ARTICLE III STANDING FOR CERCLA PRIVATE COST RECOVERY ACTIONS: HOW THE TEST'S STRAINED LOGIC BELIES ITS AUTHORITY

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ABSTRACT

This Note examines how Article III standing doctrine applies to private plaintiffs' cost recovery actions under § 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act. A review of judicial decisions reveals inconsistencies in the analysis of injury in fact and traceability, and suggests that current Article III standing doctrine is misaligned with its purported objectives. In response, this Note proposes a structured framework for assessing injury in fact and a refined approach to analyzing traceability that distinguishes between different forms of causal uncertainty. These doctrinal adjustments should better align case outcomes with Article III standing doctrine's constitutional and pragmatic goals. In the environmental context, this translates to a more robust remediation program and more effective cooperation between regulators and private entities.

INTRODUCTION

When the Supreme Court ruled in *TransUnion v. Ramirez* that "[a]n injury in law is not an injury in fact,"[1] courts, commentators,

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1. TransUnion LLC v. Ramirez, 594 U.S. 413, 427 (2021).

and practitioners alike wondered—just how many plaintiffs bringing what number of claims must we now stop at the courthouse doors? This Note identifies one such group of plaintiffs: private persons who have cleaned up hazardous substances on their land and now seek reimbursement from the parties that the law holds responsible. More specifically, this Note examines how a rigorous application of Article III standing doctrine prevents private persons from bringing Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") § 107(a)(4)(B) cost recovery actions in federal court.

Part I introduces CERCLA—a cornerstone statute of the federal government's environmental remediation program, under which the Environmental Protection Agency ("EPA") and private parties can impose liability on those responsible for the release of hazardous substances. Part I also introduces the Supreme Court's Article III standing doctrine—the current law, the prevailing rationales behind it, and its remaining ambiguities. Part II then explains why private plaintiffs seeking to recover cleanup costs likely fail to satisfy the Article III standing requirements of "injury in fact" and "traceability," even though CERCLA § 107(a)(4)(B) expressly defines a private right of action to recover said costs. Lastly, Part III argues that barring CERCLA § 107(a)(4)(B) private plaintiffs from federal court does not advance Article III standing doctrine's constitutional objectives or pragmatic goals.

This result is cause for concern. At the most tangible level, we lose an effective tool for cleaning up communities contaminated with hazardous substances. Not only do CERCLA § 107(a)(4)(B) cost recovery actions make up about half of the total set of actions that promote the cleanup of hazardous substances, but private actions may target cleanup sites that government actions tend to ignore.[2] More abstractly, this result warns that the Supreme Court's Article III standing test does not further the constitutional or pragmatic goals that legitimize the test. In the context of CERCLA, barring private cost recovery actions does not address any meaningful concern about the separation of powers, nor does it protect the adversarial proceeding from parties who might lack sufficient knowledge or

2. *See* discussion *infra* Section I.A.3.

interest in the underlying dispute.[3] Quite the opposite. By barring private cost recovery actions, the Supreme Court's Article III test frustrates the Executive Branch's cooperative strategy to clean up hazardous substances in the United States and, at the same time, deprives the adversarial system of those parties with the greatest knowledge and most compelling interest in the underlying dispute.[4]

Thankfully, the Supreme Court's Article III standing doctrine has not yet become so definite as to guarantee the de facto elimination of CERCLA private cost recovery actions. Current doctrine is ambiguous on a number of points, which puts courts, commentators, and practitioners in the position to further develop Article III standing doctrine in a way that more effectively promotes our constitutional and pragmatic goals.[5] This Note concludes by suggesting several important points in the current Article III standing doctrine that deserve such clarification.[6]

I. BACKGROUND

A. CERCLA—Imposing Cleanup Liability Irrespective of Causation

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[7] which established a regulatory framework to identify, clean up, and impose liability for sites contaminated with hazardous substances.[8] This regulatory framework supports a complex host of administrative

3. *See* discussion *infra* Section III.A.
4. *See* discussion *infra* Section III.A.
5. *See* discussion *infra* Sections I.A.3, III.B.
6. *See* discussion *infra* Section III.B.
7. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96–510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675); *see also* Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99–499, 100 Stat. 1613 (amending CERCLA). CERCLA is also commonly called "Superfund," which refers to the fact that CERCLA provides for the maintenance of a large, tax-funded trust to support the EPA's response efforts. *See* 42 U.S.C. § 9611.
8. *What Is Superfund?*, EPA (Oct. 8, 2024), https://www.epa.gov/superfund/what-superfund.

functions to achieve the first two objectives,[9] and offers a "strict, joint and several, and retroactive" liability scheme to achieve the last objective.[10] The following sections elaborate on these processes occur during the course of a private plaintiff's cost-recovery action.

1. Cleaning Up the Site

The Environmental Protection Agency ("EPA") administers CERCLA's multi-phase cleanup process,[11] which typically begins when concerned citizens or state governments alert the EPA of a potentially contaminated site.[12]

First, the EPA conducts a "preliminary assessment" of historical data and other available information to determine whether a site might be contaminated with hazardous substances.[13] If the EPA finds sufficient evidence of site contamination,[14] it may conduct a "site assessment" of the area's air, water, and soil conditions to determine whether and to what extent hazardous substances are present.[15] Based on these assessments, the EPA then evaluates whether the site presents sufficient risk to be added to the EPA's "national priorities list," which is used to keep track of "the most serious sites identified for long-term cleanup."[16] After providing notice of its intention to add the site to the national priorities list and responding to all

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9. *Superfund Cleanup Process*, EPA (Aug. 21, 2024), https://www.epa.gov/superfund/superfund-cleanup-process.

10. DAVID M. BEARDEN, CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT 13 (2012).

11. *See id*. at 1; *Superfund Cleanup Process*, *supra* note 8.

12. *See* JAN PAUL ACTON, RAND CORP., UNDERSTANDING SUPERFUND: A PROGRESS REPORT 11 (1989).

13. *About the Superfund Cleanup Process*, EPA (Oct. 9, 2024), https://www.epa.gov/superfund/about-superfund-cleanup-process#pasi.

14. In the CERCLA context, "hazardous substance" is defined broadly and, at the time of this Note's writing, includes about 800 specific substances. *See* 42 U.S.C. § 9601(14); *see also CERCLA Hazardous Substances Defined*, EPA (Jan. 14. 2025), https://www.epa.gov/epcra/cercla-hazardous-substances-defined.

