# Justice Ginsburg and the Injury in Fact Element of Standing

## INTRODUCTION

On August 3, 1993, the United States Senate confirmed the appointment of Judge Ruth Bader Ginsburg to the Supreme Court of the United States.[1] During her tenure on the Court, Justice Ginsburg will influence many areas of the law. In particular, however, Justice Ginsburg can certainly sway the Court with respect to standing.[2]

In two recent cases, *Lujan v. National Wildlife Federation*[3] and *Lujan v. Defenders of Wildlife*[4], the Supreme Court strictly construed the "injury in fact" element of the standing test, thus precluding actions seeking to redress environmental harm from reaching trial on the merits.[5] It is possible that this result is due to the inability of the Supreme Court to fit the kinds of injuries often pleaded by

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1 *Senate Confirms Ginsburg by 96-to-3 Vote*, N.Y. TIMES, Aug. 4, 1993, at A1. Under the Constitution of the United States, once the President nominates a person to the position of Supreme Court Justice, the Senate must give its consent to the nomination. U.S. CONST., art. II, § 2, cl. 2.

2 *See infra* notes 115-216 and accompanying text (discussing the Court's current stance on the standing issue in the environmental context). Federal standing doctrine is a procedural area of the law that derives from the United States Constitution's Article III requirement that the courts of the United States only adjudicate cases or controversies. *See* U.S. CONST. art. III, § 2, cl. 1. ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies to which the United States shall be a Party . . . ."). Standing is discussed at length in Section II of this Comment. For an overview of the standing requirements, see Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 679-81 (1973) (citations omitted). For the basis of the current standing requirements, see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (asserting that the standing requirement "assures an actual factual setting in which the litigant asserts a claim of injury in fact"); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261 (1977) ("[P]laintiff must show that he himself is injured . . . ."); Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (holding that the destruction of the natural beauty of land and other aesthetic elements can satisfy the injury in fact requirement); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (noting that a plaintiff must show that he has an injury in fact within the "zone of interests" protected by the relevant statute); Baker v. Carr, 369 U.S. 186, 204 (1962) (stating that the purpose of standing is to ensure that the litigants are truly adversarial).

3 497 U.S. 871 (1990).

4 112 S. Ct. 2130 (1992).

5 *Id.* at 2137, 2146; *National Wildlife Fed'n*, 497 U.S. at 894.

environmental public interest groups into the traditional standing test.[6] Nevertheless, the divided nature of the Court in both *National Wildlife Federation* and *Defenders of Wildlife* suggest that Justice Ginsburg can shift the majority of the Court to embrace less stringent standing guidelines.[7] Fortunately, Justice Ginsburg's opinions on the D.C. Circuit point to this result.[8]

The Supreme Court's reluctance to hear actions brought by public interest groups may stem from the nature of the injuries that those groups claim to suffer.[9] For example, while the plant and animal species of our planet are disappearing due to the loss of the natural habitats that sustain them,[10] this is not a traditional "inquiry" that our legal system will redress. Nevertheless, due to greater media coverage and increasingly compelling scientific evidence, other problems such as ozone depletion, global warming, and rain forest destruction have recently moved to the center of the world stage.[11]

The United States Constitution relegates the task of solving problems such as environmental degradation to the executive and legislative branches of government.[12] These two branches are in a

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6 *See infra* notes 53-69 and accompanying text (discussing the traditional test of standing).

7 *See infra* notes 232-259 and accompanying text (discussing Justice Ginsburg's apparent position on the doctrine of standing).

8 *See infra* notes 232-259 and accompanying text (discussing Justice Ginsburg's anticipated impact upon environmental standing).

9 *See, e.g., Defenders of Wildlife*, 112 S. Ct. at 2137 (citation omitted) (observing that the plaintiff claimed as its injury an increase in the extinction rate of endangred species); *National Wildlife Fed'n*, 497 U.S. at 894, 896 (noting that the National Wildlife Federation asserted that its members' "recreational use and aesthetic enjoyment" of the land at issue was at risk).

10 *See* Edward O. Wilson, *Threats to Biodiversity*, 261 SCI. AM. 108, 111 (1989). Experts believe that nearly 40% of the world's species live in tropical rain forests. *See* Anne Batchelor, *The Preservation of Wildlife Habitat in Ecosystems: Towards a New Direction Under International Law to Prevent Species' Extinction*, 3 FLA. INT'L. L. J. 307, 309 n.9 (1988) (citing Robert C. Stowe, *United States Foreign Policy and the Conservation of Natural Resources: The Case of Tropical Deforestation*, 27 NAT. RESOURCES J. 55, 57 (1987)). Plants and animals are not disappearing solely because of natural selection, or "survival of the fittest," but rather are disappearing as a result of the actions of humankind. Lee P. Breckenridge, *Protection of Biological and Cultural Diversity: Emerging Recognition of Local Community Rights in Ecosystems Under International Environmental Law*, 59 TENN L. REV. 735, 741 (1992). The primary factors responsible for environmental degradation are pollution, modern forestry practices, industrial agriculture, habitat fragmentation and destruction, and the misuse of animal and plant species. *Id.* (citations omitted).

11 *See, e.g.*, Senator Al Gore, Address at Rio Earth Summit, *in* 59 TENN. L. REV. 645, 648 (1992) ("I believe that the central organizing principle in the post-Cold War world must become the task of saving the earth's environment.").

12 *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested

position to marshal the resources of the world's nations to face this issue and to potentially save our planet.[13] Unfortunately, they have not done so.[14] Part of the blame for this failure, however, rests with the Supreme Court.[15] Increasingly by tightening environmental standing requirements, the Court is permitting agency action that harms the environment to continue unchecked.[16]

This Comment examines the Court's difficulty with applying the injury in fact element of the standing test as construed in *Defenders of Wildlife* and *National Wildlife Federation* to large scale environmental injuries. The Court's current construction of this requirement is inappropriate in the environmental context.[17] Part

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in a Congress of the United States, which shall consist of a Senate and House of Representatives."); U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

13 *See* SENATOR AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 366 (1992) (theorizing that through greater individual awareness, education, political activity, and personal responsibility, we can begin to solve the environmental problems we face today).

14 John Balzar, *Northwest Is at War with Itself*, L.A. TIMES, Aug. 6, 1990 at A1 (quotation omitted) (lamenting that "'[w]e, the richest nation in the world, are going to tell the dirt poor people of Brazil and Indonesia and Zaire to be good environmentalists? Ha. We're showing them how. In Amazonia, ancient rain forests are falling 1% a year. We're cutting ours at 3% a year.'"). One author has deemed United States progress toward greater environmental quality "embarrassing." Barry Commoner, *Failure of the Environmental Effort*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10195, 10195 (June 1988). Professor Commoner described the improvement in the United States's environmental quality as "slight" in some cases and worse in others. *Id.* Further, the Professor claimed that the government's inability to solve the problem stems from the fact that legislation only deals with the effects of pollution, rather than the causes of pollution. *Id.* at 10196. Professor Commoner concluded that shifting emphasis from palliative measures to preventative measures is the only way to improve environmental quality. *Id.*

15 *See infra* notes 115-216 and accompanying text (discussing the limitations the Court has placed upon environmental plaintiffs under its position on the standing doctrine).

16 *See* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143 (1992) (asserting that a plaintiff, who raises a general grievance and seeks relief that benefits the plaintiff no more than it benefits the general public, fails to meet Article III's standing requirements); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990) (holding that the National Wildlife Federation did not demonstrate that its members were "'adversely affected or aggrieved' by government action" by simply averring that a single member used an unspecified portion of a large tract of land); *see also* Michael J. Shinn, Note, *Misusing Procedural Devices to Dismiss an Environmental Lawsuit:* Lujan v. National Wildlife Federation, 66 WASH. L. REV. 893, 893, 908 (1991) (demonstrating that the Supreme Court's holding in *National Wildlife Fed'n* ignores precedent and concluding that the result promotes undesirable policy goals because agencies can use the decision to selectively disregard laws and insulate their decisions from judicial review).

17 *See infra* notes 213-216 and accompanying text (criticizing the Court's decisions regarding standing where environmental plaintiff's are concerned).

Legislators have noted the importance of protecting the Earth's plants and animals and the habitats in which they live. *See, e.g.*, 119 CONG. REC. 30,162 (1973) (state-

I of this Comment explains the importance of large environmental ecosystems and the function of the citizen suit as a part of current congressional attempts to protect them. The role of the Supreme Court's construction of the injury in fact requirement in the government's failure to adequately protect the citizenry's environmental interests is scrutinized in Part II. Part III probes the future of environmental litigation before the Court, concentrating on the effect of Justice Ruth Bader Ginsburg's recent appointment to the Supreme Court. Finally, this Comment concludes that the judiciary's interpretation of the injury in fact element of standing must reflect scientific understanding with respect to the fundamental nature of our environment. The Court must assimilate this understanding into the injury in fact requirement to eliminate the procedural impediments that constrain judicial review of agency action in the environmental arena, and Justice Ginsberg should facilitate this result.

## I. THE CURRENT STATE OF ENVIRONMENTAL PROTECTION

Scientists define biological diversity, or biodiversity, as "the variety and variability among living organisms and the ecological complexes in which they occur."[18] Key to the survival of any species is the integrity of the habitat in which it exists.[19] History

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ment of Rep. Sullivan) ("[E]ndangered species of plants and animals possess genetic characteristics which cannot be replaced or artificially reproduced. . . . When we threaten endangered species, we tinker with our own futures. We run risks whose magnitude we understand dimly, if at all.")

Some scientists argue that endangered species must be preserved in order to maintain biological diversity and ecological value. Mark Sagoff, *On the Preservation of Species*, 7 COLUM. J. ENVTL. L. 33, 59 (1980). Biological diversity is essential because it contributes to the stability of ecological systems, maintains a balance in nature, and promotes the resiliency of ecosystems. *Id.* (citations omitted). Ecosystems with higher degrees of genetic variation are better equipped to deal with environmental stress. *Id.* (citation omitted). Further, diverse ecosystems and endangered species have intrinsic, aesthetic, and metaphysical worth. *Id.*

18 OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, COMBINED SUMMARIES: TECHNOLOGIES TO SUSTAIN TROPICAL FOREST RESOURCES AND BIOLOGICAL DIVERSITY 59 (1992). The term "biological resources" describes genes, wildlife, and ecosystems and their importance to humans. Breckenridge, *supra* note 10, at 740 (citation omitted). These resources provide medicine, food, and industrial products to humans. *Id.* Diversity of biological resources form the backbone of "environmental services." *Id.* For example, the trees found within forest ecosystems remove carbon dioxide from the atmosphere and produce oxygen, lowering the concentration of greenhouse gases. *Id.* (citations omitted).

