and achieve rents for cartel members. However, each advocacy group has an incentive to “cheat” on the cartel by raising publicity expenditures beyond the cartel-assigned amount. Potential entrants, likewise, could choose a relatively high level of expenditures on publicity. This would procure additional members for the new advocacy group, perhaps at the expense of cartel members. There must be an effective enforcement mechanism for the cartel to remain viable.

There are at least two possibilities for an enforcement mechanism, and they could function in tandem. First, we know that lawsuit settlements with private firms result in payments to environmental groups.<sup>59</sup> Legally, these payments may be made to any groups designated by the plaintiff, subject to court approval.<sup>60</sup> If an environmental organization were to cheat on the cartel, or if a potential entrant into the environmental advocacy market were to begin a strong membership drive, it would be relatively easy for the cartel to direct settlement money away from that organization.

The second possibility for an enforcement mechanism is the dispensing of foundation money. Some foundations have an interest, ideological or otherwise, in promoting the efficient operation of the environmental advocacy groups they support. If they can reduce the diffusion of resources that occurs in the competitive process, they can receive an increased amount of services from these groups. Large foundations can simply cut funding to any group that violates the cartel they have set up.

Private foundations provide about one fifth of environmental advocacy group income, second only to memberships as a source of

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ed., 1998). In our article the definition is expanded to encompass those groups that coordinate activities to lower their collective costs and to *increase* output within the group.

58. That is, those projects and lawsuits that provide the highest level of benefits for the lowest costs.

59. *See infra* Part III.B & C.

60. *See Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987) (resulting in a judgment that required the steel company to make “donations” to the Trust for Public Lands (\$200,000), the National Fish and Wildlife Foundation (\$100,000), and Save Our Streams (\$50,000)); *see also* ADLER, *supra* note 40, at 46.

revenues.<sup>61</sup> Whatever motivates foundation giving will influence environmental group activities. Some foundations are clearly insulated from outside pressures, often intentionally, and we can only attribute their giving decisions to ideology.<sup>62</sup> Other foundations are still subject to the influences of their founders, and therefore subject to the rent-seeking behavior of those founders.

It is impossible to discern the actual motives of founders or foundation managers, but the potential for rent-seeking behavior is there. Adler suggests one example—the Surdna Foundation, founded by the Andrus family in 1917.

The foundation, which owns about 75,000 acres of private timberland in Northern California and earned \$2.7 million in timber income in 1992-93, gains benefits from federal restrictions on timber harvesting on public lands in the Pacific Northwest, a consequence of listing the Northern Spotted Owl as endangered. Since 1989 Surdna has supported the Wilderness Society, National Audubon Society, Western Ancient Forests Campaign, Oregon Natural Resources Council, and Americans for the Ancient Forest. Each of these groups support restrictions on timber harvests on federal lands. Whether deliberate or not, Surdna's contributions to efforts aimed at stopping timber harvesting on public lands increase the value of private timber, to the benefit of Surdna and Andrus timber holdings.<sup>63</sup>

The coalition of foundations supports at least two entities that could serve as cartel enforcers for environmental organizations. The first is the Green Group, formerly known as the Group of Ten. This group was created by the Kendall Foundation and others in an effort to encourage cooperation among environmental organizations.<sup>64</sup> The second is the Environmental Grantmakers Association, founded in 1987 by the Rockefeller Family Fund with the purpose of “develop[ing] collaboration among active and potential members” and “increas[ing] the resources available to address environmental concerns.”<sup>65</sup> “As often the sole source of funds for broad public outreach, grantmaking becomes the focal point for inter-organizational cooperation,” a representative of one prominent foundation explained.<sup>66</sup>

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61. For a discussion of foundation funding and its impact on environmental organizations, see ADLER, *supra* note 40, at 85-107.

62. The Pew Charitable Trusts, created by the children of free enterpriser Joseph Pew, now have managers who have departed from the founder's principles. The trusts are apparently managed with attention to the ideology of the managers and little else. *See id.* at 98.

63. *Id.*

64. *See id.* at 94.

65. *Id.*

66. *Id.* at 93 (quoting Joshua Reichert of the Pew Charitable Trusts).

Whether or not it was the intent of Congress, it seems clear that citizen suits do create financial incentives for extensive litigation and for cooperation and collusion among environmental advocacy groups. As the next section demonstrates, if the ability to file these suits is also disproportionately held by environmental groups, then they have power over the court's agenda and thus over the evolution of law.

### III. SETTING THE AGENDA FOR COURT ACTION

No society, whether barbarous or civilized, has ever found it convenient to settle the rules of precedency of rank and subordination, according to those invisible qualities; but according to something that is more plain and palpable.<sup>67</sup>

Citizen suits give environmental groups disproportionate access to courts relative to alleged violators. In general, a party with no legally recognized grievance, and hence no standing, may be displaced by other parties who have standing. At a minimum, alleged violators must pay their own court costs whether they win or lose. If environmental groups do have disproportionate access, they in effect set the agenda for Court deliberation. Special interest groups that have standing may choose when and how to bring suits that are likely to result in decisions favorable to their members.<sup>68</sup> Groups with no standing, especially the population at large, will be referred to the legislature for relief.

The long-run impact of broad standing rules is to steer the evolution of both environmental law and property rights to the benefit of groups who can set the agenda. Flick and Dunn show, for example, that different standing requirements can have a significant effect on forest policy.<sup>69</sup>

If only one set of persons—those interested in protecting endangered species—have [sic] access to the courts, while their policy competitors with commercial interests are forced to petition the legislature, then costs of negotiating, developing, and protecting property rights is much lower for environmentalists than for their competitors. The advantage can be substantial. Plaintiffs select cases and issues on which to sue. Plaintiffs and defendants together

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67. SMITH, *supra* note 1, at 671.

68. Any individual who can control the agenda of pairwise votes can lead a decision-making body to any outcome he chooses. See DENNIS C. MUELLER, *PUBLIC CHOICE II: A REVISED EDITION OF PUBLIC CHOICE 87-95* (1989).

69. See Warren A. Flick & Michael A. Dunn, *Standing to Sue and the Making of Forest Policy 9* (May 22, 1997) (unpublished manuscript, on file with authors).

decide how far to push each suit. . . .

[I]f only one interest has access to federal courts, over time the law favoring that interest will become more fully developed and well specified, which should help ensure production of the goods and services consistent with that interest. . . .