15. EPA, *supra* note 13.

16. *Id.*

comments received, the EPA renders a final decision on its inclusion.[17]

Second, the EPA conducts a "remedial investigation and feasibility study" to evaluate potential remediation plans.[18] After providing notice of its intention to effectuate a chosen plan and responding to all comments received, the EPA then publishes its "record of decision," which states the EPA's final plan of action.[19] On average, it takes eight years for the EPA to complete these steps in preparation for the actual site remediation.[20] This partly explains the finding that thirty-eight percent of Superfund expenses go to general overhead costs rather than conducting the remediation.[21]

Third, the EPA or a private party pays for or performs the remediation work in accordance with the EPA's finalized record of decision.[22] Importantly, when interested private parties participate in the selection and implementation of the remediation plan, the process may be more efficient and cost effective.[23] Congress's 1986 amendment to CERCLA reflects this preference, as the amendment made it a "prominent objective[]" to "[e]ncourage appropriate and timely cooperation by potentially responsible parties (in such matters as providing information and agreeing to take over lead and financing activities)."[24]

2. Establishing Liability

After cleaning up a contaminated site, the EPA or a private party that incurred cleanup costs may seek to hold any "potentially responsible party" ("PRP") liable for cleanup costs.[25] CERCLA defines "potentially responsible party" as a broad group that includes (1) current owners and operators of sites, (2) past owners and operators of sites at the time that hazardous substance disposal occurred, (3) transporters of hazardous substances to a site, and (4)

17. *Id.*
18. *Id.*
19. *Id.*
20. *See* ACTON, *supra* note 12, at viii.
21. *See id.* at vii.
22. *See id.* at 13.
23. *See id.* at vii.
24. *See id.* at 17.
25. 42 U.S.C. §§ 9607(a)(4)(A)–(B).

arrangers for the disposal of hazardous substances to a site.[26] As mentioned, courts have interpreted CERCLA § 107 so that potentially responsible parties may be held strictly liable for the full amount of cleanup costs incurred without any proof that the potentially responsible party caused the contamination subject to cleanup,[27] even where a defendant fits the definition of potentially responsible party based on conduct taken prior to CERCLA's enactment.[28] Congress designed this liability regime for the maximum deterrent effect.[29] The EPA has since leveraged this regime to secure over $50.3 billion through PRP site cleanup commitments and reimbursements.[30]

This regime's leverage is so substantial that it has been the subject of numerous constitutional attacks, including arguments that CERCLA constitutes impermissible retroactive litigation,[31] denies potentially responsible parties due process,[32] and exceeds Congress's

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26. *Id.* §§ 9607(a)(1)–(4).

27. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) ("Congress specifically rejected including a causation requirement in section 9607(a). The early House version imposed liability only upon 'any person who caused or contributed to the release or threatened release.'"); *see also* John C. Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493, 1496 (1994) ("Causation is a necessary prerequisite for assigning responsibility in tort law, even in strict liability regimes. Nonetheless, courts have excused the victims of hazardous waste injuries from proving causation under CERCLA because of the well-noted difficulties in determining the cause of injuries from hazardous substances.").

28. *See* BEARDEN, *supra* note 10, at 13.

29. *See* S. Rep. No. 96–848, at 30 (1980) ("By holding the factually responsible person liable, [CERCLA] encourages that person—whether a generator, transporter, or disposer of hazardous substances—to eliminate as many risks as possible.").

30. *Superfund Enforcement FY 2023 Annual Results*, EPA (Apr. 2, 2024), https://www.epa.gov/enforcement/superfund-enforcement-fy-2023-annual-results.

31. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 173–74 (4th Cir. 1988) (rejecting the argument that exposure to disproportionate liability without proof of causation violated prohibitions against impermissible retroactive statutory applications).

32. *See, e.g.*, Gen. Elec. Co. v. Jackson, 595 F. Supp. 2d 8, 17–20 (D.D.C. 2009) (rejecting the argument that the EPA's practice of issuing unilateral administrative orders constituted a due process violation), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010).

Commerce Clause authority.[33] Courts rejected each of these arguments.[34] This Note does not attempt to revive or reassess any such challenges, but instead assumes that CERCLA and its application are constitutionally valid. Rather, this Note considers whether current Article III standing doctrine prevents the federal judiciary from adjudicating private plaintiffs' CERCLA § 107 cost recovery actions. Importantly, the question of whether private plaintiffs have Article III standing to bring a CERCLA § 107 cost recovery claim is completely independent of whether private plaintiffs have a right of action to bring this claim.[35]

3. The Private Right of Action

In *United States v. Atlantic Research*,[36] the Supreme Court settled the question of whether CERCLA § 107 furnishes private plaintiffs—including potentially responsible parties—with a right of action. Specifically, the Supreme Court held that CERCLA § 107(a)(4)(B) provides private plaintiffs with a right of action to recover necessary costs incurred to conduct a voluntary cleanup in accordance with the National Contingency Plan.[37] Exercising this right of action, private plaintiffs must establish six prima facie elements to succeed in a CERCLA § 107(a) cost recovery claim.[38] A private plaintiff must establish that (1) the defendant from whom it seeks reimbursement is a potentially responsible party, (2) the release of a hazardous substance has occurred or threatens to occur, (3) the substance in question fits the statutory definition of hazardous substance, (4) the

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33. *See, e.g.*, United States v. Olin Corp., 107 F.3d 1506, 1509–10 (11th Cir. 1997) (rejecting the argument that Congress exceeded its Commerce Clause authority and finding that disposal of hazardous waste threatens interstate commerce).

34. *See supra* notes 31–33.

35. That being said, courts and commentators alike have used the term "standing" interchangeably with private right of action. *See, e.g.*, Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action under CERCLA*, 13 ECOLOGY L.Q. 181, 216 (1986) ("One of the basic issues addressed by courts has been whether 'potentially responsible parties,' who are themselves liable for cleanup costs, have standing to seek reimbursement.").

36. United States v. Atl. Rsch. Corp., 551 U.S. 128, 131 (2007).

37. *Id.* at 139.

38. HAL J. POS, STRATEGIC CONSIDERATIONS IN LITIGATING AND SETTLING PRIVATE COST RECOVERY ACTIONS FOR ENVIRONMENTAL CLEANUPS 6–18 (1994).

site in question qualifies as a facility on the national priorities list, (5) the plaintiff has actually incurred necessary response costs, and (6) the plaintiff's response costs were consistent with the National Contingency Plan.[39] Prior to filing this claim, however, a private plaintiff must give the defendant notice of its intent to do so, provide a specific description of the contamination in question, and allow the defendant sixty days to clean up the contaminated site.[40] In sum, under CERCLA and the EPA's guidance, private cost recovery actions are highly structured, labor intensive, and costly.

Moreover, private cost recovery efforts are central to the overall contaminated site remediation project. Private cost recovery actions once constituted the majority of cost recovery actions, but have since decreased in number to constitute about half of such actions.[41] Also, if private cost recovery actions are economic complements to the public enforcement,[42] then such actions may become increasingly important in light of evidence that Superfund appropriations are declining while EPA site-associated costs are increasing.[43] Further, private cost recovery actions incentivize parties potentially responsible for site contamination to cooperate affirmatively in cleanup efforts rather than contest them.[44] Indeed, the Institute for Civil Justice has estimated that contentious interactions account for thirty-two percent of all site-related expenditures by potentially responsible parties.[45] In light of these expenditures, critics rightly

39. *Id.*

40. Howard F. Chang, *Developments in Law – Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1498 (1986).

41. Gary A. Gabison, *The Problems with the Private Enforcement of CERCLA: An Empirical Analysis*, 7 GEO. WASH. J. ENERGY & ENV'T L. 189, 192 (2016).

42. *But see id.* at 197 (arguing that private cost recovery actions are not economic complements to public enforcement).

43. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-656, SUPERFUND: LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS 9, 32 (2009) ("EPA places a higher priority on cases in which it hopes to recover more than $200,000.").

44. *See* LLOYD DIXON, FIXING SUPERFUND: GETTING THE FORMULA RIGHT 3 (1994) ("Throughout the Superfund process, each of the key players implicitly or explicitly weighs the costs and benefits of cooperating with the process or of contesting it. The incentives to contest rather than to cooperate in large part determine the size of the transaction costs.").