19 128 CONG. REC. 26,189 (1982) (statement of Rep. Evans) ("[I]t is important to understand that the contribution of wild species to the welfare of mankind in agriculture, medicine, industry, and science have been of incalculable value. These contributions will continue only if we protect our storehouse of biological diversity. . . .

abounds with examples of human beings preserving natural habitats to promote the continued viability of the Earth's plant and animal species.[20] Unfortunately, the increased ability of humans to destroy the environment has created the necessity for larger scale solutions now that problems reach beyond the borders of any one city, state, country, or even continent.[21]

We humans must protect biodiversity because it is essential for our continued healthy existence.[22] Thus, the value of biodiversity is "incalculable."[23] Equally important in value are the healing characteristics apparent in species found in our rapidly disappearing rain forests and elsewhere in the natural world.[24] There is little

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[O]ur wild plants and animals are not only uplifting to the human spirit, but they are absolutely essential—as a practical matter—to our continued healthy existence.").

20 *See Exodus* 34:21 ("For six days you shall work, but on the seventh day you shall cease work . . . ."); *Exodus* 23:10-11 ("For six years you may sow your land and gather its produce; but in the seventh year you shall let it lie fallow and leave it alone. It shall provide food for . . . your people . . . what they laeve the wild animals may eat."); *Leviticus* 25:6-7 ("[W]hat the land itself produces . . . shall be food for you . . . [and] for your cattle and for the wild animals in your country."). In ancient times, the Hebrews obeyed the law of Sabbatical, contained within the Old Testament, which required that they rotate crops and leave farmland unsown every seventh year to allow the nutrients to replenish within the soil. *See Exodus* 23:10-11. More than 2000 years ago, a king of India set aside certain tracts of forest land to protect wildlife. LEE DURELL, STATE OF THE ARK 78 (1986). The Roman Emperor Hadrian sought to preserve the cedar forests of Lebanon, and European royalty in the Middle Ages placed large forests off limits to the general population *Id.*

21 *Id.* at 82.

22 Brief of Amicus Curiae American Institute of Biological Sciences in Support of Respondents at 6, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (No. 90-1424). The success of the human species can be attributed in part to its ability to make productive use of numerous other species. William M. Flevares, *Ecosystems, Economics, and Ethics: Protecting Biological Diversity at Home and Abroad*, 65 S. CAL. L. REV. 2039, 2042 (1992). The threat to biodiversity arises from the short-sighted use of those resources. *Id.* For example, the New York Times reported that a number of species of fish found off coastal waters, including swordfish, atlantic salmon, Pacific Ocean perch, mackerel, California halibut, shad, flounder, cod, and haddock, were all in danger of being depleted. *Fishing and Pollution Imperil Coastal Fish, Several Studies Find*, N.Y. TIMES, July 16, 1991, at C4. Scientists have attributed this depletion to both increased water pollution as well as to overfishing. *Id.* Furthermore, the experts noted that the effects upon the marine ecosystems from the depletion of fish at the top of the food chain could not be accurately assessed. *Id.*

23 Brief of Amicus Curiae American Institute of Biological Sciences in Support of Respondents at 8, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (No. 90-1424).

24 *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *supra* note 18, at 60. The Supreme Court has recognized the important contribution of certain plant species to medical science. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 178 (1978) (quotation omitted). In *Tennessee Valley Authority v. Hill*, a controversial case decided under the Endangered Species Act, the Supreme Court noted that oral contraceptives were developed from a chemical extraction from a common plant. *Id.* (quotation omitted).

reason to believe that scientists will not find the key to curing many of the ailments that continue to baffle the medical community in nature.[25] Additionally, most people enjoy fishing, swimming, sailing, hiking, and countless other activities that involve interaction with nature.[26] These activities have recreational and aesthetic values that only exist in undisturbed nature.[27] Thus, there are a myriad of justifications for treating the environment with intelligence.

Due to the vast scale of our planet's ecosystems, however, the responsibility to prevent the loss of biodiversity cannot be effectively placed in the hands of any individual person or even government, as ecosystems know no political boundaries.[28] It is not possible to fence off a small section of land and expect to effectively protect it from outside environmental influences.[29] As a result, the sheer enormity of the injury to both human and non-

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[25] Brief of Amicus Curiae American Institute of Biological Sciences in Support of Respondents at 8 n.9, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (No. 90-1424) (quotation and citations omitted).

[26] Flevares, *supra* note 22, at 2044.

[27] *See id.* at 2044-46 (citations omitted) (discussing the non-economic values of a healthy environment).

[28] Brief of Amici Curiae Ecotropica Foundation of Brazil, et. al. in Support of Respondents at 7, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (No. 90-1424) (quotation omitted). For example, one's neighbor's dandelions will probably spawn dandelions on one's own lawn, regardless of what kind of fence one builds.

Scholars often examine the problem of governmental responsibility for environmental protection through the lens of the public trust doctrine. *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (discussing the concept and use of the public trust doctrine).

[29] *See*, Comment, *Protecting National Parks from Developments Beyond Their Borders*, 132 U. PENN. L. REV. 1189, 1190-91 (1984). Federal case law supports the notion that the protection of one area of land requires the protection of the land surrounding it. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 538 (1976). In *Kleppe*, the Court embraced the proposition that to protect the resources of the federal park land in question, it was necessary to regulate the surrounding land. *Id.* at 538 (citation omitted).

The *Kleppe* Court upheld the constitutionality of the Wild Free-Roaming Horses and Burros Act. *Id.* at 546. That Act was passed to protect "all unbranded and unclaimed horses and burros on public lands of the United States" from "capture, branding, harassment, or death." *See* 16 U.S.C. §§ 1331, 1332 (1988).

The controversy in *Kleppe* arose after a local rancher contacted the New Mexico Livestock Board, complaining that several burros were interfering with his cattle. *Kleppe*, 426 U.S. at 532-33. Once the burros were captured and sold, the Secretary of the Interior, pursuant to the Act, sought to have the Livestock Board recover and return the burros. *Id.* at 533-34. In response, New Mexico brought suit, claiming that the Act was unconstitutional. *Id.* at 534 & n.4.

In a sweeping opinion, the Supreme Court held that the Property Clause of the Constitution empowers Congress to safeguard the environment. *Id.* at 546. The Property Clause of the Constitution states: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. CONST. art IV, § 3, cl. 2.

human interests that results from large scale damage to the environment, such as the loss of biodiversity, prevents the judicial branch from quantifying the problem in legal terms.[30]

The legislature has acted to safeguard our domestic and global environment.[31] Recognizing the urgency and importance of regulating the citizenry's interaction with the environment, Congress enacted the Clean Air Act,[32] Clean Water Act,[33] Comprehensive Environmental Response, Compensation, and Liability Act,[34] National Environmental Policy Act,[35] and Endangered Species Act.[36]

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30 *See supra* notes 22-29 and accompanying text (discussing the importance of a healthy environment and the difficulty of effectively addressing environmental problems).

31 *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1531(a)(4) (1988) (declaring Congress's intent to protect endangered species worldwide).

32 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1993) (Clean Air Act). The Clean Air Act establishes the general outline for federal control over and regulation of air pollution. *See* 42 U.S.C. § 7401 (1988 & Supp. IV 1993). The Act sets deadlines for the EPA to promulgate national ambient air quality standards to be implemented by the states, "national emission standards for hazardous air pollutants," and auto emissions standards. *See* 42 U.S.C. §§ 7409, 7412, 7521 (1988). The Act also authorizes citizen suits. 42 U.S.C. § 7604 (1988 & Supp. IV 1993).

33 Water Pollution Prevention and Control, 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1993) (Clean Water Act). The Clean Water Act bans the unpermitted discharge of pollutants, requires technology-based controls on discharges, and establishes a national permit program, the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. §§ 1311(a), 1311(b), 1342(a) (1988). The Act also authorizes citizen suits. 33 U.S.C. § 1365(a) (1988). Also, the statute seeks to make waters fishable and swimmable "wherever attainable." 33 U.S.C. § 1251 (a)(2) (1988).

34 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1993)) (CERCLA). CERCLA is essentially a comprehensive liability scheme rather than a regulatory scheme. *See* 42 U.S.C. § 9607 (1988). CERCLA established liability for the release of hazardous substances and created a "Superfund" to finance efforts to clean up such releases. 42 U.S.C. §§ 9607(a), 9611 (1988 & Supp. IV 1993).

The statute defined four classes of parties that are potentially liable for clean-up costs incurred in a CERCLA cleanup. 42 U.S.C. § 9607(a)(1)-(4) (1988). The four classes of parties that are potentially liable are: (1) current owners and operators of facilities where hazardous substances are released or threatened to be released; (2) owners and operators of facilities at the time substances were disposed; (3) persons who arranged for transportation, disposal, or treatment of such substances; and (4) persons who accepted such substances for transport, disposal, or treatment. *Id.* These parties are strictly liable for: (1) all costs of remedial action or removal incurred by the federal government consistent with the National Contingency Plan; (2) any other necessary costs of response incurred by any person consistent with the National Contingency Plan; (3) damages for injury to natural resources; and (4) costs of health assessments. *Id.*

35 42 U.S.C. §§ 4321-4370d (1988 & Supp. IV 1993) (NEPA). NEPA established broad national environmental policy goals. *See* 42 U.S.C. § 4331 (1988). Primarily, the Act required federal agencies to assess the environmental impact of contemplated actions. 42 U.S.C. § 4332 (1988). NEPA established "the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony,

These statutes are a product of a "remarkable burst of legislative activity" in the early 1970s.[37] The impetus for this "burst" is widely

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and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (1988). Section 4332(C) requires that all federal agencies

> [I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
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> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C)(i)-(v) (1988).

[36] 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1994) (ESA). ESA seeks to promote federal action that conserves species in danger of extinction and prohibits the taking of any such species by any person. 16 U.S.C. §§ 1531(b), 1538 (1988). ESA seeks preserve the species' "esthetic [sic], ecological, educational, historical, recreational and scientific value." 16 U.S.C. § 1531(a)(3) (1988). ESA protects species that are listed by the Secretary of Commerce or the Secretary of the Interior as either "endangered species" or "threatened species." 16 U.S.C. § 1533 (1988). Endangered species include "any species which is in danger of extinction throughout all or a significant portion of its range . . . ." 16 U.S.C. § 1532(6) (1988). Threatened species include "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (1988). Once a species is listed as endangered, the sale, import, export, and transport of that species are prohibited. 16 U.S.C. § 1538(a)(1)(A), (A)(1)(D) (1988).