Differential standing requirements are barriers to entry into the “market” (courts) for the production and exchange of rights.<sup>70</sup>

In a pair of articles, Stearns explains the rationale for standing as a complement to the *stare decisis* doctrine.<sup>71</sup> Given judges’ preferences, their decisions can be modeled as strategic game-playing. If those preferences are multi-peaked, cycling can be a problem.<sup>72</sup> Vote trading can potentially resolve cycling by changing ordinal preferences into cardinal preferences, but the institutions of federal courts discourage vote trading.<sup>73</sup> *Stare decisis*, Stearns explains, prevents undesirable cycling in judicial decisions by adding a deliberate path dependence to case law. *Stare decisis* can thereby prevent cycling and add rationality and continuity to case law, yet there remains an incentive among interest groups to manipulate the order in which cases are heard. Restrictions on standing may preserve the fairness of this order.<sup>74</sup> Stearns addresses neither the rent-seeking implications of

70. *Id.* The last sentence in the quoted passage is misleading, however. First, the courts can in no way be classified as a market; markets are characterized by pricing and *voluntary* production and exchange, which do not exist in courts. Second, property rights are not produced; they have always existed in someone’s bundle, though perhaps unnoticed and uncontested (i.e. marginally irrelevant). They may only be sold, traded, or taken forcibly. The “production” of rights that Flick and Dunn mention may be more accurately described as the unbundling of rights.

71. See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) [hereinafter Stearns, *Standing Back From the Forest*]; Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995) [hereinafter Stearns, *Standing and Social Choice*].

72. In the game theoretic context, cycling occurs when there is no Nash equilibrium among three or more players. The sequence of the decision—the agenda or the docket—may then be used to manipulate outcomes. Politically and legally, this causes arbitrariness, a problem first recognized by the Marquis de Condorcet in 1785. Kenneth Arrow unwittingly generalized de Condorcet’s work. See Stearns, *Standing Back From the Forest*, *supra* note 71, at 1329; see also MUELLER, *supra* note 68, at 63-65; Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994).

73. Stearns argues that the custom of publishing opinions imposes a reputational cost on judges who write opinions inconsistent with their previous statements. Judges must therefore engage in principled voting. See Stearns, *Standing Back from the Forest*, *supra* note 71, at 1376.

74. For more applications of voting paradoxes to courts, see generally Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Lewis A. Kornhauser & Lawrence Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986); Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717 (1979).

standing nor the unique treatment of standing in environmental cases, but his conclusions clearly support a theme of this paper—that liberalized standing makes rent-seeking less costly to rent-seekers. The prevailing concern of this paper is not the origin of standing or its efficiency-inducing, decision-stabilizing function, but rather the wealth transfers that may result from changes in standing.

#### IV. CITIZEN SUITS AND RAISING RIVALRY'S COSTS

Country gentlemen and farmers are, to their great honour, of all people, the least subject to the wretched spirit of monopoly.<sup>75</sup>

##### A. Regulation, Standing, and Rent Seeking

Environmental groups are not the only ones to use environmental law to serve their interests. Rival business groups can use it as well. It has been demonstrated that a polluting industry can (and does) use environmental regulation to raise rivals' costs, perhaps form a legal cartel to restrict entry, and enjoy monopoly rents.<sup>76</sup> While economists can make assertions about what approach to regulation would be most efficient, or welfare-maximizing for society as a whole, political outcomes more often reflect the values of special interests and political wealth-brokers.<sup>77</sup> Here the rent-seeking approach is helpful. Special interest groups seeking rents may be able to influence the rule-making and rule-interpreting process in order to gain supra-normal profits for themselves. Public interest goals, such as a cleaner environment, may be sacrificed for the sake of special interest goals.<sup>78</sup>

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75. SMITH, *supra* note 1, at 428.

76. See, e.g., Michael T. Maloney & Robert E. McCormick, *A Positive Theory of Environmental Quality Regulation*, 25 J.L. & ECON. 99, 100 (1982).

77. On regulatory outcomes, Maloney and McCormick write:

The maze of environmental quality regulation is overwhelming and bears little resemblance to the efficiency criteria proposed in the economics literature. Many regulatory techniques—such as technology-specific regulations, differential standards for old versus new firms, uniform percentage reductions across pollution sources, and the inalienability of pollution permits—are hard to understand on the surface. Some of the confusion is the result of only focusing on the externality effects of air and water pollution and ignoring the effects of price changes on the regulated industry.

*Id.*

78. For applications of this theory to environmental regulation see generally BRUCE YANDLE, *COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT: CREATING WEALTH IN HUMMINGBIRD ECONOMIES* (1997); James M. Buchanan & Gordon Tullock, *Polluters' Profits and Political Response: Direct Controls Versus Taxes*, 65 AM. ECON. REV. 139 (1975); Maloney & McCormick, *supra* note 76; David W. Riggs, *Acid Rain and the Clean Air Act: Lessons in Damage Control*, in *TAKING THE ENVIRONMENT SERIOUSLY* (Roger Meiners & Bruce Yandle eds., 1993); Richard L. Stroup & Jane S. Shaw, *Environmental Harms from Federal Gov-*

The rent-seeking or special interest approach is often applied to regulation, but applications to standing have been rare. Our approach searches for the winners and losers created by various standing rules, and attempts to determine if the winners are using standing rules to gain monopoly rents.

If standing is denied to one group and given to another, it may be that command and control regulation is more likely to result because market-based systems of regulation (e.g. marketable permits) do not work as well for wealth transfers.<sup>79</sup> Competitive markets do not generate artificial output or price restrictions in the way that command and control regulation does. Any environmental regulation that relies upon competitive markets for the allocation of property rights in an environmental resource will enjoy efficiencies not found in command and control regulation.<sup>80</sup>

Buchanan and Tullock lend support to the view that command and control regulation is more suitable to wealth transfers than some other pollution reduction schemes (specifically, emissions taxes).<sup>81</sup> Command and control regulation produces an output restriction, which leads to price increases enjoyed by firms in the regulated industry.<sup>82</sup> Existing firms may be exempt from certain requirements due to grandfather clauses, or they at least may be able to better absorb the cost of regulation than marginal competitors.<sup>83</sup> Command and control, technology-based regulation is thus a cartelizing influence on industry, resulting in economic rents for the regulated.

[U]nder regulation firms may well secure pecuniary gains from the imposition of direct controls that reduce total industry output. To the extent that the restriction is achieved by the assignment of production quotas to existing firms, net profits may be present even for the short term and are more likely to arise after adjustments in

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*ernment Policy*, in TAKING THE ENVIRONMENT SERIOUSLY, *supra*.