45. *Id.* at 1.

question whether dollars spent by interested parties result in "appropriately large amounts of cleanup,"[46] and commentators suggest that increasing the number of private cost recovery actions would improve the liability regime's cost effectiveness.[47]

Lastly, private cost recovery actions might serve the interests of distributive justice in ways that ordinary EPA enforcement does not. Private cost recovery actions might expedite the cleanup of smaller sites where evidence establishing liability is weaker, since the EPA views these sites as low priority according to its utilitarian calculus.[48] But those exposed to hazardous waste might understandably be less concerned with the efficient allocation of EPA funds. Rather, those facing the immediate threat of injury prefer cleanup as soon as possible and by whomever is qualified. Potentially responsible parties fill this gap, and extending them a private right of action to recover cleanup costs makes it possible for them to do so.

B. Article III Standing—Furthering Constitutional and Pragmatic Goals

Article III Section 2 of the Constitution limits the scope of the federal judiciary's power by defining that "the judicial Power shall extend" to "cases" and "controversies."[49] As then D.C. Circuit Judge Antonin Scalia explained, the Supreme Court tethered its standing jurisprudence to Article III Section 2 "for want of a better vehicle," to prevent the judiciary from encroaching on operations of the executive and legislative branch.[50] The Supreme Court's interest in part reflects the judiciary's traditional stance against issuing mere advisory opinions,[51] and the judiciary's reluctance to effectuate the

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46. *See* ACTON, *supra* note 12, at ix.

47. *See* Chang, *supra* note 40, at 1504.

48. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 43.

49. U.S. CONST. art. III, § 2.

50. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

51. *See, e.g.*, Letter from Thomas Jefferson, U.S. Sec'y State, to John Jay, U.S. Sup. Ct. Chief Just., and Justs. of the Sup. Ct., (July 18, 1793), https://www.loc.gov/resource/mtj1.018_1215_1215/?st=text (requesting the judiciary to provide an ex-ante opinion on the legality of contemplated executive actions); letter from John Jay, U.S. Sup. Ct. Chief Just., to George Washington, U.S. President (Aug. 8, 1793), https://founders.archives.gov/documents/

large volume of administrative challenges that Congress invited when it liberalized the Administrative Procedure Act.[52] In addition, the Supreme Court purportedly has developed Article III standing doctrine to ensure that parties have a sufficient personal stake in the dispute to serve as effective adversaries in their judicial proceedings.[53] This rationale parallels pragmatic arguments against the judiciary rendering advisory opinions, as the rationale posits that effective adjudication requires a well-developed set of facts and a sufficiently knowledgeable pair of adversaries to render sound decisions.[54]

Against the backdrop of these constitutional and pragmatic interests, the Supreme Court has developed a formal test to determine whether a plaintiff has standing to bring its claim in federal court. The following sections briefly describe this test, the mounting criticisms it faces, and its remaining ambiguities. Part II then applies this test to potentially responsible parties bringing CERCLA § 107 private cost recovery actions.

1. Current Doctrine

In *Lujan v. Defenders of Wildlife*, the Supreme Court summarized the evolution of its jurisprudence and neatly defined the three elements a plaintiff must satisfy to establish its Article III standing. First, the plaintiff must show that it suffered an "'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[55] Second, the plaintiff must show "a causal connection

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Washington/05-13-02-0263 (declining the President's request by stating such an ex-ante opinion would contravene the Framers' intent to establish separation of and checks on powers between the federal branches of government).

52. *See* Scalia, *supra* note 50, at 887–90.

53. *Id.* at 891.

54. *See* Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003 (1924) ("The stuff of these contests are facts, and judgment upon facts. Every tendency to deal with [adversarial contests] abstractedly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions unrelated to actualities.").

55. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citations and internal quotations omitted).

between the injury and the conduct complained of."[56] Third, the plaintiff must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision."[57]

Applying this test, the Court found that the plaintiff, an environmental group, lacked standing to challenge the U.S. Secretary of the Interior's promulgated rule which purported to limit the scope of its obligations under the Endangered Species Act.[58] Plaintiff argued that this agency ruling—which permitted other federal agencies to conduct development projects in foreign nations without having first to perform an impact-on-endangered-species consultation—threatened to harm the plaintiff's members.[59] Specifically, the plaintiff argued that the agency ruling increased the likelihood that endangered species would go extinct, which in turn deprived plaintiff's members of recreational enjoyment.[60] Although the Court found that plaintiff's alleged injury was sufficiently concrete, it found that the injury was not actual or imminent because none of plaintiff's members had specific plans to visit any geographic sites allegedly threatened by the agency's ruling.[61]

Subsequent cases added important clarifications to the Supreme Court's standing doctrine. For example, in *Clapper v. Amnesty International USA*, the Supreme Court clarified that a plaintiff's self-inflicted injuries are not fairly traceable to any defendant.[62] In that case, the Court found that plaintiffs—a group of lawyers, human rights, labor, legal, and media organizations—lacked standing to challenge a provision of the Foreign Intelligence Surveillance Act authorized government surveillance of certain foreign persons, which allegedly included many of plaintiffs' clients.[63] While plaintiffs argued that the provision forced them to take expensive technological measures to protect their clients' security interests, the Court responded that plaintiffs "cannot manufacture standing merely by

56. *Id.*
57. *Id.* at 561 (citations and quotations omitted).
58. *See id.* at 558, 578.
59. *Id.* at 563.
60. *Id.*
61. *Id.* at 564.
62. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 418 (2013).
63. *Id.* at 404–406.

inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[64] In addition, the Court noted that, even in the absence of the statute, the plaintiffs would have had a similar incentive to incur their expenses.[65]

Most recently, in *TransUnion v. Ramirez*, the Supreme Court clarified that plaintiffs do not necessarily satisfy their burden of establishing injury in fact by showing that one of their legal rights has been violated.[66] The Supreme Court reasoned that "if the law of Article III did not require plaintiffs to demonstrate a 'concrete harm,' Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law."[67] Pursuant to this rule, the Supreme Court found that although the Fair Credit Reporting Act purported to hold the defendant liable for producing erroneous credit reports of plaintiff class members, these members lacked standing unless they could show that the defendant disseminated these reports to potential creditors.[68]

2. Mounting Critiques

Commentators and courts[69] have sharply critiqued the Supreme Court's development of Article III standing doctrine. One common criticism has been that the *Lujan* opinion ignored salient constitutional history in characterizing standing as an "irreducible constitutional minimum,"[70] a result that extended the doctrine further away from its origins as a prudential measure.[71] Others have taken

64. *Id.* at 416.

65. *Id.* at 417.

66. TransUnion LLC v. Ramirez, 594 U.S. 413, 427 (2021).

67. *Id.* at 428.

68. *Id.* at 433–38.

69. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (criticizing the majority's standing analysis as a "word game played by secret rules.").

70. *See, e.g.*, Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L. J. 1141, 1152 (1993); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) ("There was no doctrine of standing prior to the middle of the twentieth century.").