The ESA requires federal agencies to consult with the Department of the Interior to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . ." Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1988). After consultation with an affected agency, the Secretary is required to issue a biological opinion of the effects the proposed agency action might have on listed endangered species, and propose an acceptable alternative plan if the intended action is found to jeopardize those species. 16 U.S.C. § 1536(b)(3) (1988).

[37] ROBERT V. PERCIVAL ET. AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 103 (1992). As Percival points out, however, environmental regulation has a long history, as well as strong common law roots in private and public nuisance law. *Id. See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1985) (setting forth the historical background of the American legal system); Joel F. Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974) (discussing the minimal effects of nuisance law upon industrialization during the period of the Industrial Revolution). For an example of an early environmental case decided under nuisance law, see Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 659, 667 (Tenn. 1904) (allowing a claim for monetary damages but refusing to close a copper smelter due to the odors emitted from it).

attributed to the federal government's increased interest in environmental protection that followed a series of disasters,[38] public demonstrations,[39] and books[40] that focused the public's attention and stirred politicians to action.[41]

Congress has sought the aid of the citizenry as private attorney generals to ensure compliance with enacted statutes.[42] To that end, most environmental statutes today employ the citizen suit as an enforcement mechanism.[43] Citizen suits are actions brought by citizens against governmental agencies and those who violate environmental statutes.[44] Generally, citizen suit provisions authorize two types of suits: (1) suits to force an agency to take non-discre-

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38 *See* PERCIVAL, *supra* note 37, at 2. The 1969 oil spill in Santa Barbara, the Exxon *Valdez* oil spill, the Chernobyl reactor explosion, and the Union Carbide plant explosion in Bhopal, India are widely credited with spurring environmental legislation and raising public consciousness. *Id.* In 1980, Congress enacted CERCLA (Superfund) in response to the environmental disaster at Love Canal. *Not So Super Superfund*, N.Y. TIMES, Feb. 7, 1994, at A16. The Hooker Chemical Company filled the Love Canal with 20,000 tons of toxic chemicals. *Id.* These chemicals were believed to be responsible for the high rates of cancer, miscarriages, and birth defects encountered in the vicinity of the canal. *Id.*

39 *See* PERCIVAL, *supra* note 37, at 4. The devastating oil spill in the Santa Barbara channel and the media's coverage of the disaster enhanced participation in the first Earth Day, held on April 22, 1970. *Id.*

40 *See, e.g.*, RACHEL CARSON, SILENT SPRING (1962) (exposing the highly toxic nature of the pesticide DDT).

41 *See* PERCIVAL, *supra* note 37, at 4.

42 Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 339, 340 (1990) (citations omitted).

43 *Id.* at 340 (citing Toxic Substances Control Act § 20, 15 U.S.C. § 2619(a) (1988)) (other citations omitted); *see* 16 U.S.C. § 1540(g)(1) (1988) (setting forth the citizen suit provision of the Endangered Species Act); 30 U.S.C. § 1270(a) (1988) (allowing for citizen suits under the Surface Mining Control and Reclamation Act of 1977); 33 U.S.C. § 1415(g)(1) (1988) (providing for private persons to bring civil suits under the Marine Protection, Research, and Sanctuaries Act); 33 U.S.C. § 1515(a) (1988) (permitting citizens to seek equitable relief under the Deepwater Port Act); 42 U.S.C. § 300j-8(a) (1988) (setting forth the citizen suit provisions of the Safe Drinking Water Act); 42 U.S.C. § 4911(a) (1988) (allowing citizen's to bring suit under the Noise Control Act); 42 U.S.C. § 6972(a) (1988) (providing private citizens with the authority to bring civil actions under the Resource Conservation and Recovery Act); 42 U.S.C. § 7604(a) (1988 & Supp. IV 1993) (authorizing citizen suits under the Clean Air Act); 42 U.S.C. § 9659(a) (1988) (permitting citizens to seek relief under CERCLA); 43 U.S.C. § 1349(a) (1988) (setting forth the citizen suit provisions of the Outer Continental Shelf Lands Act).

The Clean Water Act simply permits suits by "any citizen." Greve, *supra* note 42, at 340 n.5 (citing The Clean Water Act § 505, 33 U.S.C § 1365 (1988)). Under the Clean Water Act, the term "citizen" is defined as "a person or persons having an interest which is or may be adversely affected." *Id.* (citing Clean Water Act § 505(g), 33 U.S.C. §§ 1365(a), 1365(g) (1988)). The Federal Insecticide, Fungicide and Rodenticide Act is the only significant federal environmental statute that lacks provisions for citizen suits. *Id.* (citing 7 U.S.C. § 3136(g) (1988)).

44 PERCIVAL, *supra* note 37, at 192.

tionary action and, (2) suits to force people or organizations to comply with environmental statutes.[45] Statutes allowing citizen suits against government agencies are patterned on the citizen suit provision of the Clean Air Act, which authorizes "any person" to sue the Environmental Protection Agency administrator "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."[46] Further, the statute defines "person" as including individuals, corporations, partnerships, municipalities, and agents of the United States.[47] This kind of suit is particularly useful in the enforcement of statutory deadlines created by Congress and missed by the EPA.[48]

The Natural Resources Defense Council (NRDC) made significant use of the citizen suit provision of the Clean Water Act against private parties who violated the statute in the early 1980s, when government enforcement of environmental statutes under the first Reagan administration declined dramatically.[49] The NRDC examined the discharge monitoring reports (DMRs), which all dischargers are required to file and which are open to the public under the Act.[50] The NRDC then systematically analyzed the DMRs as prima facie evidence of Clean Water Act violations,

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45 *Id.* The federal judiciary promoted the efficacy of these provisions through an increased willingness to open the court system for judicial review of agency decisions affecting the environment. *See* Sierra Club v. Morton, 405 U.S. 727, 738 (1972). In the landmark case of *Sierra Club*, the Supreme Court recognized that aesthetic, conservational, and recreational interests may be sufficient to establish injury in fact for purposes of standing. *Id.* (quoting Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970)).

46 *See* 42 U.S.C. § 7604(a)(2) (1988).

47 42 U.S.C. § 7602(e) (1988).

48 PERCIVAL, *supra* note 37, at 667.

Created in 1970 by executive order, the EPA serves the following principle functions:

> -The establishment and enforcement of environmental protection standards consistent with national environmental goals.
> -The conduct of research on the adverse effects of pollution and on methods and equipment for controlling it, the gathering of information on pollution, and the use of this information in strengthening environmental protection programs and recommending policy changes.
> -Assisting others, through grants, technical assistance and other means, in arresting pollution of the environment.
> -Assisting the Council on Environmental Quality in Developing and recommending to the President new policies for the protection of the environment.

42 U.S.C. app. § 4321 (1988).

49 PERCIVAL, *supra* note 37, at 996.

50 *Id.*

mailed 60-day notice letters to parties in violation, and followed with suits to force compliance.[51] These types of suits are valuable because they act as a venue for public, democratic participation in efforts to redress environmental pollution.[52]

## II. The Role of the Supreme Court in the United States Government's Failure to Adequately Protect the Citizenry's Environmental Interests

### A. *The Standing Requirement*

Congress has granted the federal courts the power to judicially review administrative actions taken under many of the federal environmental statutes.[53] Also, the citizen suit provisions of most of these statutes grant jurisdiction to the appropriate federal district courts.[54] Therefore, many environmental disputes surrounding the implementation of federal environmental statutes come before the Supreme Court on appeal.[55] In the context of environmental law, however, constitutional standing dictates the effectiveness of

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51 *Id.*

52 Greve, *supra* note 42, at 340 (citations omitted)

53 *See* 7 U.S.C. § 136n(a) (1988) (providing that the federal district courts have jurisdiction to review administrative actions under the Federal Pesticide, Fungicide, and Rodenticide Act); 15 U.S.C. § 2618(a) (1988) (stating that petitions for judicial review under the Toxic Substances Control Act must be filed with the federal courts of appeals); 16 U.S.C. § 1536(n) (1988) (granting the federal circuit courts jurisdiction to review administrative actions under the Endangered Species Act); 30 U.S.C. § 1276(a) (1988) (providing that the federal district courts have the authority to review actions under the Surface Mining Control and Reclamation Act); 33 U.S.C. § 1369(b) (1988) (stating that the federal courts of appeals have the authority to review administrative actions under the Act); 42 U.S.C. § 300-j(7) (1988) (permitting the federal courts of appeals to judicially review actions taken by the administrator under the Safe Drinking Water Act); 42 U.S.C. § 6976(a) (granting the United States Court of Appeals for the District of Columbia the authority to judicially review administrative actions under the Resource Recovery and Conservation Act); 42 U.S.C. § 9613(a) (1988) (providing that the Court of Appeals for the District of Columbia Circuit has the authority to review administratve actions under CERCLA).

54 *See* 16 U.S.C. § 1540(c) (1988) (granting the federal district courts jurisdiction over actions that arise under the Endangered Species Act); Safe Drinking Water Act, 42 U.S.C. § 300j-8(a) (1988) (stating that citizen suits commenced under the Safe Drinking Water Act are to be heard by the federal district courts); 42 U.S.C. § 4911(a) (1988) (asserting that the federal district courts have jurisdiction to hear citizen suits commenced under the Noise Control Act); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (1988) (granting the federal district courts the authority to adjudicate citizen suits under the Resource Recovery and Conservation Act); 42 U.S.C. § 7604 (1988) (authorizing the federal district courts to hear citizen suits under the Clean Air Act); 42 U.S.C. § 9659(b) (1988) (permitting the federal district courts to hear cases brought by citizens under CERCLA).