79. See Buchanan & Tullock, *supra* note 78, at 142.

80. See, e.g., William O'Neil et al., *Transferable Discharge Permits and Economic Efficiency: The Fox River*, 10 J. ENVTL. ECON. & MGMT. 346 (1983); Robert W. Hahn, *Economic Prescriptions for Environmental Problems: How the Patient Followed the Doctor's Orders*, 3 J. ECON. PERSP. 95 (1989).

81. See Buchanan & Tullock, *supra* note 78, at 142.

82. See Maloney and McCormick, *supra* note 76, at 112, 120. Maloney and McCormick found that the final announcement of emission rules that affected the U.S. copper industry boosted the stock prices of major firms in the industry. It is of interest that the EPA had indicated before the announcement that, if the rules were made final, there would never be another copper smelter built in the United States. Maloney and McCormick found similar increases in stock prices of textile firms after the promulgation of an Occupational Safety and Health Administration cotton dust standard.

83. See *id.* at 101.

plant. In effect, regulation in this sense is the directional equivalent of cartel formation provided that the individual firm's assigned quota falls within the limited range over which average cost falls below price.<sup>84</sup>

Regulation not only corrects a resource misallocation, but it creates a scarcity rent as well. In the recent history of environmental quality, the common access problem has been addressed by federal and state agencies through a standards-based approach, rather than through the enforcement of tradable property rights. As a consequence, rents from the right to use these assets have accrued to producers.<sup>85</sup>

The Achilles heel of all cartels is usually the lack of enforcement—the ability to punish cartel members that produce more than their assigned quota and to keep would-be competitors out of the industry. Under liberalized standing rules, the cartel of environmental advocacy groups helps enforce the industrial cartels. As we discussed above, payoffs to the enforcers come in multiple forms, notably above-cost reimbursements of attorneys' fees and so-called "credit projects," or payments to environmental advocacy groups as part of settlements.

Yandle emphasizes the decentralized aspect of common law as a natural guard against rent seeking:

At common law, a party damaged by a polluting firm may bring an action against the polluter. If damages are proven and evidence linking the damage to the polluter is demonstrated, the court can award damages and/or grant an injunction stopping the pollution. The court cannot impose an award for damages on an entire industry or issue an industry-wide or nationwide injunction. There is no way for an industry to gain from a common-law action. Dischargers that comply with common-law rules may gain briefly, however, when scofflaws are brought to justice. But any gains that play across a competitive industry will soon be dissipated by competitive expansion of clean output. Can a discharger gain an advantage by attracting a common-law suit? Hardly. And can an industry lobby every common-law judge in the country and gain some special treatment by the courts? It is unimaginable. Simply put, common-law remedies encourage firms to avoid imposing real harm on the actual receivers of pollution, and punish those firms that do not.<sup>86</sup>

Traditional standing rules required proving the harm and tying the harm suffered by the plaintiff to the actions of the defendant.<sup>87</sup>

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84. Buchanan & Tullock, *supra* note 78, at 142.

85. Maloney & McCormick, *supra* note 76, at 99.

86. YANDLE, *supra* note 78, at 66.

87. Justice Brandeis, in a concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936), wrote, "The Court developed, for its own governance in the cases

Early in the history of cartelizing regulation, standing rules permitted lawsuits “by members of the regulated industries but not by outsiders and members of the public”<sup>88</sup> As regulation grew to encompass all industries and cartels grew in strength, these barriers fell.<sup>89</sup> Harm-based standing rules no longer applied, and everyone gained standing through citizen suit provisions in statutory law.<sup>90</sup>

Market-based systems give everyone standing, in a sense. With a market-based system it may be impossible to appropriate others’ property through the courts.<sup>91</sup> No output restriction is generated, and no artificial price increases are produced. For market-based regulatory systems such as emission fees, performance standards, and tradable pollution permits, Yandle writes, output limitation and cartel

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confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.” In part, the rules state,

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. . . . Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. . . .

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. . . .

*Id.* at 347-348 (Brandeis, J., concurring) (emphasis added). See also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); CRAIG R. DUCAT, *CONSTITUTIONAL INTERPRETATION* 69-70 (6th ed. 1996); Peter A. Alpert, *Citizen Suits under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?*, 16 B.C. ENVTL. AFF. L. REV. 283, 288 (1988).

88. DUCAT, *supra* note 87, at 68.

89. See, e.g., *Scenic Hudson Preservation Conference v. Federal Power Comm’n*, 354 F.2d 608, 615-16 (2d Cir. 1965).

90. See Michael J. Walker & Jon D. Jacobs, *EPCRA Citizens Suits: An Evolving Opus with a Discordant Note*, 7 J. ENVTL. L. & PRAC. 15 (Jan./Feb. 1997) (on file with authors). Environmental groups may sometimes be granted standing in their own behalf. Walker and Jacobs note:

In *Delaware Valley Toxics Coalition v. Kurz-Hastings*, 813 F. Supp. 1132 (E.D. Pa. 1993), the Delaware Valley Toxics Coalition (DVTC) undertook a computer study to determine if any local companies failed to submit required EPCRA reports. This study required the DVTC to purchase certain items and incur at least 250 hours of staff time. This expenditure of time reduced the availability of staff to perform its primary function, that is, disseminating information to educate and train others. The court found that this constituted injury in fact, fairly traceable to the defendant’s actions (or lack of), and likely to be redressed by a favorable decision.

*Id.*

91. In certain situations, rent-seeking may actually have positive consequences. If specialized knowledge has been developed in the manufacture of a more efficient pollution reduction device, for instance, or if a patent has been obtained in a more efficient machine, then appeals to the state to rescind command-and-control regulations in favor of a market-based system may: (1) satisfy the definition of rent-seeking, and (2) have positive (welfare-enhancing) consequences. Any positive price is all rent, once the knowledge has been produced. Admittedly, this is an unusual application of the term “rent-seeking,” but it is technically consistent with the definition commonly used by economists.

profits are temporary at best:

Assume the same level of pollution reduction is mandated, but the industry is told it can accomplish the reduction in any way it desires, just so long as the environment is protected. Firms that discover new ways to reduce pollution can do so. Competition among firms pushes toward improved, lower-cost environmental management. Those that find better approaches can expand, relative to firms that are less successful. Ultimately, the industry will achieve the reduction, but entry and exit will not be blocked. Any extra profits made along the way will be temporary.<sup>92</sup>

### B. *Standing, Bootleggers, and Baptists*

It is useful to consider all the parties involved in applying pressure to change standing requirements. As we know, those favoring citizen-suit provisions include not only industries with an interest in cartelization, but also environmentalists or victims of pollution who have preferences for a cleaner or less developed world. “[E]nvironmental regulation, that is, regulation of a competitive industry in a negative externality setting, carries with it the implication that producers and the victims of pollution may find it in their self-interest to form a like-minded coalition to lobby for input restrictions and/or output reductions.”<sup>93</sup>

Yandle explains how one of these groups can use the arguments of the other to achieve different objectives.<sup>94</sup> Common interests between groups as unlike as bootleggers and Baptists can lead to odd partnerships in political lobbying. The bootleggers desire the closing of their competition—liquor stores—in the interest of higher profits. The Baptists favor restrictions on the sale of alcohol for moral reasons. Both may favor a ban on Sunday liquor sales. Bootleggers, rather than arguing that an output restriction would transfer wealth in their direction, garner support for Sunday alcohol bans by using the moral reasoning of the Baptists.