71. *See* S.T. Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95 (2014) (tracing the origins and development of standing doctrine from

issue with the vague—even metaphysical[72]—nature of the standing inquiry, and have suggested that judges might employ standing analysis when they wish to decide a case according to, but without divulging their subjective values.[73] These same commentators liken the standing analysis to *Lochner*-era inquiries of substantive due process.[74] The latter criticism is reminiscent of Justice Scalia's critique in the substantive due process context that, by allowing "a select, patrician, highly unrepresentative panel of nine" to decide what is essentially a policy question, we "violate a principle even more fundamental than taxation without representation: no social transformation without representation."[75] Ironically, when Justice Scalia wrote the majority opinion in *Lujan*, he presumably did not believe that the "concrete harm" inquiry entails mere policy questions.

3. Remaining Ambiguities

Many conceptually difficult questions remain with respect to Article III standing jurisprudence, both in the form of explanatory questions as to the meaning of the *prima facie* elements stated in *Lujan*, as well as structural questions as to how much further the Supreme Court could curtail access to the federal judiciary before raising serious constitutional concerns.

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prudential concerns); Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727 (2009) (arguing that courts' standing doctrine should embrace prudential concerns as the heart of the analysis).

72. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICHIGAN L. REV. 163, 191(1992) ("Whether an injury is cognizable should depend on what the legislature has said, explicitly or implicitly, or on the definitions of injury provided in the various relevant sources of law. The Court should abandon the metaphysics of injury in fact.").

73. *See, e.g.*, Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 658 (1985) ("[S]tanding can apparently be either rolled out or ignored in order to serve unstated and unexamined values.").

74. *See id.*

75. Obergefell v. Hodges, 576 U.S. 644, 718 (2015) (Scalia, J., dissenting). One might imagine that standing doctrine critics might even endorse Justice Alito's contention that "authority to regulate . . . must be returned to the people and their elected representatives. *Cf.* Dobbs v. Jackson's Women's Health Org., 597 U.S. 215, 292 (2022). Surely an ironic twist!

The "injury in fact" requirement has generated the most ambiguities, only some of which the Court has addressed. For example, in response to widespread confusion on how parties might argue the injury in fact requirement, the Supreme Court in *Spokeo v. Robins*, ruled that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[76] In addition, the Court explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[77] Yet the Court's explanation—that Congressional enactments can somehow "give rise" to standing without serving the actual basis for it—poses a contradiction. How can it be that "that there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right,"[78] and yet, Congressional enactments might somehow "elevate"[79] *de facto* harms? Moreover, it is unclear what specific attributes of a Congressional enactment are relevant to this inquiry—their proffer of benefits that might then be lost, their influence on the sociological processes that generate consensus as to what constitutes harm, or some other attribute? Others have questioned whether the Court in reality applies different unstated principles to analyze standing with respect to different categories of claims.[80] Others still have grappled with the abstract question of what it means for a given harm to be "imminent."[81]

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76. Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016).

77. *Id.* at 341 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

78. *See Lujan*, 504 U.S. at 576–77.

79. *See Spokeo*, 578 U.S. at 341.

80. Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. UNIV. L. REV. 169, 175 (2012) ("[W]e [] recommend what we believe to be the best overall solution: frank recognition that the Case or Controversy Clause has two tiers, one for cases where Congress has created procedural rights and made it clear that they can be enforced without meeting the normal injury, causation, and redressability requirements . . . and another tier for all other cases, where the normal requirements apply.").

81. *Compare* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410 (2013) (rejecting plaintiff's "highly attenuated chain of possibilities" alleging that the government might use its newly granted authority to intercept client communications, thereby imposing security costs) *with* Monsanto v. Geertson Seed

The "fairly traceable" requirement is also ambiguous, though commentators have shown it less attention.[82] For one, the Supreme Court has offered little explanation for why it switched from using its original terminology—asking whether the plaintiff's injury is "fairly traceable"[83] to the defendant—to its more modern formulation—asking whether the plaintiff's injury has a "causal connection" to the defendant's conduct.[84] The plain meaning of these two phrases significantly differs. "Traceable" derives from the transitive verb "to trace," denoting that a subjective observer exists and applies some theory of attribution connecting one observation to another.[85] Importantly, the concept of "traceability" does not presuppose any particular theory of attribution. By contrast, the concept of "causal connection" invokes just one theory of attribution—that of causality.[86]

Farms, 561 U.S. 139, 153–154 (2010) (accepting plaintiff's argument that deregulation of genetically modified agricultural products would result in horizontal gene transfer to plaintiff's conventional agricultural products, thereby harming plaintiff's prospect of marketing its conventional agricultural products). This Author interprets the apparent tension between these two cases to stand for the proposition that the court is more likely to find that harm is imminent when effectuated by non-human physical processes, as opposed to human decision-making, which is to some extent always discretionary.

82. *See* Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241, 1243 (2011).

83. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

84. *See, e.g.*, *Lujan*, 504 U.S. at 560.

85. *Traceable*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/traceable (last accessed Mar. 30, 2025). For additional commentary describing the Supreme Court's incorporation of the phrase "fairly traceable" into its standing analysis, see Mary Kathryn Nagle, *Tracing The Origins Of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477 (2010).

86. Although "causality" is generally understood as just an etiological phenomenon, rich histories of thought spanning from classical antiquity to the postmodern era have described "causation" in other ways. For example, Aristotle classically suggested that causation is all-at-once an etiological, teleological, formal, and material phenomenon. *See* ARISTOTLE, PHYSICS, bk. II (Jonathan Barnes ed., R. P. Hardie & R. K. Gaye, trans., Princeton Univ. Press ed. 1984) (c. 350 B.C.E.). This Author hopes for law to embrace more than just etiological traditions. While etiological theories of causation are certainly useful, other

Moreover, causal theories of attribution take several forms—most commonly, the forms of but-for causation and proximate causation.[87] Commentators rightly note that courts have failed to clarify this part of its standing doctrine.[88] Some argue that courts should embrace the theory of proximate causation as the core of the fairly traceable analysis.[89] Environmentally-conscious plaintiffs particularly endorse this formulation,[90] due to the exceedingly difficult nature of proving that a particular occurrence operated as a "but-for cause" of an identified environmental phenomenon.[91] After all, alleged environmental harms tend to be rooted in the science of ecology, a field that contemplates the stochastic interrelatedness of seemingly discrete phenomena.[92]

In addition to ambiguities regarding *Lujan*'s prima facie elements, weighty questions exist about how the Supreme Court's standing doctrine squares with structural protections of the Constitution. Generally, these questions ask—how much further may the Supreme Court limit access to federal courts without improperly abdicating the judicial power or interfering with the other branches' constitutional prerogatives to operate within the context of tripartite government?

One subset of questions arises from the fact that courts and commentators have been mostly silent on how Article III standing

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theories of causation might help us to grapple with different realities. One should choose the best tool for every job.

87. *See* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 351 (1928).

88. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUMBIA L. REV. 1432, 1464 (2024) ("After *Linda R.S.*, *EKWRO*, and *Allen v. Wright*, the precise nature of the causation requirement is quite obscure.").

89. *See* Meier, *supra* note 82, at 1243.

90. *See, e.g.*, Blake Welborn, *The Energy Capital of the World and Environmental Justice: Citizen Suits in Houston*, 53 TEX. ENV'T L. J. 195 (2023) (arguing that the "but-for" causation test is inappropriate in the context of citizen suits alleging environmental harms).