55 *See supra* notes 53-54 and accompanying text (asserting that most litigation under the federal environmental statutes occurs in the federal courts).

these statutes.[56]

Article III of the Constitution governs standing through its "case or controversy" requirement.[57] In its most basic form, this test involves a determination of whether the court is empowered to resolve the disputed issue.[58] The goal of the early standing doctrine was to insure that the parties before the court were truly adversarial and had personal stakes in the outcome.[59] Today, however, answering the question of what constitutes a case or controversy is anything but a basic task.[60]

The Supreme Court controls which cases it may hear by examining the plaintiff's claims in light of Article III's requirement as well as in light of court-imposed "prudential" considerations.[61] Plaintiffs ostensibly meet the standing requirements by satisfying a three-pronged test.[62] The constitutional component requires that

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56 *See infra* notes 106-114 (discussing how the doctrine of standing presents difficulties in the adjudication of cases under the environmental statutes).

57 U.S. CONST., art. III, § 2, cl. 1. See *supra* note 2 for the text of the Clause.

58 *See* Warth v. Seldin, 422 U.S. 490, 498 (1975) ("[I]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.")

59 *See* Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Ananlysis*, 86 HARV. L. REV. 645, 679-81 (1973) (citations omitted) (discussing how representativeness may pose problems where standing is concerned).

60 *See supra* notes 9-11 and accompanying text (noting that the less-concrete nature of environmental injuries may discourage courts from hearing cases brought by environmental groups on behalf of their members).

The history of the standing doctrine is beyond the scope of this Comment. Extant histories include Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969) and Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961). Despite the sheer enormity of case law and scholarship devoted to the single issue of standing, the guidance provided by the Supreme Court as to its seemingly clear analytical framework has been "less than pellucid." Dellums v. United States Nuclear Regulatory Comm'n, 863 F.2d 968, 971 (D.C. Cir. 1988).

61 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24:5 (2d ed. 1983) (stating that the constitutional and prudential requirements of standing complicate the standing issue); *see also*, JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 34-54 (1978) (surveying standing's conceptual doctrinal development). See *infra* notes 101-105 and accompanying text for a discussion of prudential limitations upon standing.

62 *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Simon v. Eatern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)) ("[A]t an irreducible minimum, Art. II requires the party . . . to 'show that he personally has suffered some actual or threatened injury' . . . that

a potential plaintiff demonstrate: (1) an "injury in fact"[63] or "distinct and palpable" injury[64] which (2) "'fairly can be traced to the challenged action'"[65] and (3) "'is likely to be redressed by a favorable decision.'"[66]

The Supreme Court uses the phrase "injury in fact" to describe the kind of injury, caused by the defendant and redressable by the courts, that meets the constitutional prerequisites for standing.[67] The precise meaning of the phrase continues to elude definition.[68] Currently, the Court focuses on the cognizability of the plaintiff's injury and the concrete and immediate character of the harm.[69]

The concept of cognizability relates to whether some factor common to all plaintiffs defines or limits an injury.[70] In *Sierra Club v. Morton*,[71] the Court clearly defined the type of cognizable injury

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the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'").

For the purposes of this Comment, only the "injury in fact" element is relevant, and discussion of the other elements is therefore limited. "Redressibility" and "traceability" are the final prongs of the standing test. *See id.* (quoting *Simon*, 426 U.S. at 38, 41). Traceability requires that the plaintiff's injury be "fairly traceable" to the defendant's action or inaction. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261 (1977); *see also* Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) (footnote and citations omitted). When the defendant named in the suit is not responsible for the claimed injury, there is no Article III case or controversy. *Simon*, 426 U.S. at 41-42. The redressibility element requires that the injury be "likely . . . redressed by a favorable decision." *Id.* at 38.

63 *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact . . . ."); *see also Valley Forge*, 454 U.S. at 472 (articulating that the standing requirement "assures an actual factual setting in which the litigant asserts a claim of injury in fact"); *Arlington Heights*, 429 U.S. at 261 ("The plaintiff must show that he himself is injured by the challenged action of the defendant.").

64 Allen v. Wright, 468 U.S. 737, 751 (1984) (citing *Gladstone*, 441 U.S. at 100 (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975))).

65 *Valley Forge*, 454 U.S. at 472 (quoting *Simon*, 426 U.S. at 41); *see also Arlington Heights*, 429 U.S. at 261 (citations omitted) ("[T]he complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions.").

66 *See Valley Forge*, 454 U.S. at 472 (quoting *Simon*, 426 U.S. at 38).

67 *See id.* at 473.

68 Kurt S. Kusiak, Note, *Standing to Sue: A Brief Review of Current Standing Doctrine*, 71 B.U. L. REV. 667, 670 (1991) (noting that early case law interpretations of Article III provide only basic guidelines for resolving current standing questions and recommending that federal judges rely on the Article's underlying principles to reach standing determinations).

69 *Id.* at 670-71.

70 *See* Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1929-30 (1986) ("The question 'Are you injured?' folds itself within two inquiries. Is the interest asserted actually injured? And, is the interest asserted, if injured, one of which the court will take cognizance?").

71 405 U.S. 727 (1972). Standing applies both to individual plaintiffs as well as organizations suing on behalf of their members. *See, e.g.*, Warth v. Seldin, 422 U.S.

that would satisfy the standing requirement.[72] The Sierra Club sought to restrain federal officials from approving a development plan for a ski resort adjacent to the Sequoia National Forest.[73] The Sierra Club claimed that it would be injured by the adverse effects that this Walt Disney Enterprises plan would have on the environment.[74] The Sierra Club never pleaded that its members ever used or planned to use the land.[75] The Supreme Court affirmed the Ninth Circuit's determination that the Sierra Club failed to allege sufficient injury, and thus denied them standing.[76]

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490, 511 (1975) (citations omitted) ("[I]n attempting to secure relief from injury to itself, an association may assert the rights of its members . . . ."); *see also* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) (setting the standard for organizations suing on their members' behalf).

72 *See Sierra Club*, 405 U.S. at 734-35 ("[T]he 'injury in fact' test requires no more than an injury to a cognizable interest. It requires that the party seeking review be . . . among the injured.").

The Court in *Sierra Club* referred to language in *Association of Data Processing Service Organizations, Inc. v. Camp* that outlined acceptable types of injury. *Id.* at 738 (quoting Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970)). In *Data Processing*, the owner of a business that sold data processing services brought an action against the Comptroller of Currency and a national bank, challenging a ruling promulgated by the Comptroller that allowed national banks to provide data processing services. *Data Processing*, 397 U.S. at 151. The Supreme Court applied a two-part standing test, requiring the plaintiff to demonstrate an injury in fact that fell within the zone of protection afforded by the statute upon which the suit was premised. *Id.* at 152, 153. Discussing the types of injury that were sufficient to satisfy this test, Justice Douglas, writing for the majority, explained that injury in fact can be demonstrated by non-economic loss as well as by financial loss. *Id.* at 154. In addition, Justice Douglas stated that the plaintiff's "interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values." *Id.* (quotation and citation omitted).

73 *Sierra Club*, 405 U.S. at 729-30. Sierra Club sought to prevent Walt Disney Enterprises from converting Mineral King Valley, an undeveloped recreation area, into a ski resort. *Id.* at 728, 729-30. Disney's development plan encompassed 80 acres of land and received approval by the Forest Service in the winter of 1969. *Id.* at 729. Disney's plans for the resort included a multi-million dollar complex of motels, parking lots, swimming pools, and other facilities intended to accommodate 14,000 customers per day. *Id.* Additionally, Disney intended to construct ski lifts, ski trails, and other facilities required to turn the mountain into an area suitable for skiing. *Id.* The plan also included the construction of high-voltage lines and a twenty-mile highway to be provided by the state of California. *Id.*

74 *Id.* at 734.

75 *Id.* at 735. The Sierra Club brought suit "as a membership corporation with 'a special interest in the conservation and the sound maintenance of the national parks, games refuges and forests of the country.'" *Id.* at 730. Although the district court granted Sierra Club a preliminary injunction against the Walt Disney construction, the Ninth Circuit reversed, maintaining that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them." *Id.* at 731 (citation and quotation omitted) (alteration in original).

76 *Id.* at 731, 741 (citation omitted).

Writing for the majority, Justice Stewart posited that the destruction of the natural beauty of the land could satisfy the requirement of injury in fact.[77] The Justice then declared that the size of the group claiming injury had no bearing on its ability to obtain judicial review.[78] However, Justice Stewart maintained, "the party seeking review [must] be himself among the injured," and the underlying injury would be accredited only to those who actually use the lands at issue.[79] The Court implied, nonetheless, that the Sierra Club could achieve standing if its complaint had been amended to include allegations that their personal use and enjoyment of the land was adversely affected by the proposed development.[80]

In dissent, Justice Douglas sharply criticized the requirement of individual injury.[81] Advocating the creation of a legal fiction to allow the environment to sue for its own protection, much like a corporation, Justice Douglas stated that the environment is an "inarticulate member of the ecological group [that] cannot speak."[82] Because the environment is an inanimate object and because federal agencies are often controlled by powerful interests, the Justice concluded, the environment must be granted the ability to bring suit on its own behalf.[83]

In a separate dissent, Justice Blackmun criticized the current procedural concepts of standing as rigid, inflexible, and inadequate to manage the new issues that accompany environmental litigation.[84] Justice Blackmun favored granting certain groups standing to bring suit on behalf of the environment where those groups have a "provable, sincere, dedicated and established status" and are "pertinent, bona fide and well-recognized" in the environmental arena.[85]

One year later, in *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP),[86] the Supreme Court expanded upon

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77 *Id.* at 734.

78 *Id.*

79 *Id.* at 735.

80 *Id.* at 735, 736 (footnote omitted).

81 *See id.* at 751-52 (Douglas, J., dissenting).

82 *Id.* at 742-43, 752 (Douglas, J., dissenting) (footnotes omitted).

83 *Id.* at 745-46, 749 (Douglas, J., dissenting).

84 *Id.* at 755-56 (Blackmun, J., dissenting).

85 *Id.* at 757-58 (Blackmun, J., dissenting).