The Baptists bring something to the anticompetitive effort that cannot be delivered by bootleggers. They add public interest content to what otherwise would be a strictly private venture. The Baptist element, which I ask you to think of as a generic term, adds a moral ring to what might otherwise be viewed as an immoral effort, the passing of money (and electability) to politicians to obtain a political favor.<sup>95</sup>

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92. YANDLE, *supra* note 78, at 66.

93. Maloney & McCormick, *supra* note 76, at 100.

94. See YANDLE, *supra* note 78.

95. *Id.* at 70.

The “bootleggers” with whom we are presently concerned are the industries interested in output limitation. The “Baptists” are the environmental advocacy groups. Both entities benefit from cooperation.<sup>96</sup> Firms interested in raising their rivals’ costs have found that contributing to environmental groups is one of the most effective ways of accomplishing that end.

In regulatory episodes that are controversial, there is an incentive for the rent-seeking bootleggers to subsidize the actions of the public-interest Baptists. The subsidy would provide an indirect moral avenue for rent-seeking behavior, thereby lowering the political costs of supporting the regulation. Interdependent interest groups with the same means to different ends creates the potential for cross subsidization; increasing the difficulty of distinguishing rent-seeking from the public interest motive.<sup>97</sup>

Examples of industry-environmentalist cooperation are numerous. Blakeman Early of the Sierra Club stated forthrightly that “[t]he commercial waste industry has an interest in improving regulations sufficiently to drive mom-and-pop operations out of business.”<sup>98</sup> Adler notes that WMX (now Waste Management, Inc.), the largest waste management company in the United States, “has funded the National Audubon Society, National Wildlife Federation, Natural Resources Defense Council, Wilderness Society, and World Resources Institute, typically giving over \$700,000 annually to environmental causes.”<sup>99</sup> A former director of environmental affairs for WMX, William Y. Brown, who also served as acting director of the Environmental Defense Fund, acknowledged, “[w]e’re in a position to benefit from the same objectives that [environmental groups] are pursuing. . . . Stricter legislation is environmentally good and it also helps our business.”<sup>100</sup>

Yandle explains the advantage presented to the environmental advocacy groups from a movement toward statutory law and unlimited standing to sue:

The environmental statutes offered another attractive feature for environmentalists who could not make a valid claim of damages in a common-law court, but who nonetheless felt driven to correct perceived environmental harms. Under the statutes, any citizen could file an administrative complaint, which merely had to show

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96. However, we have shown that the interest of the “Baptist” environmentalists may be partially pecuniary. *See supra* Part I.

97. Jason F. Shogren, *The Optimal Subsidization of Baptists by Bootleggers*, 67 PUB. CHOICE 181, 182 (1990).

98. ADLER, *supra* note 40, at 97.

99. *Id.*

100. *Id.*

an infraction of rules created by statute, and seek access to a federal court. Under federal statutes, infractions of federal rules automatically contain a federal question. The old common-law requirements of standing and demonstration of damages were not required. In effect, the statute law of the 1970s made every U.S. citizen an environmental deputy.<sup>101</sup>

The “bootlegger” interest groups will tend to support this deputization because it adds to the power of their co-belligerents. Any environmental legislation that contributes to output limitation and the cartelization of industry will be more strictly enforced under citizen-suit provisions.

One citizen suit brought against a Pennsylvania cement kiln company illustrates how liberalized standing can be used to raise rivals' costs.<sup>102</sup> Cement manufacturing entails the use of a large amount of energy, and about 25 cement kilns in the United States use hazardous waste-derived fuels (HWDFs) as a remunerative partial substitute for coal.<sup>103</sup> Because hazardous wastes can be disposed of in cement kilns while meeting federal emissions regulations, cement manufacturers can receive substantial revenue from burning this waste.<sup>104</sup> The Keystone Cement Co., of Bath, Pennsylvania, received about 15% of its 1995 revenues from HWDF use.<sup>105</sup>

In September 1995, Pennsylvania Environmental Enforcement Project (PEEP), a local citizens' group based in the Bath area, filed suit against Keystone under the citizen-suit provision of the Resource Conservation and Recovery Act (RCRA).<sup>106</sup> PEEP alleged that Keystone had violated RCRA as well as the Clean Air Act and the Emergency Planning and Community Right-to-Know Act.<sup>107</sup> Calling the cement kiln an “imminent” threat to area residents, PEEP sought to enjoin Keystone from burning hazardous waste in its kilns.<sup>108</sup>

The RCRA of 1976 gave birth to a strictly regulated hazardous

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101. YANDLE, *supra* note 78, at 108.

102. *See* Pennsylvania Env'tl. Enforcement Project, Inc. v. Keystone Cement Co., C.A. No. 95-5869 (E.D. Pa. filed Sept. 1995).

103. *See* Bruce Rubenstein, *Outraged Citizens or Public Relations Ploy? Shills Front for Corporation in Pennsylvania*, 6 CORP. LEGAL TIMES 1 (Dec. 1996).

104. *See id.* at 25-26.

105. *See* SCOTT H. SEGAL, *THE WOLF IN SHEEP'S CLOTHING: THE MISUSE OF CITIZENS SUITS BY ECONOMIC COMPETITORS* 2 (1997).

106. *See* *Keystone Cement Co.*, C.A. No. 95-5869.

107. *See* Lori Tripoli, *Think Globally, Sue Locally: Uncovering the Citizen Front*, 10 INSIDE LITIG. 1, 2 (Nov. 1996).