91. For a thoughtful exploration of how basic legal theories struggle to conceptualize problems that are rooted in our relationship with the environment, see MARIAN CHERTOW & DANIEL ESTY, THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY (1997).

92. William A. Garton, *Ecology and the Police Power*, 16 S.D. L. REV. 261, 261–62 (1971) ("The essence of ecology is the interrelatedness of all life on the planet.").

doctrine might apply to a range of government plaintiffs.[93] One commentator has even proposed the novel argument that Article III standing might bar federal prosecutors from bringing charges against criminal defendants for so-called "victimless crimes."[94] How this theory interacts with the Supreme Court's (perhaps abandoned) precedent that plaintiff-states have "special solicitude" remains to be seen.[95]

Another subset of questions concerns whether the Constitution's structure might limit the Supreme Court's power to deny plaintiffs access to the federal judiciary. Commentators are right to point out the irony that standing doctrine interferes with Congress's ability to set federal policy,[96] notwithstanding the fact that standing doctrine is intended to prevent such judicial interference.[97] Part II of this Note applies current standing doctrine to CERCLA § 107(a) private rights of action. In doing so, it details one such interference.

II. ANALYSIS

Few cases have applied the Supreme Court's current standing doctrine to CERCLA § 107(a) cost recovery actions. The dearth of cases may be because only an estimated sixty private cost recovery actions are filed each year in the United States,[98] or because *TransUnion*'s ruling has only been available for three years at the time of this Note's writing. Without *TransUnion*'s clarifications, potential defendants might have assumed that a private plaintiff's

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93. Ryan H. Nelson, *Article III Standing in Federal Prosecution of "Victimless Crimes"*, 93 FORDHAM L. REV. 1, 2–3 (2024).

94. *See id.* at 9–10 (The Courts' Article III standing jurisprudence "seems to refute the federal government's presumption that a defendant's violation of a criminal statute— notwithstanding the absence of actual harm to the people or their property or the real risk thereof—ipso facto gives federal courts subject matter jurisdiction over the resulting prosecution.").

95. *See* Massachusetts v. EPA, 549 U.S. 497, 520 (2007); *but see Article III - Standing - Special Solicitude Doctrine - Affordable Care Act* - California v. Texas, 135 HARV. L. REV. 343 (2021) (commenting on the uncertain status of the special solicitude doctrine).

96. Note, *Standing in the Way: The Courts' Escalating Interference in Federal Policy Making*, 136 HARV. L. REV. 1222, 1229 (2023).

97. *See* Scalia, *supra* note 50, at 882.

98. *See* Gabison, *supra* note 41, at 192.

standing was a foregone conclusion. This assumption would have been understandable prior to *TransUnion* since the Supreme Court had clearly stated that PRPs possess a private right of action to bring cost recovery claims.[99] After all, prior to *TransUnion*, it was not fully apparent that an injury in law does not suffice to show an injury in fact. For that reason, prior to *TransUnion*, courts might have conflated the private plaintiff's right of action with its Article III standing.[100]

Whatever explains the lack of attention to Article III standing in the CERCLA context, the sections below discuss how the few courts that have addressed the issue employed erroneous and highly strained forms of analysis.

A. Injury in Fact

As to the first *prima facie* element of standing, existing court analysis suffers from two general problems. First, courts applying the standing doctrine to CERCLA § 107(a) private cost recovery actions misidentify the nature of the plaintiff's alleged harm (i.e., the incurrence of costs) and improperly consider matters outside the scope of this harm. Second, even excusing this impropriety, courts have been too quick to confirm that these alleged harms are concrete, particularized, and actual or imminent. The following sections detail these missteps.

1. Identifying the Injury

One misstep that courts take is misidentifying the plaintiff's injury. By definition, CERCLA § 107(a)'s private right of action should only take stock of "necessary costs of response" to analyze the plaintiff's injury.[101] It is for this reason that courts[102] and

99. United States v. Atl. Rsch. Corp., 551 U.S. 128, 137–39 (2007).

100. *See, e.g.*, Wilson Rd. Dev. Corp. v. Fronabarger Concreters, Inc., 971 F. Supp. 2d 896, 917 (2013) ("[Plaintiff] did incur costs within the meaning of CERCLA, and therefore has standing to pursue claims under CERCLA."); Lake Elmo v. 3M Co., 237 F. Supp. 3d 877, 884 (D. Minn. 2017) ("A plaintiff who has incurred response costs covered under CERCLA has suffered a sufficient injury to meet the minimum Article III threshold for an injury in fact.").

101. 42 U.S.C. § 9607(a)(4)(B).

commentators[103] alike characterize CERCLA § 107(a)(4)(B) as providing a "cost recovery action." Indeed, courts have ruled that a plaintiff may not recover for toxic tort injuries,[104] for environmental resource injuries,[105] nor to recover attorney's fees pursuant to this right of action.[106]

The scope of injury recognized by CERCLA's private cost recovery action is significant to the Article III standing analysis because a plaintiff must prove its standing separately for, and in the specific context of, "each form of relief sought."[107] It would be inexplicable for the court—for standing purposes alone—to weigh injuries that are not cognizable under the law that supplies the plaintiff's cause of action. To do so would subvert Congress's intent regarding what the cause of action is designed to address, an inherent limitation on the judiciary's power to effectuate claims.[108] Some might counter by citing Justice Scalia's often-quoted language that "the Article III requirement of remediable injury in fact . . . has nothing to do with the text of the statue relied upon,"[109] but this

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102. E.g., Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 169 (2004) ("After CERCLA's passage, litigation also ensued over the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs.").

103. *See, e.g.*, POS, *supra* note 38, at 6 ("A private cost recovery action under section 107(a) of CERCLA consists of six prima facie elements.").

104. E.g., Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1248 (M.D. Pa. 1990) ("[C]ourts have consistently held that Congress did not intend CERCLA to be utilized as a means to recover "economic loss" for civil damages that a private party may seek as part of a toxic tort action.").

105. E.g., Sayreville v. Union Carbide Corp., 923 F. Supp. 671, 680 (D.N.J. 1996) ("Only the Federal government or an authorized representative of a state has standing to bring an action for natural resource damages recovery under section 107(a)(4)(C).").

106. E.g., Key Tronic Corp. v. United States, 511 U.S. 809, 818 (1994) ("To conclude that a provision that only impliedly authorizes suit nonetheless provides for attorney's fees . . . would be unusual if not unprecedented. Indeed, none of our cases has authorized fee awards to prevailing parties in such circumstances.").

107. *See* Friends of Earth v. Laidlaw Env't Servs., 528 U.S. 167, 185 (2000).

108. TransUnion LLC v. Ramirez, 594 U.S. 413, 427 (2021) ("Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise legal oversight of the Legislative and Executive Branches, or of private entities.").