86 412 U.S. 669 (1973). In *SCRAP*, five law students challenged the Interstate Commerce Commission's (ICC) proposed surcharge on freight rates. *Id.* at 674, 678. Most of the railroad companies in the United States had requested the 2.5% surcharge on freight rates to meet "increasing costs and severely inadequate revenues." *Id.* at 674. The students alleged that the ICC failed to prepare an environmen-

its holding in *Sierra Club*, reaching its most liberal definition of the Article III injury requirement, .[87] The *SCRAP* Court held that harm to economic, recreational, and aesthetic interests was sufficient to constitute injury in fact, declaring that an "identifiable trifle" would satisfy the requirement.[88] Thus, the Court asserted, plaintiffs should not be denied standing simply because they allege an injury only to the use and enjoyment of the environment.[89]

In both *Sierra Club* and *SCRAP*, the claimed injury was the re-

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tal impact statement, as the National Environmental Policy Act (NEPA) requires, to examine the effects of the rate hike. *Id.* at 679 (citing 42 U.S.C. § 4332(2)(C) (1988)); *see supra* note 35 (describing the NEPA). Central to the students' claim of injury was the theory that the higher rate would discourage the use of recyclable materials and encourage the use of new raw materials because of increased transportation costs. *SCRAP*, 412 U.S. at 685. Further, alleged SCRAP, the surcharge would result in higher prices for finished products and the destruction of natural resources such as forests, streams, and rivers. *Id.* at 678. Finally, the SCRAP members alleged that they used the Washington, D.C. metropolitan area for its forests and streams and that their use of these natural resources was adversely affected by the surcharge. *Id.*

87 *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-2 (1976) (describing *SCRAP* as "an all-time high in Supreme Court liberality on the subject of standing.");

A number of lower court cases also reflect this liberal view of the standing doctrine where environmental issues are concerned. *See* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1096-97, 1097 (D.C. Cir. 1970) (stating that the health risk from DDT is sufficient injury for standing in an action challenging Secretary of Agriculture's failure to restrict its use); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 615, 616 (2d. Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (citation omitted) (holding that the effects of a hydroelectric power project upon aesthetic and recreational interests were sufficient to demonstrate standing without a showing of economic injury); Crowther v. Seaborg, 312 F. Supp. 1205, 1212, 1217 (D. Colo. 1970) (declaring that property owners in vicinity of proposed atomic blast site were adversely affected by the actions of the Atomic Energy Commission, and therefore had standing to sue).

88 *SCRAP*, 412 U.S. at 686-87, 689 n.14 (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)) (other citation omitted).

89 *Id.* at 686-87. Writing for the Court, Justice Stewart rejected the government's argument that, under the *Sierra Club* Court's analysis, the students lacked standing because their claims were unsubstantiated, vague, and insufficient. *Id.* at 683-84, 685. The Court distinguished *Sierra Club* on the grounds that SCRAP had appropriately alleged in its pleadings that the action complained of would adversely impact lands used by the organization's members. *Id.* at 687 (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). Justice Stewart explained that "aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.* at 686 (quoting *Sierra Club*, 405 U.S. at 734). Expanding upon the notion that the large number of injured plaintiffs should not deter their ability to bring suit, Justice Stewart stated that if the courts denied standing where many people were injured, then the "most injurious and widespread Government actions could be questioned by nobody." *Id.* at 686, 688.

sult of an extended chain of causation.[90] The Court resolved these cases differently, however, because, where SCRAP alleged specific allegations of a palpable injury,[91] the Sierra Club's complaint reflected more of a "mere interest in the problem."[92] These cases represent an expansion of the standing doctrine that enabled environmental law to undergo a marked transformation over the past twenty years.[93]

Additionally, both *Sierra Club* and *SCRAP* enhanced the ability of environmental organizations to bring suit against administrative agencies on their members' behalf.[94] Most importantly, for the first time, the Supreme Court recognized that harm to the enjoyment of the aesthetic quality of land and to ecological values are sufficient injuries upon which to base standing, even though they are not economic in nature.[95] The reason may be that the Court chose to associate the injuries in these cases with traditional personal injuries rather than to recognize them as innovative environmental injuries.[96]

As a second facet of the standing doctrine's injury in fact analysis, the Supreme Court also requires that the injury be "actual or imminent, not 'conjectural or hypothetical.'"[97] The aim of this

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90 *Id.* at 688 (stating that the injury alleged in *SCRAP* was "far less direct and perceptible" than that alleged in *Sierra Club*, and asserting that the court in *SCRAP* was required to follow a "more attenuated line of causation to the eventual injury").

91 *See id* at 687.

92 *Sierra Club*, 405 U.S. at 739. In *SCRAP*, Justice Stewart stated that the "pleadings must be something more than an ingenious academic exercise in the conceivable." *SCRAP*, 412 U.S. at 688. The Court held that the plaintiff must at minimum allege that he has been harmed or is in immediate danger of being harmed by an agency action, and not simply that he can "imagine circumstances in which he could be affected by the agency's action." *Id.* at 688-89.

93 *See* Bill J. Hays, Comment, *Standing and Environmental Law: Judicial Policy and the Impact of* Lujan v. National Wildlife Federation, 39 KAN. L. REV. 997, 999 (1991) (citation omitted) ("The Supreme Court's decision in *Sierra Club v. Morton* . . . opened a new era in the federal courts by allowing an environmental organization to challenge a proposed development on federal land on behalf of its members.").

94 *Id.*

95 *Id.* at 999-1000 (citing *Sierra Club*, 405 U.S. at 738) (explaining that access to the federal courts is increased for environmental plaintiffs because the Supreme Court "recognized aesthetic and recreational interests as sufficient to meet [A]rticle III's requirement of injury in fact, so long as actual use of the threatened lands was alleged").

96 Interview with Professor Marc R. Poirier, Associate Professor of Law, Seton Hall University School of Law, in Newark, N.J. (Mar. 22, 1994).

97 *See* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)). In *City of Los Angeles v. Lyons*, the Supreme Court denied standing to an individual who alleged that the police stopped him for a minor traffic violation and placed him in a chokehold until he was unconscious. *Lyons*, 461 U.S. at 97-98, 113. The victim sued the City of Los Angeles to enjoin future use of the

prong of the inquiry is not to measure the seriousness or degree of unconscionability of the alleged injury.[98] Rather, the Supreme Court seeks to ensure that injury has occurred or that the plaintiffs are threatened by potential future injury at the hands of the defendants.[99] The result is consistent with the overall aim of the standing doctrine, which is to sharpen controversies and demarcate the separate branches of government.[100]

The Supreme Court also examines cases for standing through a non-constitutional lens, exercising what are commonly referred to as prudential concerns.[101] The three main limitations of prudential consideration provide a self-imposed restraint on the

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chokehold technique by the police force, claiming that it was unnecessarily dangerous. *Id.* at 98. The Court denied standing, reasoning that "the injury or threat of injury must be both 'real and immediate,' not 'hypothetical' or 'conjectural.'" *Id.* at 102, 110, 113 (quotations omitted). The majority stated that:

> [i]n order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner.

*Id.* at 105-06. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, dissented and found that the city had implicitly authorized the chokehold. *Id.* at 113-14 (Marshall, J., dissenting) (citation omitted).

98 Kusiak, *supra* note 68, at 673 (explaining that "[i]t is not the seriousness or unconscionability of the injury that is important").

99 *Id.* (asserting that "it is the potential for future injury to the plaintiff from the named defendants that should guide the inquiry").

100 *Id.* at 673-74 (noting that in *SCRAP, Sierra Club,* and *Lyons,* the Court recognized that Article III limitations prevented it from resolving disputes that did not involve "relatively concrete disputes between discernable parties" and that solving general societal problems was a responsibility best left to the legislature).

101 Warth v. Seldin, 422 U.S. 490, 498 (1975) (citation omitted). In essence, prudential concerns involve determining whether the proper functions of the courts are fulfilled by hearing a case. *Id.* at 500 (citation omitted). They are generally consistent with the underlying goal of the standing doctrine because they promote judicial restraint, deference to the legislature, and separation of powers. *See id.* (citation omitted) ("Without such limitations—closely relate to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions . . . ."); *see also* Allen v. Wright, 468 U.S. 737, 760 (1984) (quoting *Lyons,* 461 U.S. at 112) (alteration in original) (opining that "[a]nimating this Court's holdings was the principle that '[a] federal court . . . is not the proper forum to press general complaints about the way in which government goes about its business'"); Schlesinger v. Reservists Comm., 418 U.S. 208, 220 (1974) (stating that "standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share").

Supreme Court.[102] First, the Court has generally required that the interests of plaintiffs challenging an agency ruling or governmental regulation fall within the "zone of interests" encompassed by the statute at issue.[103] Second, plaintiffs cannot assert generalized grievances more appropriately handled by the legislature.[104] Third, the rights, interests, or issues presented by a suit must be those of the plaintiffs, not those of third parties.[105]

Environmental suits are often premised upon injuries recognized by statute.[106] The limits of Congress's power to create a statutory right, however, are not clear from the text of the Constitution.[107] Article III vests federal judicial power in the Supreme Court and any lower courts that Congress establishes, extending the power of these courts to cases that arise under congressional legislation.[108] Further, the judicial power reaches all cases

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102 *See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) (citation omitted) (stating that the Court had resolved issues of standing by exercising "rule[s] of self-restraint").

103 *Id.* at 153. Courts generally apply prudential limitations where no statute explicitly grants standing to the plaintiffs. Sarah A. Robichaud, Note, Lujan V. National Wildlife Federation: *The Supreme Court Tightens the Reins on Standing for Environmental Groups*, 40 CATH. U. L. REV. 443, 460 (1991) (citation omitted). The Supreme Court applies the "zone of interests" test to determine the scope of implied or express statutory standing. *See Data Processing*, 397 U.S. at 153 ("[T]he question [is] whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.").

The Supreme Court examined the ability of plaintiffs to challenge governmental action in *Data Processing*. *See id.* at 151. This case marked the introduction of the "zone of interests" test for statutory standing. *See id.* at 153. The Court considered whether the plaintiff had demonstrated an "injury in fact," and stated that the injury could be "economic or otherwise." *Id.* at 152.

The Administrative Procedure Act (APA) confers standing to persons "'aggrieved by agency action within the meaning of a relevant staute.'" *Id.* at 153-54 (quoting 5 U.S.C. § 702 (1964 & Supp. IV)). For a general discussion of standing under the APA, see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 255-64 (1988).

104 *See* CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 13, at 71 (4th ed. 1983).

105 *Warth*, 422 U.S. at 499 (citations omitted).

106 *See supra* note 43 (listing the citizen suit provisions of the major environmental statutes).

107 *See Warth*, 422 U.S. at 514 (citing Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. . . . Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute"); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring) (noting that "with [the] statute purporting to give those who are authorized to complain to the agency the right to sue in court, I would sustain the statute insofar as it extends standing to those in the position of the petitioners . . . .").