108. *See* Rubenstein, *supra* note 103, at 26.

waste incineration industry.<sup>109</sup> U.S. industry produces about 250 million tons of hazardous waste annually, and with incinerators charging hundreds of dollars per ton destroyed, the incineration industry rapidly expanded.<sup>110</sup> In the 1980s, the cement industry started burning liquid hazardous waste in its kilns, taking some of the market share away from the incinerators. While incinerators charged \$284 per ton to burn liquid waste, cement kilns charged only \$100 per ton (in 1990).<sup>111</sup> The cement kiln's cost advantage over incinerators grew more pronounced once new technology allowed kilns to burn solid waste as well.<sup>112</sup> Over 60 percent of the incinerator industry's market had been captured by cement kilns by 1991.<sup>113</sup>

Understandably, this competition provoked a hostile reaction from the incinerator industry, which formed the Association for Responsible Thermal Treatment (ARTT) in December of 1993.<sup>114</sup> The stated purpose of the association was "to advocate that combustion of hazardous waste be done using the most advanced technology possible and under the most stringent standards."<sup>115</sup> Since then, both industries have been engaged in a lobbying and public relations battle to tilt environmental regulation in their favor.<sup>116</sup>

The *Keystone Cement Co.* case demonstrates how citizen-suit provisions provide another avenue for firms to raise rivals' costs and gain rents. PEEP, which was incorporated only weeks before the suit was filed, was found to have been heavily supported by one of Keystone's competitors—a hazardous waste incinerator. Within eight months' time, PEEP received at least \$250,000 from Rollins Environmental Services, an incinerator and one of three members of the ARTT.<sup>117</sup> A PEEP representative testified that, unlike its parent environmental organization, PEEP did not oppose all hazardous waste

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109. See James T. Bennett, *Selling its Reputation: The American Lung Association*, in ALTERNATIVES IN PHILANTHROPY 1 (1995).

110. See *id.*

111. See *id.*

112. See Rubenstein, *supra* note 103, at 26.

113. See *id.*

114. See Bennett, *supra* note 109.

115. Tripoli, *supra* note 107, at 4.

116. See, e.g., Rubenstein, *supra* note 103; Jeff Bailey, *Waste Firms to Petition EPA to Ban Hazardous-Material Burning at Kilns*, WALL ST. J., Jan. 31, 1994, at B5A; Cathleen Cole, *Texas Lung Association Enters Fray Between Cement and Incinerator Industries*, TEX. ENVTL. NEWS 12 (Oct. 1994).

117. See Rubenstein, *supra* note 103, at 26.

incineration, but only that which occurred in cement kilns.<sup>118</sup> After the suit was settled, PEEP dissolved.

Initially, Rollins denied association with PEEP, but a later admission by a Rollins spokesperson and court-released documents proved the connection.<sup>119</sup> Furthermore, the documents clearly show an effort by Rollins to raise the costs of cement kiln rivals. For example, one Rollins memo lists the cement kilns “most vulnerable” to additional regulation, noting: “Kilns or companies with the smallest waste rates should be the most vulnerable. . . . For these kilns the cost of regulatory and compliance efforts would be a higher percentage of waste revenues. Any additional costs would ‘have a smaller denominator’ in affecting the cost per pound burned.”<sup>120</sup> In other words, enforced regulation would raise average costs at marginal kilns by a higher percentage than at kilns that used a larger proportion of hazardous waste.

Christopher Marraro, Keystone’s attorney, commented that the PEEP citizen suit was part of “a strategy put forth by commercial hazardous waste incinerators, or at least by a sub-group, to use citizen groups to bring lawsuits for the purpose of trying to achieve something they’ve failed to achieve in administrative or legislative forums—to shut cement kilns out of the hazardous waste market.”<sup>121</sup>

Certainly the Keystone case is not an isolated example. A Midlothian, Texas cement kiln has been engaged in a similar battle with citizen groups who have received substantial support from incinerators.<sup>122</sup> In Michigan, the Huron Environmental Activist League

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118. *See id.* at 27; Tripoli, *supra* note 107, at 3.

119. *See* Rubenstein, *supra* note 103, at 27.

120. Memorandum from Charles Lamb to Phil Retallick, Cement Kiln Strategy (Nov. 17, 1995)(on file with authors).

121. Tripoli, *supra* note 107, at 3.

122. Though the defendants cannot prove that the incinerator group initiated the lawsuit, “Downwinders at Risk,” a citizen group, has received airline fares, copiers, reimbursement of phone expenditures, and other donations from the ARTT. The American Lung Association (ALA) has used a \$46,000 grant from the ARTT for funding the prosecution, a grant which the ARTT specified had to be used against cement kilns in Texas. *See* Letters from Harold Green, TXI Director of Corporate Communications (on file with authors) Shortly after the founding of ARTT in 1993, it made an initial \$150,000 donation to the ALA, which has been followed by other donations such as the one mentioned above. The Cement Kiln Recycling Coalition has argued that the donations have been used in a multi-state campaign “focused exclusively on attacking cement kilns that burn waste. No such ALA programs have been aimed at commercial incinerators.” Press Release from Cement Kiln Recycling Coalition, *Cement Group Calls for Investigation of American Lung Association* (January 26, 1995) (on file with authors). For more on the ARTT-ALA connection, see Bennett, *supra* note 109; YANDLE, *supra* note 78, at 71-72 (mentioning briefly various cooperative efforts between hazardous waste incinerators and envi-

(HEAL) filed a citizen suit against Lafarge, another hazardous waste-burning cement company.<sup>123</sup> The Lafarge Vice President of Environmental Affairs suspects that their competitors are funding the opposition in an effort to raise Lafarge's costs. He stated, "[w]e suspected they may be getting some funding provided by the ARTT to the American Lung Association and then to HEAL."<sup>124</sup>

The use of citizen suits to rent-seek is not confined to the cement kiln industry. Northrup and White find that construction unions have used a wide variety of strategies, including citizen suits, to impose costs on non-union contractors.<sup>125</sup> Unions have typically begun their intervention in the construction permitting process

by claiming that the user's application does not protect sufficiently the air or water quality, that drainage or waste disposal plans are insufficient, or that the construction plan violates other environmental regulations. The union posture may be supported by environmental groups and by "consumer groups" that spring up and likely are controlled or funded by unions. . . . Often. . . the union action seems more designed to inflict costs on the users than to protect the environment.<sup>126</sup>

Northrup and White provide multiple examples of union uses of suits against electric utilities and oil and gas companies. One such case, filed under the Clean Water Act, is *Labor for the Public Interest v. Union Oil*.<sup>127</sup> Labor for the Public Interest sought an injunction against Union Oil's alleged pollution of San Pablo Bay, in addition to up to \$25,000 in civil penalties for each violation.<sup>128</sup>

Insofar as industries benefit from cartelizing environmental rules, industries will be assisted by citizen-suit provisions. But Greve writes, [C]artels do need barriers, both to protect against outsiders and to police relations among the interests within. The purpose of the regulatory arrangement thus entailed, first, a natural stopping point: regulation went only so far as to protect its intended beneficiaries—the members of the cartel—from harmful effects. . . . *The cartel nature of regulation entailed, second, standing rules that permit*

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ronmental groups).