109. *See* Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 97 (1998).

argument is misguided. Justice Scalia's statement only foreshadowed the Court's later position that positive law is insufficient to elevate a plaintiff's identified injury to the status of a true "injury in fact."[110] In other words, the proper analysis must begin by identifying the legally cognizable injury that the plaintiff alleges, and only thereafter can one assess whether the identified injury is sufficiently concrete, particularized, and actual or imminent.[111] Importantly, no authority invites courts to consider phenomena antecedent to the plaintiff's identified injury. For example, it would be exceedingly odd for courts to characterize the slickness of a floor as the "injury" in a slip in fall case.[112] Injury consists only of physical or emotional harm suffered by the fallen person.[113]

Yet courts commit this exact error in the CERCLA context. For example, in *Yakama Nation v. Airgas USA*, the court found that a private plaintiff had standing to bring a cost recovery action, reasoning that the adverse environmental conditions that preceded its injury had harmed the plaintiff's ability to enjoy treaty rights related to natural resources.[114] Similarly, in *Lake Elmo v. 3M Co.*, the Court considered contamination of the plaintiff's water to constitute injury in plaintiff's cost recovery action.[115] But "injury" in the CERCLA context strictly refers to response costs, not the environmental conditions on which they are based.[116] By contrast, *Yakama Nation v. City of Yakima* comes closer to exhibiting the proper focus—noting that when the plaintiff incurred costs responding to environmental contamination, this "deprive[d] it of its ability to use those funds

110. *See TransUnion*, 594 U.S. at 427.

111. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992).

112. Whether a defendant breached its duty and whether injury occurred are of course distinct inquiries. *See, e.g.*, Est. Mikulski v. Centerior Energy Corp., 133 N.E. 3d 899, 918 (Ohio Ct. App. 2019) ("Foremost, the elements of breach of fiduciary duty show that the breach of the duty cannot constitute the injury itself; the breach of duty and injury are two separate elements.").

113. *See generally*, RESTATEMENT (SECOND) OF TORTS § 7 (AM. LAW INST., 1965).

114. Confederated Tribes & Bands of the Yakama Nation v. Airgas USA LLC (*Yakama Nation v. Airgas USA*), 435 F. Supp. 3d. 1103, 1123–25 (D. Or. 2019).

115. *See* Lake Elmo v. 3M Co., 237 F. Supp. 3d 877, 881 (D. Minn. 2017).

116. *See* Nagle, *supra* note 27, at 1514.

elsewhere."[117] However, the court mistakenly added that environmental contamination's interference with the plaintiff's treaty rights and cultural artifacts at the contaminated site also weighed in favor of the plaintiff's injury in fact.[118] Since response costs comprise the relevant injury, these latter factors should not weigh on the injury in fact analysis unless they follow from the plaintiff's diminished funds.

2. Assessing the Injury

Even assuming that preconditions to a plaintiff's injury are relevant when assessing the *de facto* quality of that injury—as the above courts erroneously do—courts might still find that cost-recovery plaintiffs fail to establish injury in fact. For example, courts might still distinguish cleanup costs from "compliance costs."[119] Additionally, courts might still find that environmental harms prompting cleanup were not sufficiently "imminent" to constitute an injury in fact.[120] Either of these observations should lead the court to find against the plaintiff.

First, cleanup costs are not "compliance costs," which courts rightly note are a paradigmatic category of injury in fact. But courts have been too quick to find that cleanup costs qualify and have failed to reconcile important differences between the two. For example, whereas government regulation necessarily proscribes compliance costs, plaintiffs bringing CERCLA cost recovery actions take on

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117. Confederated Tribes & Bands of the Yakama Nation v. City of Yakima (*Yakama Nation v. City of Yakima*), No. 1:20-CV-03156-SAB, 2022 U.S. Dist. LEXIS 101585, at *12 (E.D. Wash. Mar. 7, 2022).

118. *See id.*

119. Courts have described "compliance costs" as a clear-cut example of injury in fact, but these courts have done so in the context of pre-enforcement actions. *See, e.g.*, Louisiana v. Equal Emp. Opportunity Comm'n, 705 F. Supp. 3d 643, 652-53 (W.D. La. 2024) ("For Article III standing purposes, such compliance costs are a classic 'pocketbook injury' redressable through a pre-enforcement APA rule challenge.").

120. Courts have equivocated as to when harm is "imminent." *Compare* Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) ("A threatened injury must be 'certainly impending' to constitute injury in fact") *with Geertson Seed Farms*, 561 U.S. at 154 (finding that plaintiff established it suffered an injury in fact by showing that there was a "substantial risk" that its alleged harm would materialize).

cleanup costs voluntarily.[121] Indeed, the Supreme Court clearly stated in *Atlantic Research* that a plaintiff is prohibited from bringing a cost recovery action if the government mandates cleanup.[122]

One might counter that CERCLA private plaintiffs must "comply" with the EPA's National Contingency Plan, which might justify characterizing cleanup costs as compliance costs.[123] However, that argument ignores the Supreme Court's substantive concern that "an enterprising plaintiff would be able to secure a lower standard for Article III standing" by their affirmative and voluntary actions.[124] CERCLA encourages potentially responsible parties to take such affirmative and voluntary actions, both by participating in the design of the cleanup plan, and by footing the bill.[125] Also, given the significant involvement of private plaintiffs in the EPA's formulation of a cleanup plan,[126] private plaintiffs might pre-dictate the amount of cleanup costs they will incur. In other words, CERCLA *authorizes* private plaintiffs to incur cleanup costs, whereas other laws *obligate* private plaintiffs to do so.[127]

Second, environmental damages might not be sufficiently imminent to satisfy the injury in fact requirement of Article III standing. CERCLA only requires that the *release* of a qualifying hazardous substance be imminent,[128] not that subsequent environmental harms are imminent. So, even if a court finds that a release is imminent, that court must still find that concrete and

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121. *See* Appleton Papers Inc. v. George A. Whiting Paper Co., 572 F. Supp. 2d 1034, 1041–42 (E.D. Wis. 2008) (interpreting CERCLA's use of the term "voluntary" to merely delineate between cleanup costs incurred in response to government action and cleanup costs incurred in the absence of government action).

122. United States v. Atl. Rsch. Corp., 551 U.S. 128, 139 (2007) ("[B]y reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a). As a result, though eligible to seek contribution under § 113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under § 107(a).").

123. *See supra* Section I.A.1.

124. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416 (2013).

125. *See* JAN PAUL ACTON, *supra* note 12, at 17.

126. *See supra* Sections I.A.1, I.A.3.

127. *See supra* note 119 and accompanying text.

128. *See* 42 U.S.C. § 9607(a)(4).

particularized harm accompanying the release is imminent.[129] The Court's analysis in *TransUnion* illustrates this methodology. In that case, the Supreme Court found that the plaintiff class members failed to satisfy the injury in fact requirement by showing that the defendant credit reporting agency had placed false and stigmatic statements in the plaintiff class members' credit reports.[130] The Court clarified that until harm to plaintiff class members materialized (i.e., others accessed the false and stigmatic information in their credit reports), no injury in fact has occurred.[131] Similarly, in the CERCLA context, the existence of hazardous substances in a geographic site may or may not materialize in the form of injury to health, assets, or property value.[132] For purposes of establishing CERCLA liability, the plaintiff need not make this showing since Congress recognized that such harms would raise difficult questions of proof.[133] But for Article III standing purposes, the plaintiff must show that such harms are actual or imminent.

B. Traceability

Another misstep of the courts is giving short shrift to defendants' arguments that cleanup costs are not fairly traceable to the defendant.

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129. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

130. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 439 (2021).

131. *See id.*

132. *See, e.g.*, *Cleanup Activities: Love Canal, Niagara Falls, NY*, EPA, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0201290 (last accessed Mar. 30, 2025) (from 1942 to 1953, the Hooker Electrochemical Company disposed of 21,000 tons of hazardous chemicals in a 16-acre landfill site, which reportedly caused extensive damage by leaking into groundwater, creeks, and homes).