108 U.S. CONST. art. III, §§ 1 & 2. See *supra* note 2 for the text of § 2.

and controversies that arise under the Constitution, as well as those that arise "under the laws of the United States."[109] Therefore, Congress has the power to control the scope of the judiciary's power by creating statutory rights.[110]

The debate in environmental litigation focuses on these statutory rights.[111] Most litigation in the environmental field is premised upon statutes that create private rights of action, define injuries, and delineate zones of interest so as to grant standing to as large a group as possible.[112] The Supreme Court, however, has the ultimate power to interpret these statutes and the citizen suit provisions set forth within them.[113] The result is that the Court still has the opportunity to screen out often unwanted environmental litigation, thereby making unwarranted policy decisions.[114]

### B. *The Devolution of Injury in Fact*

The Supreme Court has recently begun to limit the effective-

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109 U.S. CONST. art. III, § 2.

110 *See* Dan Braveman, *The Standing Doctrine: A Dialogue Between the Court and Congress*, 2 CARDOZO L. REV. 31, 51 (1980) (arguing that Congress may legitimately conclude that a plaintiff need not show actual injury to meet Article III standing requirements).

111 *See, e.g.*, Hays, *supra* note 93, at 1000-01 (citations omitted) ("Express exclusion of separation of powers questions from the threshold determination of who has standing . . . acknowledges that the central issue . . . involves the operation of government according to the rule of law, and that it is the court's duty to 'say what the law is,' and in so doing give effect to the will of Congress.") Congress created environmental rights for the citizenry by providing for citizen suits in environmental statutes. *See supra* note 43 (listing the citizen suit provisions of the major environmental statutes).

112 Hays, *supra* note 93, at 1000 (citations ommitted).

113 *See* U.S. CONST. art. III.

114 *See id.*; Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2135, 2146 (1992) (using the standing doctrine to deny Defenders of Wildlife from seeking relief under the Endangered Species Act).

Until *Defenders of Wildlife*, the Court deferred to Congress with respect to standing when it could discern congressional intent. *See, e.g.*, Block v. Community Nutrition Inst., 467 U.S. 340, 352-53 (1984) (holding that Congress intended to preclude consumers from seeking judicial review under the Agricultural Marketing Agreement Act of 1937); Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9, 109 (1979)) (holding that Congress intended that standing under the Fair Housing Act be extended to the limits of Article III).

In his account of the history of the law of standing, Professor Cass Sunstein demonstrated the extent to which the *Defenders of Wildlife* Court departed from this philosophy. *See generally* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). For other historical accounts of the Court's position on the standing doctrine, see generally Berger, *supra* note 60; Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1972-73); Nichol, *supra* note 70; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

ness of citizen suits by using standing as a shield to fend off environmental cases, thus frustrating congressional intent to promote private enforcement of federal environmental laws.[115] In the late 1960s and the early 1970s, the federal courts were receptive to citizen suit litigation arising from the environmental legislation enacted during that period.[116] In the 1980s, however, the Supreme Court led the federal courts in adopting a less favorable stance towards environmental litigation.[117] This occurred despite Congress's continued interest in protecting the environment, apparently as part of a larger movement promoting judicial restraint.[118] Some commentators have suggested that the judiciary may be using separation of powers to disguise judicial policy activism.[119] Thus, "the institutional judicial restraint prompted by these concerns . . . has the potential to raise separation of powers problems similar to those that courts purporting to exercise institutional restraint are seeking to avoid."[120]

### 1. *Lujan v. National Wildlife Federation*

Two recent cases, *Lujan v. National Wildlife Federation*[121] and *Lujan v. Defenders of Wildlife*[122], demonstrate the Court's struggle to apply the injury in fact requirement in the environmental context.[123] The first, *National Wildlife Federation*, illustrates the Court's misapplication of the injury in fact requirement to prevent the re-

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115 *See* Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209, 209 (1987) ("By the 1980's, the courts, led by the Supreme Court, were presenting a much lower profile in environmental cases, even though Congress remained firmly committed to . . . environmental protection initiatives . . . ."); *see, e.g., Defenders of Wildlife*, 112 S. Ct. at 2135, 2146 (using the standing doctrine to deny Defenders of Wildlife from seeking relief under the Endangered Species Act).; Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990) (holding that the National Wildlife Federation did not meet the requirements for standing under the relevant statutes by simply asserting that one of its members used an unspecified area of the vast tract of land at issue).

116 Glicksman, *supra* note 115, at 209. The federal courts initially reacted by lowering the procedural barriers to environmental lawsuits in order to promote the new pro-environmental objectives of Congress. *Id.*

117 *Id.*

118 *Id.* at 209, 210. The trend toward judicial restraint continues today, driven by concerns that the judiciary is not qualified to review the executive's implementation of regulatory legislation. *Id.* at 210.

119 *See, e.g., id.* at 253.

120 *Id.* at 210.

121 497 U.S. 871 (1990).

122 112 S. Ct. 2131 (1992).

123 *See supra* notes 115-216 and accompanying text (illustrating how the Supreme Court has found it difficult to apply the test of standing where the injuries alleged are environmental in nature).

view of an undeclared agency program.[124] *National Wildlife Federation* began as a challenge by the National Wildlife Federation (NWF)[125] to a Department of the Interior land withdrawal review program designed to reevaluate and reclassify land under federal control.[126] The goal of NWF's suit was to force the Bureau of Land Management (BLM) to comply with the procedural requirements of the Federal Land Policy and Management Act of 1976 (FLPMA)[127] and the National Environmental Protection Act of

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124 *See* Shinn, *supra* note 16, at 905 (asserting that the *National Wildlife Federation* Court misinterpreted the opinion of the court of appeals in finding that NWF's members did not contend that they used specific areas of land); *see also* E. Gates Garrity-Rokous, Note, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 YALE L.J. 643, 653 (1991) (contending that the Court's decision in *NWF* gave federal agencies an effective tactic for avoiding judicial review).

125 The National Wildlife Federation is a non-profit, 4.5 million-member organization that works to protect natural resources and educate the public about the environment. John Treangen, Note, *Standing: Closing the Doors of Judicial Review*, 36 S.D. L. REV. 136, 138 (1991).

126 National Wildlife Fed'n v. Burford, 676 F. Supp. 271, 272-73 (D.D.C. 1985), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987).

In 1976, Congress passed the Federal Land Policy and Management Act (FLPMA). *See id.* at 272; 43 U.S.C. §§ 1701-1784 (1988 & Supp. IV 1993). The Bureau of Land Management (BLM) enforces certain provisions of the FLPMA known as the land withdrawal review program. *See National Wildlife Fed'n*, 497 U.S. at 877. Withdrawals act to withhold federal land from sale, settlement, location, or entry pursuant to applicable federal natural resources laws. 43 U.S.C. §§ 1702(j) (1988). The land withdrawal review program, however, was not an administrative program because the BLM never issued an order or regulation to implement it. *National Wildlife Fed'n*, 497 U.S. at 890. The National Wildlife Federation merely used the name to describe BLM's continual review of withdrawal revocation applications, which entailed categorizing lands as "public" and creating "land use plans." *Id.*

The BLM's goal during this period was to eliminate all unnecessary withdrawals, thereby opening the maximum number of acres possible to mining and mineral leasing operations. National Wildlife Fed'n v. Burford, 835 F.2d 305, 309 (1987). Under the FLPMA, the BLM removed protective restrictions from approximately 180 million acres of federally-owned land in seventeen states. *Id.* at 307.

In 1985, the National Wildlife Federation brought suit against the BLM to challenge the land withdrawal review program and the revocation of protected status of the undeveloped land. *National Wildlife Fed'n*, 676 F. Supp. at 272-73. The district court initially granted National Wildlife Federation's request for a preliminary injunction against the program. *Id.* at 279. The District of Columbia Circuit affirmed the district court's issuance of a preliminary injunction. *National Wildlife Fed'n*, 835 F.2d at 327.

127 43 U.S.C. §§ 1701-1784 (1988 & Supp. IV 1993). Congress declared that "in administering public land statutes and excercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public . . . ." 43 U.S.C. § 1701(a)(5) (1988). The FLPMA is an elaborate system of controls for reviewing past withdrawals and classifying federal lands. *See* 43 U.S.C. § 1714 (1988). Under the statute, the Secretary of the Interior can recommend removing protected status from federal land where doing so is consistent with the purposes of the programs that had originally classified the land as protected. 43 U.S.C. § 1714(b) (1988). *See generally*, GEORGE

1969 (NEPA).[128]

To satisfy the injury in fact element of standing, NWF claimed that its members used a particular area affected by the land withdrawal revocation program for recreation and aesthetic enjoyment.[129] NWF anticipated that the proposed mining and drilling would destroy the wildlife habitat of the public lands, thus ruining

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CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW (1994) (discussing public natural resources law from historical, constitutional, statutory, and administrative perspectives).

The FLPMA requires the Secretary to process land withdrawl revocation proposals in order to effectuate the sale of federal land, to clear records where land slated for withdrawal was engaged in a conflicting use, or to reestablish multiple use management of land. *See* 42 U.S.C. § 1712 (1988). While the FLMPA does not define "land use plans," it provides the Secretary with nine criteria to use as guidelines for formulating a strategy:

> (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;
> (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
> (3) give priority to the designation and protection of areas of critical environmental concern;
> (4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;
> (5) consider present and potential uses of the public lands;
> (6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
> (7) weigh long-term benefits to the public against short-term benefits;
> (8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and
> (9) . . . coordinate the land use inventory, planning, and management activities . . . of other Federal departments and agencies and of the States and local governments within which the lands are located . . . .

43 U.S.C. § 1712(c) (1988).

128 *National Wildlife Fed'n*, 497 U.S. at 879.

The NEPA is codified as 42 U.S.C. §§ 4321-4370d (1988 & Supp. IV 1993). For more information about the NEPA, see *supra* note 35.

In part, the object of the NEPA and the FLPMA is to force agencies to consider the environmental effects of their actions and to incorporate public input into their decisions. *See* 42 U.S.C. §§ 4331(b), 4332(2)(C) (1988); 43 U.S.C. §§ 1712(a), 1739(e) (19).

Neither the FLPMA nor NEPA have provisions for citizen suits. *See* 43 U.S.C. §§ 1701-1784 (1988 & Supp. IV 1993); 42 U.S.C. §§ 4321-4370d (1988 & Supp. IV 1993). Therefore, NWF sought judicial review of the BLM's program under § 702 of the Administrative Procedure Act (APA). *National Wildlife Fed'n*, 497 U.S. at 882 (quotation omitted). Section 702 of the APA provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1988).