123. See *Huron Envtl. Activist League v. Harding*, No. 95-81890-CE (Mich. Cir. Ct. Ingham County filed Dec. 1, 1995).

124. Tripoli, *supra* note 107, at 4.

125. See generally Herbert R. Northrup & Augustus T. White, *Construction Union Use of Environmental Regulation to Win Jobs: Cases, Impact, and Legal Challenges*, 19 HARV. J.L. & PUB. POL'Y 55 (1995).

126. *Id.* at 61, 62.

127. No. C92-2531 (N.D. Cal. filed Nov. 19, 1993).

128. See Northrup & White, *supra* note 125, at 81.

*lawsuits by members of the regulated industries. . . but not by outsiders and members of the public...*<sup>129</sup>

Greve argues that conservative standing rules support the cartels of regulated industries. Yet if liberalized standing increases the enforcement of cartelizing regulations, then *liberalized* standing rules for environmental groups, not conservative standing rules, support industrial cartels. Greve has the relationship exactly backwards. As federal courts moved toward more conservative standing rules in the 1990s, the enforcement mechanism for the industrial cartels was seriously damaged.

### C. *Laidlaw and Industrial Rent-Seekers*

The *Lujan v. National Wildlife Federation*<sup>130</sup> and *Lujan v. Defenders of Wildlife*<sup>131</sup> cases, followed by *Steel Company v. Citizens for a Better Environment*<sup>132</sup> and *Bennett v. Spear*,<sup>133</sup> signaled a shift in the Supreme Court away from the liberalized standing requirements of the 1970s and 1980s. As standing was made more difficult for environmental interest groups to obtain, many industries were threatened with loss of rents as the enforcement program for cartelizing regulation was deprived of a key component. Anything that works to decrease enforcement endangers industrial cartels. Though not a subscriber to the rent-seeking idea, Mintz comments that a particular period of lower enforcement at EPA was not viewed favorably by some firms: "EPA's weakened enforcement effort also met with increasing disenchantment from some elements of industry. During this period, a number of regulated firms became concerned that the decline in EPA enforcement was contrary to their interests."<sup>134</sup>

The Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*<sup>135</sup> marks a return to less stringent standing requirements and could reintroduce more effective regulation, with a corresponding reinforcement of industrial cartels.

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129. MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 10 (1996) (emphasis added).

130. 497 U.S. 871 (1990).

131. 504 U.S. 555 (1992).

132. 523 U.S. 83 (1998).

133. 520 U.S. 154 (1997).

134. JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 50-51 (1995).

135. See 528 U.S. 167 (2000).

## V. THE MAJORITARIAN RATIONALE FOR CITIZEN-SUIT PROVISIONS

That it was the spirit of monopoly which originally both invented and propagated this doctrine, cannot be doubted; and they who first taught it were by no means such fools as they who believed it.<sup>136</sup>

In defense of more liberal standing rules for environmental plaintiffs, some authors have argued that, due to the free-rider problem and high transactions costs, majoritarian environmental preferences are underrepresented in the American political process relative to the narrow interests of the business community.<sup>137</sup> Preferential treatment for environmental plaintiffs is therefore seen as necessary to level the playing field. Such arguments are based on questionable assumptions and a rather naïve characterization of the economics of collective action.

Perhaps the single most questionable of these implicit assumptions is that environmental interest groups, or citizens acting individually to achieve environmental goals, represent the preferences of the public at large. Environmental actions are costly. Because resources are scarce, those used to improve environmental quality are not available to produce food, housing, and the other goods and services that people value. Hence, the assertion that the preferences of environmental groups express majoritarian preferences implies that the majority of citizens are willing to pay higher prices and absorb reduced standards of living to enjoy more environmental quality. Furthermore, it implies that the majority of citizens are also in agreement with environmental groups as to the *extent* of any resource reallocation that may be desired.

While environmental advocacy groups may reflect true majoritarian views on some environmental issues, the blanket application of this proposition to all issues is questionable for several reasons. First, the premise itself is simply speculation, generally unsupported by documented evidence or logic.<sup>138</sup>

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136. SMITH, *supra* note 1, at 461.

137. For example, in his discussion of the issue, John Echeverria, author of a Brief filed in support of the petitioners in *Laidlaw*, asserts that the Court erred in many of its rulings during the last decade because its failure to recognize that, because of the free-rider problem, “majoritarian interest in environmental protection” is underrepresented in the political process. See Brief Amicus Curiae of Americans for the Environment in Support of Petitioners at 1, *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167 (2000) (No. 98-822).

138. For example, implicit in Echeverria's apt description of the free rider is the assumption that the environmental organizations pushing for certain environmental action are producing a

Second, even if environmental interest groups do reflect majoritarian views, those views may reflect a lack of information more than informed preferences. The trade-off between environmental improvements and prices, employment, and other indicators of economic well-being is not generally well known.<sup>139</sup> While damages from pollution, and hence the benefits of environmental controls, are highly publicized, the individual sacrifice in material well-being required to achieve specific environmental improvements is not well publicized. Indeed, it is in the interest of environmental interest groups and enforcement agencies to exaggerate damages from pollution. By doing so interest groups improve their chances of attracting members and contributions, and enforcement agencies improve their chances of larger budgets and increased political influence.<sup>140</sup> For example, as documented in the National Acid Precipitation Assessment Program, widely reported damages from acid deposition prior to 1990 were wildly exaggerated.<sup>141</sup> Importantly, these exaggerated damages

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public good. *See id.* at 5.

Even among a majority that agrees that clean air or clean water or a greater variety of healthy animal populations is a desirable goal, there might be considerable disagreement with the environmental organizations over the effectiveness or efficiency of the means toward those ends. A particular citizen suit or lobbying effort, then, might be viewed by the majority as a public *bad*. In addition, because the production of any public good requires sacrificing resources that would otherwise be used in the production of other goods and services, it is not at all clear that the trade-offs acceptable to the environmental advocacy group are even approximately consistent with the trade-offs the majority would make to acquire that public good.