133. S. Rep. No. 96–848, at 108 (1980) ("This bill represents not merely an attempt to grapple with the broad health and environmental concerns raised by chemical poisons, but also an attempt to responsibly address the unique problems raised by proof of chemically caused disease. Numerous commentators have recognized the problems which arise in the context of proving causation when the injury is a disease."). For a detailed compilation of the legislative history evidencing Congress's policy considerations in the CERCLA context, see HELEN COHN NEEDHAM & MARK MENEFEE, SUPERFUND: A LEGISLATIVE HISTORY: THE EVOLUTION OF SELECTED SECTIONS OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT 307 (1983).

First, cleanup costs constitute "self-inflicted" harms, notwithstanding the superficial analysis of courts that have taken up the issue. In *Clapper*, the Supreme Court reasoned that plaintiff-businesses failed to satisfy the traceability requirement by alleging that possible government action motivated plaintiffs to incur security costs.[134] In that case, the Supreme Court reasoned that plaintiffs' security costs were self-inflicted because they were motivated by fear of uncertain future harm, not any affirmative obligation to incur such costs.[135] In the CERCLA context, the *Yakama Nation v. City of Yakima* court attempted to distinguish the above precedent by simply stating that the chain of causation in *Clapper* was more attenuated than the chain of causation that underlies CERCLA private cost recovery actions.[136] But that conclusion is not obvious. Multiple parties often pollute sites on the National Priority List,[137] and pollutants from different sources may mix and exhibit synergistic effects.[138] Moreover, CERCLA might hold a defendant liable without proof that the defendant's specific pollutants are present at the site.[139] As to this last possibility, the Supreme Court explained that a potentially responsible party may be held liable so long as the

134. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 418 (2013).

135. *See id.* at 416–18.

136. *See Yakama Nation v. City of Yakima*, 2022 U.S. Dist. LEXIS 101585, at *14.

137. As an extreme example, in the case of *U.S. Oil Recovery Site Potentially Responsible Parties Grp. v. R.R. Comm'n*, a group of over 100 potentially responsible parties existed, which sued nearly 1,200 parties that the group believed to be responsible. U.S. Oil Recovery Site Potentially Responsible Parties Grp. v. R.R. Comm'n, 898 F.3d 497, 500 (2018).

138. *See* Julie L. Mendel, *CERCLA Section 107: An Examination of Causation*, 40 WASH. U. J. URB. & CONTEMP. L. 83, 95 (1991) ("CERCLA 'takes into account the synergistic potential of improperly managed hazardous substances and essentially presumes a contributory 'causal' relationship between each of the hazardous substances disposed of at a site and the hazardous conditions existing at the site.'") (citing South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 992 n.5 (D.S.C. 1986), *aff'd in part and vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988)).

139. United States v. Wade, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983) (CERCLA "could be read merely to require that hazardous substances like those found in a defendant's waste must be present at the site. The legislative history provides no enlightenment on this point. I believe that the less stringent requirement was the one intended by Congress.").

plaintiff shows that similar substances to the one contributed by the defendant are found at the contamination site.[140] In light of these complex unknowns, it is unclear why the court in *Yakama Nation v. City of Yakima* concluded that the *Clapper* situation entailed a more attenuated chain of causation. At least in *Clapper*, the facts definitively identified a specific and single defendant.

Other courts have dodged the traceability analysis entirely as well. For example, in *Spokane v. Monsanto*, when the court reached the traceability prong of the analysis, it declined to apply extant standing doctrine because the claimant had brought its CERCLA § 107(a) cost recovery claim as a defendant (i.e., bringing a counterclaim) rather than as a plaintiff.[141] First, the court's differential treatment of counterclaims seems at tension with the Supreme Court's insistence that Article III is an "irreducible constitutional minimum" and that its prima facie elements are "not merely pleading requirements."[142] Procedural murkiness notwithstanding, why would the court bother to apply Article III standing doctrine in the first place if it doubts as a general matter whether Article III standing doctrine governs counterclaims? The opinion reads as though the Court simply wished to avoid the strange outcome—that post-*TransUnion*, CERCLA cost recovery actions might not be heard by federal courts.

By contrast, the court in *Yakama Nation v. City of Yakima* displayed no such apprehension. In that case, the court ruled that the plaintiff failed "to demonstrate that its injury is casually [sic] connected to" the defendant's conduct.[143] That being said, the court did not explain what test it employed to assess the second prima facie element of standing, instead offering mostly conclusory assertions that the plaintiff's injury was neither "causally connected to," nor "fairly traceable to," nor did it "ha[ve] a nexus to," the defendant's conduct.[144]

This case raises the concern that hereafter, CERCLA § 107(a) plaintiffs will mostly fail to establish Article III standing at the

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140. *Id*.

141. Spokane v. Monsanto Co., 237 F. Supp. 3d 1086, 1091–92 (E.D. Wash. 2017).

142. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

143. *Yakama Nation v. City of Yakima*, 2022 U.S. Dist. LEXIS 101585, at *16.

144. *Id.*

summary judgment stage.[145] Of course, parties might still seek to settle before the ultimate disposition of the case. The parties in *Yakama Nation v. City of Yakima* did so shortly after the above ruling, recovering $300,000 to end the decades-long dispute.[146] Although the plaintiffs had incurred $134,000 in cleanup costs prior to that point,[147] additional funding might have been needed to fully remediate the site. More generally, one wonders to what extent the court's decision might deleverage cost recovery claimants.

C. Redressability

As to the third prima facie element of standing, courts' analyses are straightforward and sound. As the court in *Spokane v. Monsanto* explained, "[t]here is little question that [the claimant's] alleged injury would be redressed if the Court granted . . . damages and restitution for past and future response costs."[148] The court's phrasing again emphasizes that, in the CERCLA context, the proper focus of *de facto* injury is on cleanup costs, not environmental harms.[149]

III. REFLECTIONS

The foregoing material illustrates that Article III standing doctrine does not apply neatly to private plaintiffs with CERCLA § 107(a) cost recovery claims, and as a result—private plaintiffs might lose access to the courts and to the economic leverage that this entails. In the CERCLA context, doctrinal ambiguities related to injury-in-fact and traceability appear in full force, misleading courts to commit significant errors and to bend logic to its breaking point. But how do

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145. At the summary judgment stage, a plaintiff may not rely on mere allegations but must present evidence of the material facts that allegedly support each element of its Article III standing. *See Lujan*, 504 U.S. at 561.

146. Joyce Hanson, *Yakama Nation's $300k Superfund Settlement Wins Approval, Yakama Nation Fisheries* (Dec. 15, 2022), https://yakamafish-nsn.gov/news/yakama-nations-300k-superfund-settlement-wins-approval.

147. *Id.*

148. Spokane v. Monsanto Co., 237 F. Supp. 3d 1086, 1092 (E.D. Wash. 2017).

149. *Id.* at 1091 ("Monsanto's alleged injury does not arise from an interest in the Spokane River. Rather, Monsanto alleges that it has suffered a direct economic injury because it has 'paid and will continue to pay necessary response costs consistent with the National Contingency Plan . . . .'").

these results square with the purpose of Article III standing doctrine, and what doctrinal clarifications might better align case outcomes with said purpose?