129 *National Wildlife Fed'n*, 497 U.S. at 886 (quotation omitted).

their aesthetic and recreational value to NWF members.[130] On cross-motions for summary judgment,[131] the District Court for the District of Columbia found that NWF members' affidavits referred only to land use in the vicinity of affected areas, and not to the use of any specifically affected lands.[132] Thus, the court held that NWF lacked standing to challenge BLM's proposed action of withdrawal revocation.[133]

In *National Wildlife Federation v. Burford*,[134] the D.C. Circuit reversed the district court's decision.[135] The appellate court held that the affidavits submitted by NWF, when read along with the entire record of the case, alleged specific facts sufficient to demonstrate an injury in fact upon which to premise standing and survive

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130 *See id.* (quotation omitted). First, NWF sought a preliminary injunction to prohibit the Department of the Interior from eliminating or altering the status of any of the lands in the public domain under BLM's control. *National Wildlife Fed'n*, 676 F. Supp. at 273. The Department of the Interior moved to dismiss the case, claiming that NWF lacked standing to bring suit. *Id.* at 277. The District Court for the District of Columbia granted NWF's motion for a preliminary injunction and denied Interior's motion to dismiss. *Id.* at 277, 279. On appeal, the United States Court of Appeals for the District of Columbia Circuit upheld the preliminary injunction. *National Wildlife Fed'n*, 835 F.2d at 327. The D.C. Circuit denied the Department of the Interior's petition for a rehearing. National Wildlife Fed'n v. Burford, 844 F.2d 889, 890 (D.C. Cir. 1988) (per curiam).

131 National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 328 (D.D.C. 1988), *rev'd* 878 F.2d 422 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990). NWF submitted four additional affidavits in an attempt to meet the requirements for standing. *Id.* at 328 n.3.

132 *Id.* at 332. The Peterson Affidavit stated:

> My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

*National Wildlife Fed'n*, 497 U.S. at 886 (quotation omitted). NWF member Richard Erman's affidavit was similar to Peterson's, except that it pertained to withdrawal revocations in Arizona. *Id.* (quotation omitted).

133 *National Wildlife Fed'n*, 699 F. Supp. at 332. The court reasoned that the two affidavits submitted by NWF's members failed to demonstrate standing because they did not present allegations of injury with enough specificity to survive Interior's motion for summary judgment. *Id.*

134 878 F.2d 422 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

135 *Id.* at 434. The court remanded for trial on the merits and declined to reinstate the preliminary injunction, reasoning that the decision on the merits would be forthcoming. *Id.* at 425 n.2, 434. The appellate court also held that the district court abused its discretion when it refused to allow NWF members to submit four additional affidavits to support the group's standing. *Id.* at 433.

a motion for summary judgment.[136] The Supreme Court granted certiorari to resolve the difficult issues posed by the *Burford* line of cases.[137]

In *Lujan v. National Wildlife Federation*,[138] the Supreme Court, in a five to four majority opinion written by Justice Scalia, reversed the decision of the D.C. Circuit.[139] Justice Scalia explained that plaintiffs must identify an agency that has injured them in some way and demonstrate that they have suffered a legal wrong or have been adversely influenced or aggrieved, within the purview of the relevant statute, by the challenged action.[140] The Court held that NWF's affidavits did not allege injuries sufficient upon which to premise standing.[141] The majority acknowledged that recreational and aesthetic injuries were within the zone of interests of FLPMA and NEPA.[142] Justice Scalia declared, however, that the affidavits in the *National Wildlife Federation* case failed to allege harm to a sufficient level of detail and demonstrate a concrete agency action

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136 *Id.* at 430, 431. The affidavits, the D.C. Circuit asserted, contained adequate details to require the district court to reach the merits of the case. *Id.* at 430.

137 Lujan v. National Wildlife Fed'n, 493 U.S. 1042, 1042 (1990).

138 497 U.S. 871 (1990).

139 *Id.* at 875, 900. Justice Scalia was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy. *Id.* at 874. Justice Blackmun wrote a dissenting opinion, in which Justices Brennan, Marshall, and Stevens joined. *Id.* at 900 (Blackmun, J., dissenting).

140 *Id.* at 882, 883. "Agency action" includes any "rule" or action defined in the Administrative Procedure Act, which provides in pertinent part:

> "[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

5 U.S.C. § 551(4) (1988).

Agency action is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." 5 U.S.C. § 551(13) (1988).

In addition to meeting the definition of agency action, Justice Scalia stated, the challenged action must be "final" when review is pursued under the general review provisions of the APA rather than under a specific statute. *National Wildlife Fed'n*, 497 U.S. at 882 (quotation omitted). *See generally* Garrity-Rokous, *supra* note 124 (discussing what constitutes final agency action).

141 *National Wildlife Fed'n*, 497 U.S. at 889.

142 *Id.* at 886. Specifically, Justice Scalia stated: "We have no doubt that 'recreational use and aesthetic enjoyment' are among the *sorts* of interests those statutes were specifically designed to protect. The only issue, then, is whether the facts alleged in the affidavits showed that those interests of *Peterson and Erman* were actually affected." *Id.*

that resulted in the harm.[143] In essence, Justice Scalia misapplied procedural rules to reach the desired result of preventing NWF from having a trial on the merits.[144]

Additionally, the majority declared that because there was no final agency action within the meaning of the Administratve Procedure Act (APA),[145] the case was not ripe for review.[146] In an attempt to constrain the judiciary's ability to review agency action, Justice Scalia reasoned that the plaintiffs were seeking to change the way the Secretary of the Interior administered the BLM program, which was not truly an agency action.[147] The majority noted that there was no regulation or order promulgated by the Department of Interior or BLM that created or defined the challenged program.[148] The majority also observed that the program was con-

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143 *Id.* at 889, 890. Overruling the court of appeals, the Supreme Court stated that the decision below was incorrect because it presumed that the affidavits embraced the specific facts necessary to present an issue for trial. *Id.* at 889. The *National Wildlife Federation* majority argued that granting standing based on the affidavits would defeat the purpose of the summary judgment rule because it would prevent a party from contesting a baseless claim. *Id.*

The majority, however, incorrectly characterized the appellate court's opinion as assuming that NWF members used the specific land in question. Shinn, *supra* note 16, at 905. The Court supported this erroneos assumption by inaccurately portraying an out-of-context portion of the court of appeals's decision. *Id.* The majority omitted a crucial court of appeals finding that the Peterson affidavit could only refer to parts of the affected land that were not previously open for mining. *Id.* (citing National Wildlife Fed'n v. Burford, 878 F.2d 422, 431 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990)). The Court's failure to acknowledge this finding implied that the D.C. Circuit found only general averments in the affidavit with respect to land affected by the withdrawal program. *Id.* A careful reading of the court of appeals opinion, however, shows that this is not correct. *Id.* (citing *National Wildlife Fed'n*, 878 F.2d at 430, 431).

144 *See id.* at 910. Examining Federal Rule of Civil Procedure 56(e), Justice Scalia noted that the Court is not obliged to assume that general allegations support the facts necessary to support the complaint. *National Wildlife Fed'n*, 497 U.S. at 889; *see* Celotex Corp. v. Catrett, 447 U.S. 317, 322 (1986) (holding that a motion for summary judgment must be granted if the non-moving party, after sufficient time for discovery, is unable to establish an element of his case). Interpreting the requirements of section 702 of the APA, Justice Scalia explained that the burden of proof lies upon the party seeking judicial review to allege the requisite facts. *National Wildlife Fed'n*, 497 U.S. at 884-85 (citing Sierra Club v. Morton, 405 U.S. 727, 740 (1972)).

145 5 U.S.C. §§ 581-596 (1988 & Supp. V 1994).

146 *National Wildlife Fed'n*, 497 U.S. at 892-93. "Ripeness" refers to the notion that a case may be brought too soon and "not yet be ripe for adjudication." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 2.12(d) (3d ed. 1986). The ripeness doctrine is supported by both pragmatism and policy considerations. *Id.* Concrete issues enable the court to resolve cases without reaching constitutional issues. *Id.* As a practical matter, "if the Court waits for an actual controversy, the whole constitutional problem may just be eliminated by later developments." *Id.*

147 *National Wildlife Fed'n*, 497 U.S. at 891.

148 *Id.* at 890. The land withdrawal review program, the Court asserted, was "simply

tinuously changing.[149] Therefore, the majority asserted, the proper venue for recourse was not through the judiciary, but rather through the legislative or executive branches.[150] Judicial review might only be appropriate, Justice Scalia stated, for each separate and individual revocation of a withdrawal or reclassification.[151] Thus, according to the majority, even though a case by case inquiry into the land withdrawal review program would be frustrating to NWF, there could be no extensive review or improvement of the program through the judicial branch.[152]

Finally, Justice Scalia declared, the courts cannot intervene in an agency decision until the plaintiffs simplify the controversy to judicially manageable proportions and demonstrate that the agency's action has caused them either harm or an imminent threat of harm.[153] As the pleadings did not adequately define the program or demonstrate an imminent threat of harm, the Justice explained, judicial intervention would be improper.[154] What Justice Scalia failed to note was that NWF had previously challenged BLM over the same course of conduct[155] and that Congress had

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the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA." *Id.* Justice Scalia contended that the land withdrawal program was actually a compilation of 1250 individual orders issued by BLM that terminated existing classifications or revoked withdrawals. *Id.* (citation omitted). Under the APA, the Justice concluded, the land withdrawal program would not properly be construed as agency action or final agency action unless BLM issued an order or regulation which affected or encompassed all of the individually issued orders. *Id.* at 890 n.2. *See generally* Peter H. A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627 (1983) (discussing the non-implementation of certain statutes, legal actions brought to force implementation, and the Court's reluctance to review administrative non-implementation).

149 *National Wildlife Fed'n*, 497 U.S. at 890. The Court posited that the individual BLM orders could constitute "rules of general applicability" or individual agency "actions," despite finding that they did not meet the requirements for agency action. *Id.* at 892, 892-93. These "rules," the Justice opined, represented BLM's intention to permit certain activities on land under their jurisdiction, to refuse to intervene with certain activities, and to take certain action when requested. *Id.* at 892. The Court stated that these directives were not the kind of final agency action that is ripe for judicial review because the action or inaction was discretionary and either did not immediately occur or did not harm the plaintiff. *Id.* at 892-93.

150 *Id.* at 894.

151 *Id.* at 892.