139. A major obstacle to assessing the cost of public goods and jointly consumed externalities, like pollution, is that little market information is available from which the true preferences of individuals can be deduced. Further, when asked to reveal preferences, individuals have incentive to strategically misstate their true evaluations. A substantial literature has been produced in which authors propose decision-making "mechanisms" to overcome this problem. *See, e.g.,* A.H. Barnett, *Soliciting Accurate Evaluations of Public Goods*, 9 PUB. FIN. Q. 221 (1981); Peter Bohm, *An Approach to the Problem of Estimating Demand for Public Goods*, 73 SWEDISH J. ECON. 55 (1971); James M. Buchanan, *The Institutional Structure of Externality*, 14 PUB. CHOICE 69 (1973); Edward H. Clarke, *Multipart Pricing of Public Goods*, 11 PUB. CHOICE 17 (1971); J.H. Dreze & D. de la Vallee Poussin, *A Tatonement Process for Public Goods*, 38 REV. ECON. STUD. (1971); E.A. Thompson, *A Pareto Optimal Group Decision Process*, 1 PAPERS ON NON-MARKET DECISION MAKING 133 (1965); T. Nicolaus Tideman & Gordon Tullock, *A New and Superior Process for Making Social Choices*, 84 J. POL. ECON. 1145 (1976).

140. For a detailed discussion of interest group politics, see ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY* (1981).

141. The National Acid Precipitation Assessment Project was a decade-long study funded by Congress at \$570 million, that employed several thousand of the world's top environmental scientists. The study is remarkable both because of its finding that acid precipitation damages were dramatically overstated by the popular press and because the study was essentially buried by the EPA because its results were not consistent with an activist policy of control for acid forming gases. *See* NATIONAL ACID PRECIPITATION ASSESSMENT PROGRAM, ANNUAL REPORT (1988); NATIONAL ACID PRECIPITATION ASSESSMENT PROGRAM, ANNUAL REPORT

played an important role in the controls on acid forming gases that were incorporated into the 1990 Clean Air Act Amendments.

Further, it is likely that where costs are recognized they are perceived as being borne by producers<sup>142</sup> instead of consumers and employees.<sup>143</sup> Casual observation suggests that the general population does not fully perceive the specifics of how these costs are reflected in reduced individual well being. As a consequence, there would appear to be a systematic bias in perceptions of citizens at large in assessing the benefits and costs of environmental controls. Specifically, it is likely that benefits are overestimated relative to costs.

This bias may, in part, explain the political popularity of environmental legislation. Since 1970, this popularity has produced a stream of increasingly restrictive environmental legislation. With each amendment, the Clear Air and Clean Water Acts have become more restrictive. Indeed, additional environmental regulation has joined support for veterans, Social Security, and the family farm on the list of things that successful politicians find very difficult to oppose. To the extent that political rhetoric and campaign positions reflect actual political agendas, the assertion that free-rider problems and high transaction costs cause under-representation of environmental interests is highly suspect.

Third, the implication that the community of polluters is unanimous in its opposition to environmental controls is misguided. In fact, environmental laws (including citizen-suit provisions) can be used by some firms to construct entry barriers and raise rivals' costs.<sup>144</sup> As a consequence, opposition to controls by those who represent rival business interests, and indirectly the interest of consumers, may be

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(1989); NATIONAL ACID PRECIPITATION ASSESSMENT PROJECT, REPORT TO CONGRESS (1992). For a discussion of the general tendency of environmentalists and journalists to greatly exaggerate (or even fabricate) environmental problems, see JULIAN SIMON, HOODWINKING THE NATION (1999).

142. This is implied by William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247 (2001) and Echeverria in his Brief Amicus Curiae of Americans for the Environment in Support of Petitioners, *Laidlaw*, 528 U.S. 167 (No. 98-822), among others.

143. Buzbee ignores the possibility that the demand curve for a firm's product might not be horizontal. Buzbee states, "The targets of regulation make compliance decisions based on their sense of obligation to comply with the laws, their evaluation of compliance costs and the likelihood particular conduct will result in sanctionable violations, their evaluation of how pollution might result in adverse market evaluations or nuisance liability, and their views of how their workers and neighbors will react to their compliance record." Buzbee, *supra* note 142, at 272. Nowhere does Buzbee consider the firm's ability to pass costs on to the consumer. Because cost increases may not have impacts exclusively on producers, compliance decisions may be based upon the elasticity of demand for a firm's product.

144. See *supra* Part V.

diluted by the lobbying efforts of environmental advocacy groups. Environmental groups that successfully promote adoption of environmental legislation are, perhaps unwittingly, acting to benefit a subset of firms that would use the legislation as a mechanism to limit competition.<sup>145</sup>

Fourth, both the costs and benefits of enforcement of environmental laws are highly diffuse. No doubt many citizens are interested in the quality of their environment, and they may free-ride on the efforts of others in gaining environmental improvements. However, they have similar incentives in resisting the excessive enactment or enforcement of controls that raise prices and marginally reduce their material well being. For example, as noted by Echeverria, milk consumers do not mount organized efforts to resist price supports for milk that serve the interests of milk producers at the expense of higher prices for consumers.<sup>146</sup>

In their actions as voters, citizens are subject to “rational voter ignorance.”<sup>147</sup> As a consequence, they have little incentive to become well informed about the costs and benefits of environmental controls.<sup>148</sup> The impacts of environmental controls on environmental quality and their impacts on the material well-being of individuals are both diffuse and relatively small for each individual. As a consequence, individual citizens lack incentive to devote large amounts of time or money in either becoming informed or promoting change. Whether individuals perceive over-enforcement or under-enforcement, they have incentive to free ride. Further, the same incentives that lead to free-rider problems yield rational voter ignorance. To say that these forces have greater impact on one side of the

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145. However, environmental advocacy groups operate under budget constraints and would be more likely to lobby for legislation or pursue enforcement when those actions can produce financial rewards from a subset of firms who would also benefit. One result of this incentive structure is the biasing of environmentalist activity toward remunerative or low-cost activities and away from those activities that are in line with the groups' central mission—those which are most likely to produce environmental restoration or conservation. See Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, 7 REG. 12 (1983).

146. See Brief Amicus Curiae of Americans for the Environment in Support of Petitioners at 9, *Laidlaw*, 528 U.S. 167 (No. 98-822).

147. For a discussion of the implications of rational voter ignorance, see JAMES M. BUCHANAN, *PUBLIC FINANCE IN DEMOCRATIC PROCESS: FISCAL INSTITUTIONS AND INDIVIDUAL CHOICE* 6-7 (1967).

148. The lack of knowledge of the “concerned” citizens in the *Laidlaw* case illustrates the point. They apparently were unaware that their concerns about Laidlaw's emissions damaging water quality were unfounded. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 178 (2000) (stating that “Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992”).

issue than the other is speculation based more on advocacy than on evidence.