A. Does Article III Standing Doctrine Further Its Goals in the CERCLA Context?

Current standing doctrine significantly interferes with the executive and legislative branches and deprives adversarial proceedings of some of the most knowledgeable and interested parties' cooperation. Simply put, these results do not further any readily identifiable interests or policy goal.

As to the separation of powers concern, Article III standing doctrine does not mitigate any risk of excessive or improper interference in this context. For one, CERCLA private cost recovery actions never threatened to encroach on executive or legislative powers. Unlike the plaintiffs in *Lujan* who challenged the Secretary of Interior's promulgation of a broadly applicable rule,[150] CERCLA private plaintiffs do not challenge any administrative plans. Instead, CERCLA private plaintiffs effectuate the EPA's administrative plan, by helping to formulate and implement cleanup operations under the National Contingency Plan.[151] Congress specifically defined this as an objective in its 1986 amendments to CERCLA.[152]

This cooperative framework surrounding potentially responsible parties and the EPA exists for a good reason. As empirical studies suggest, CERCLA's administration suffers from high overhead costs, in part due to contentious relationships between interested parties.[153] By recruiting potentially responsible parties, the EPA can reduce transaction costs, eliminate the need for private parties to conduct redundant work, and also avail itself of private parties' expertise.[154] In addition, there are much fewer possible claimants under CERCLA § 107(a)(4)(B) compared to the tidal wave of claimants under other environmental statutes that threaten to flood the courts.[155] Indeed,

150. *See Lujan*, 504 U.S. at 558–60.
151. *See supra* Sections I.A.1., I.A.3.
152. *See* JAN PAUL ACTON, *supra* note 12, at 17.
153. *See supra* Sections I.A.1, I.A.3.
154. *See id.*
155. *See* Gabison, *supra* note 41, at 192.

CERCLA's effect is a far cry from the reality that the Supreme Court disapproved of in *United States v. SCRAP* when it warned that, pursuant to the cause of action in that case, "all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm . . . ."[156]

As to the pragmatic concern that plaintiffs should be fit candidates for adversarial proceedings, what better party to drive the investigation, coordination, and action necessary to conduct a cleanup than the owners and operators of the contaminated site? While some might argue in favor of excluding PRPs from the driver's seat to prevent abuse, that argument is unavailing. As the Supreme Court explained in *Atlantic Research*, private cost recovery actions do not expose defendants to unfair treatment or confer preferential treatment to plaintiffs, in light of the fact that courts will still allocate costs according to principles of equitable apportionment.[157] Also, as explained above, potentially responsible parties that might bring private cost recovery actions are, by definition, intimately associated with the facts of a given case.[158] Lastly, CERCLA does not warrant *TransUnion*'s rebuke—that it is improper for Congress to deputize private plaintiffs as champions of the public interests.[159] Rather, in the CERCLA context, the executive branch deputizes the private plaintiff vis-a-vis the EPA's National Contingency Plan.[160] In other words, the actual practice of CERCLA enforcement comports with the notion that the executive branch has the prerogative to set enforcement priorities.

B. What Doctrinal Clarifications Would Further Article III Standing Goals?

First, courts, commentators, and practitioners should attempt to clarify *Spokeo*'s suggestion that Congressional enactments may still be relevant to the Courts' Article III standing analysis. As discussed

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156. United States v. Students Challenging Regul. Agency Procs, 412 U.S. 669, 687 (1973).

157. United States v. Atl. Rsch. Corp., 551 U.S. 128, 140 (2007) ("Resolution of a §113(f) counter-claim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the §107(a) action.").

158. *See* 42 U.S.C. §§ 9607(a)(1)–(4).

159. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 426–27 (2021).

160. *See supra* Sections I.A.1., I.A.3.

above,[161] it is unclear what the *Spokeo* Court intended when it stated that Congressional enactments can still "give rise" to standing without serving as the actual basis for it.[162] This Author suggests at least one specific attribute of Congressional enactments that should be relevant to the courts' Article III standing analysis: the extent to which the enactment empowers the executive branch to regulate the private cause of action. As in the CERCLA context, the executive branch's high degree of control over the private cause of action promotes useful cooperation and might screen for only the most appropriate plaintiffs to participate in an adversarial proceeding.

Second, courts, commentators, and practitioners should resolve whether a plaintiff's chosen cause of action in any way prefigures the range of *de facto* injuries that a plaintiff might attempt to show for purposes of establishing Article III standing. Namely, standing doctrine should provide a standard as to what categories of facts properly weigh on the adequacy of a potential *de facto* injury. In the CERCLA context, for example, courts have offered varying analyses on whether alleged environmental harms are relevant to the inquiry of whether the injury of cleanup costs is sufficiently concrete, particularized, and actual or imminent.[163] As a preliminary matter, this Author suggests that the cause of action alone identifies what injury a plaintiff may allege for standing purposes. For example, CERCLA § 107(a)(4)(B) should require plaintiffs to identify cleanup costs as their alleged *de facto* injury. In addition, this author suggests that conditions antecedent to said injury are irrelevant to assessing its *de facto* character. In the CERCLA context, this would mean that evidence of any antecedent environmental harms that prompted cleanup costs are irrelevant to whether those cleanup costs constitute an injury in fact. This principled approach would decrease the likelihood that plaintiffs might mislead the court with related but ultimately irrelevant information.

Third and lastly, courts, commentators, and practitioners should develop more workable standards to assess the likelihood of an event

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161. *See supra* Section I.B.3.

162. Spokeo, Inc. v. Robins, 578 U.S. 330, 330 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.").

163. *See supra* Section I.B.3.

occurring for purposes of "imminence" analysis under the *de facto* injury requirement, and for purposes of "causation" analysis under the traceability requirement. Theories underlying these notions remain largely unexamined in the standing context,[164] and this allows courts to mask unprincipled and potentially value-laden judgments behind their equivocations.[165] As one suggestion, courts would do well to delineate between different categories of uncertain phenomena. For example, to say that a result is "uncertain" because a person has not yet decided to bring about that result is qualitatively different from saying that a result is "uncertain" because a complex environmental phenomenon may or may not bring about that result. After all, the law can only influence the uncertain decision maker's chosen result, not the environmental phenomenon's eventuality.

CONCLUSION

Applying Article III standing doctrine in the CERCLA cost recovery context reveals important ambiguities in current doctrine and suggests its misalignment with Article III standing's purported goals. The few courts that have considered this issue stumbled through Article III's injury in fact and traceability analysis. Doing so, these courts drifted further in the wrong direction, thereby depriving an important environmental regime of suitable plaintiffs, and without conferring any benefit related to separation of powers concerns. Thankfully, each doctrinal stumble draws attention to Article III standing doctrine's ambiguities and invites further clarification. With respect to the injury in fact requirement, this Note suggests a more methodical approach to identify and then assess a plaintiff's alleged injury. Concerning the traceability requirement, this Note recommends that courts should delineate between different categories of uncertain phenomena that might weigh on the inquiry. These doctrinal adjustments promise to align case outcomes with our constitutional goals. In the environmental context, this translates to a more robust remediation program and a more cooperative exchange between regulators and those regulated. All the while, this approach

164. *But see* Meier, *supra* note 82.

165. *See* Nichol, *supra* note 73, at 658.

gives deference to the underlying purposes of Article III standing doctrine.