More importantly, appeals to majoritarian preferences are based on the implicit presumption that simple majority decision rules produce socially desirable decisions. Fallacies in this proposition have been central tenets of welfare economics and public choice analysis for many years.<sup>149</sup> Simply put, majoritarian decision mechanisms do not provide a means for voters to reveal intensity of preference, i.e., benefits and costs, in the decision-making process. As a consequence, a small number of voters who experience great harm as a result of a collective decision can be out-voted by a larger number of individuals who experience only small gains from the decision. Further, majority voting is potentially confiscatory, in that a majority can vote to take the property of a minority of voters. Wetlands and endangered species legislation might be examples. In short, majority voting rules are very poor decision-making mechanisms for issues related to how specific scarce resources are to be used. In light of this, it is very difficult to take seriously complaints<sup>150</sup> that recent Court decisions have not adhered to majoritarian preferences.

#### VI. OPENING A CAN OF HARMS: FROM “CONCERN” TO STANDING IN *LAIDLAW*

The capital of all the individuals of a nation, has its limits in the same manner as that of a single individual, and is capable of executing only certain purposes.<sup>151</sup>

While we prefer to leave the legal pros and cons of Court decisions to legal scholars, as economists, we would be remiss if we did not address the Court’s interpretation of “harm” in their recent decision in *Laidlaw*. Specifically, the majority opinion of the Court was that “concern” about possible damages from emissions by Laidlaw Environmental Services was adequate to show harm, even though there appeared to be no evidence that Laidlaw’s emissions actually caused any environmental damage.<sup>152</sup> Certainly, concern can impose

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149. See, e.g., JOSEPH E. STIGLITZ, *THE ECONOMICS OF THE PUBLIC SECTOR* 156 (2d ed. 1986); see also JAMES M. BUCHANAN & MARILYN R. FLOWERS, *THE PUBLIC FINANCES: AN INTRODUCTORY TEXTBOOK* 124 (5th ed. 1980); Gordon Tullock, *Problems with Majority Voting*, 67 J. POL. ECON. 571 (1959).

150. See, e.g., Brief Amicus Curiae of Americans for the Environment in Support of Petitioners, at 3-10, *Laidlaw*, 528 U.S. 167 (No. 98-822).

151. SMITH, *supra* note 1, at 347.

152. The District Court concluded that there had been “no demonstrated proof of harm to

psychic costs on individuals, and such psychic costs can be legitimately included in a reasonable assessment of benefits and costs. However, this ruling has the bizarre consequence of assigning significant weight to concerns that appear to have been unfounded.

As in all other cases, resources available to courts are scarce. One economic function of standing rules is to ration those scarce resources in such a way that relatively more meritorious and substantive cases are adjudicated, while less substantive cases are resolved in other ways.<sup>153</sup> For the Court to rule in favor of standing for an individual who “was concerned that the river was polluted by Laidlaw’s discharges,” despite the (implicit) finding that Laidlaw’s discharges did not in fact pollute the river, appears to be pure folly. It would appear to open the court system to a potential barrage of trivial suits. Significantly, there is apparently nothing limiting the application of this principle outside environmental cases. In antitrust cases, for example, the *concern* of monopolization might be enough to warrant standing.

Additionally, because of the complexity of the economic and environmental systems being regulated, environmental laws are inherently imprecise and vague on many points. Hence, reasonable enforcement of such laws must depend on reasonable decisions by administrators and courts in determining when violations are sufficiently serious to warrant action. If “concern,” no matter how unfounded that concern, is now adequate to not only gain access to the court but to also warrant punitive action, then the Court has made a major step toward removing all reason from this particular facet of the judicial process.

## VII. CONCLUSION

The proposition is so very manifest, that it seems ridiculous to take any pains to prove it; nor could it ever have been called in question, had not the interested sophistry of merchants and manufacturers confounded the common sense of mankind.<sup>154</sup>

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the environment,” that the “permit violations at issue in this citizen suit did not result in any health risk or environmental harm,” and that the “available data . . . fail to show that Laidlaw’s actual discharges have resulted in harm to the North Tyger River.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 956 F. Supp. 588, 600, 602, 603 (D.S.C. 1997). However, the Supreme Court majority opinion held that the relevant showing for standing “is not injury to the environment but injury to the plaintiff.” *See Laidlaw*, 528 U.S. at 181.

153. *See* Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

154. SMITH, *supra* note 1, at 461.

This article has addressed some of the central economic issues in citizen-suit provisions of environmental legislation and the doctrine of standing. We have not attempted to address the perennial separation of powers issues, the consistency or inconsistency of the Court's decisions on standing, possible political or personal motivations of Supreme Court Justices, or any legal convolutions surrounding the standing issue.

Instead, we have discussed the economic incentives of environmental advocacy groups and industrial interest groups, hoping to shed some light upon the economic consequences of a case like *Laidlaw* that changes the standing landscape. *Laidlaw* may be expected to increase the effectiveness of environmental interest groups as they help enforce environmental legislation—and consequently augment the demonstrably monopolizing effect on industry that many environmental rules have. Environmental advocacy groups, as they change bundles of property rights, should benefit through credit projects and above-cost reimbursements of attorneys' fees. Certain firms will enjoy monopoly rents from the effective suppression of rivals provided by environmental regulations. Other firms will suffer as more politically successful competitors manage to deploy more “concerned citizens” against them in court. Consumers, the least well-organized interest group, may be expected to absorb much of the cost of well-enforced environmental rules through higher prices for goods and services.

Though we have focused on the economic effects of changes in standing rules, throughout this article we have touched on the economic functions of standing. Standing restrictions can maintain the fairness of the order in which cases are heard,<sup>155</sup> and force trivial or subjective grievances toward other avenues for resolution.

Furthermore, “majoritarian interests” provide a poor rationale for lowered barriers to standing. The economics of collective action show that majority voting is a poor decision mechanism for issues related to resource allocation. Notably, citizen-suit provisions do not overcome obstacles to the expression of majoritarian interests.

Finally, the *Laidlaw* Court's willingness to weight the subjective concerns of plaintiffs more heavily than objective measures of pollution damage seems to open the door to a flood of suits based on the unfounded worries of countless citizen plaintiffs. The inscrutable

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155. See Stearns, *Standing and Social Choice*, *supra* note 71.

logic behind the majority opinion in *Laidlaw* signals that there is no limitation on lawsuits by any group having a member living in the vicinity of the alleged violator. If this decision produces offspring in other areas of law, such as antitrust, the economic effects could be far-reaching indeed.