152 *Id.* at 894. Justice Scalia justified this "frustrating" result by stating that "the traditional . . . mode of operation of the courts" is to function in this fashion, requiring case by case adjudication rather than "across-the-board protection of our Nation's wildlife . . . ." *Id.*

153 *Id.* at 891.

154 *Id.* at 892-93.

155 National Wildlife Fed'n v. Burford, 835 F.2d 305, 317 (D.C. Cir. 1987).

tried to inject an environmental conscience into federal land use decisions by enacting the FLPMA and the NEPA.[156]

In dissent, Justice Blackmun vehemently argued that the majority had failed to understand that the courts should strive to construe procedural rules pragmatically in order to effectuate the just and efficient settlement of legal disputes.[157] To this end, the Justice rejected the majority's interpretation of standing requirements.[158] Justice Blackmun also castigated the majority for not finding that the district court had abused its discretion in refusing to consider the additional affidavits filed by NWF.[159] Additionally, the dissent declined to address the ripeness issue, claiming that the issue was not properly before the Court.[160]

Justice Blackmun further argued that NWF alleged sufficient facts to establish standing and withstand a summary judgment motion.[161] The dissent claimed that NWF's affidavits identified particular revocations that caused harm to the plaintiffs.[162] In failing to

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156 *See* 42 U.S.C. §§ 4321-4370d (1988 & Supp. IV 1993); 43 U.S.C. §§ 1701-1784 (1988 & Supp. IV 1993); *supra* notes 35, 127 (discussing, respectively, the NEPA and the FLPMA).

157 *NWF*, 497 U.S at 912 (Blackmun, J., dissenting). Justice Blackmun stated:

> The District Court and today's majority fail to recognize the guiding principle of the Federal Rules of Civil Procedure, the principle that procedural rules should be construed pragmatically, so as to ensure the just and efficient resolution of legal disputes. . . . But where the Rules expressly confer a range of discretion, a District Court may abuse its authority by refusing to take account of equitable concerns, even where its action violates no express command. In my view, such an abuse of discretion occurred here.

*Id.* at 912-13 (Blackmun, J., dissenting).

158 *Id.* at 902 (Blackmun, J., dissenting).

159 *Id.* at 904-05 (Blackmun, J., dissenting).

160 *Id.* at 915 n.16 (Blackmun, J., dissenting).

161 *Id.* at 902, 904 (Blackmun, J., dissenting). Explaining the requirements that NWF had to meet in order to have standing, Justice Blackmun pointed out that specific evidence showing an injury is required by Federal Rule of Civil Procedure 56(e), which governs litigants' burdens in motions for summary judgment. *Id.* at 902 (Blackmun, J., dissenting) (quotation omitted). The Justice stated that NWF fulfilled the evidence portion of the requirement by submitting the sworn accounts of two members. *Id.* The specificity element, Justice Blackmun continued, was satisfied by examining the affidavits in the context of the record as a whole, thus completing the requirements for standing to survive a motion for summary judgment. *Id.* at 903-04 (Blackmun, J., dissenting).

162 *Id.* at 902 (Blackmun, J., dissenting) (citation omitted). The issue, the Justice stressed, was whether there was a genuine question for trial, not whether NWF had proven that it had standing to bring suit. *Id.* at 903 (Blackmun, J., dissenting). The Justice noted that NWF alleged that the government's actions would cause increased mining of public lands, which would damage the environment and therefore diminish the recreational use of the lands by NWF members. *Id.* at 900 (Blackmun, J., dissenting). Also, the dissent noted, "evidence supported the Federation's assertion

confer standing upon NWF, Justice Blackmun asserted, both the district court and the majority disregarded the judiciary's interest in the "just and efficient resolution of legal disputes."[163]

Finally, the dissent agreed with the framework of the majority's analysis of the land withdrawal review program, but disagreed with the result the majority reached in the case *sub judice*.[164] The true issue, Justice Blackmun explained, was whether the agency actions that allegedly violated the law were part of the agency action in dispute, not whether the scope of the agency action challenged was too broad.[165] According to the dissent, the fact that the land withdrawal review program was never deemed a "program," but instead remained a series of individual agency actions, should not bar its review by the judiciary.[166] Justice Blackmun would have, therefore, remanded the case to the district court to determine whether the land withdrawal review program was an agency action within the meaning of the APA.[167]

### 2. *Lujan v. Defenders of Wildlife*

The Supreme Court further limited the types of injuries that satisfy the injury in fact element in *Lujan v. Defenders of Wildlife*.[168] In *Defenders of Wildlife*, the plaintiffs, Defenders of Wildlife (Defenders), brought suit to challenge a regulation promulgated under the

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that on lands newly opened for mining, mining in fact would occur." *Id.* Concluding, the dissent observed that prior to the action brought by NWF, 406 mining claims had been filed for the South Pass-Green Mountain area and more than 7200 in twelve other Western states had been filed as well. *Id.* at 900 n.1 (Blackmun, J., dissenting).

163 *Id.* at 912 (Blackmun, J., dissenting). With respect to the district court's refusal to consider additional affidavits submitted by NWF, Justice Blackmun asserted that the court had improperly terminated the lawsuit. *Id.* at 904 (Blackmun, J., dissenting). Justice Blackmun opined that the district court ended proceedings via a technical mechanism, ignoring the massive nature of the litigation and instead reaching a result that could have been legitimately averted. *Id.* This mistake, the Justice declared, was compounded by the majority's failure to appreciate the complexity and expense of the underlying litigation, as well as by a failure to properly construe the Federal Rules of Civil Procedure. *Id.* at 904-05 (Blackmun, J., dissenting). The Federal Rules of Civil Procedure, stated Justice Blackmun "'shall be construed to secure the just, speedy, and inexpensive determination of every action.'" *Id.* (quotation omitted).

164 *See id.* at 913 (Blackmun, J., dissenting).

165 *Id.* at 914 (Blackmun, J., dissenting).

166 *Id.* at 913, 914-15 (Blackmun, J., dissenting).

167 *Id.* at 914-15 (Blackmun, J., dissenting).

168 112 S. Ct. 2130 (1992); *see* Richard J. Pierce, Jr., Comment, Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170-71 (1993) (asserting that "Justice Scalia's opinion in *Defenders* is an insupportable judicial contraction of the legislative power to make judicially enforceable policy decisions") (footnote omitted).

Endangered Species Act (ESA) by the Secretary of the Interior.[169] The regulation at issue declared that federal agencies funding projects in foreign countries had no duty to consult the Secretary regarding the impact these projects would have upon the endangered species of the world.[170] As a result, federal agencies could fund global projects without regard to their effect upon endangered species, but could not do the same within the territorial United States.[171]

Within the ESA, there is explicit authorization for "any person" to obtain judicial review of agency action thought to violate the Act.[172] Defenders brought suit under this provision to force

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169 *Defenders of Wildlife*, 112 S. Ct. at 2135; *see supra* note 36 for a discussion of the ESA.

The Secretary of the Interior moved to dismiss the case for lack of standing, and the district court granted the Secretary's motion. Defenders of Wildlife v. Hodel, 658 F. Supp. 43, 44, 48 (D. Minn. 1987), *rev'd*, 851 F.2d 1035 (8th Cir. 1988). The Circuit Court of Appeals for the Eighth Circuit reversed. Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1044 (8th Cir. 1988). On remand, the Secretary again moved for summary judgment on the issue of standing, and Defenders moved for summary judgment on the merits. Defenders of Wildlife v. Hodel, 707 F. Supp. 1082, 1083 (D. Minn. 1989), *aff'd sub nom.* Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), *rev'd*, 112 S. Ct. 2130 (1992). The district court denied the Secretary's motion on the grounds that the Eighth Circuit had resolved the issue, and found for Defenders on the merits. *Id.* at 1083-84, 1086. The court of appeals affirmed. Defenders of Wildlife v. Lujan, 911 F.2d 117, 125 (8th Cir. 1990), *rev'd*, 112 S. Ct. 2130 (1992). The Supreme Court granted certiorari to review the case. Lujan v. Defenders of Wildlife, 111 S. Ct. 2008, 2008 (1991).

170 *Defenders*, 112 S. Ct. at 2135; *see also* 50 C.F.R. 402.01 (1986) (1986 Rule).

After Congress passed the ESA in 1973, it was uncertain whether the ESA's obligations applied to United States government actions in foreign countries. Sunstein, *supra* note 114, at 198. Then, in 1978, the Department of the Interior determined that those actions were regulated. *Id.* (citing 50 C.F.R. 402.02 (1978) (1978 Rule)). In 1978, Congress amended the ESA and enacted the new section 7(a), with the specific intention of restating existing law on section 7, including the 1978 Rule on foreign consultation requirements. *See* H.R. CONF. REP. NO. 1804, 95th Cong., 2d Sess. 18 (1978). Despite the clear manifestation of congressional intent that federal agency actions outside of the territorial United States were subject to the section 7 consultation process, the Department of the Interior reversed the policy in 1983. *See id.*; Sunstein, *supra* note 114 at 198 (citing 50 C.F.R. 402.01 (1986)) (other citation omitted). The new regulation announced that only actions within the territorial United States were governed by the consultation requirement. *See* 50 C.F.R. 402.01 (1986).

171 *See* 50 C.F.R. 402.01 (1986).

172 16 U.S.C. § 1540(g) (1988). The provision states, in part:

> [A]ny person may commence a civil suit on his own behalf—
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> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or
>
> . . . .
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> (C) against the Secretary where there is alleged a failure of the Sec-

the Department of the Interior to change its ruling.[173] Defenders premised their standing largely upon injuries to two members of its organization.[174] Both members submitted affidavits containing general allegations intended to satisfy Article III and prudential limitations upon standing.[175]

The Supreme Court reversed the court of appeals's finding of standing, holding that Defenders failed to demonstrate adequate standing to seek judicial review of the regulation.[176] Because the statute expressly granted to any person the right to bring suit to challenge agency violations of the ESA,[177] the majority in effect held that Congress can not delineate which kinds of harm satisfy the injury in fact requirement.[178]

Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, authored the opinion of the Court.[179] The Jus-

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> retary to perform any act or duty . . . which is not discretionary with the Secretary.
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> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.

*Id.* The statutory definition of "person" includes corporations, partnerhips, and associations such as the respondents. 16 U.S.C. § 1532(13) (1988). See *supra* note 36 for further discussion of the ESA.

173 *Defenders of Wildlife*, 112 S. Ct. at 2135. Specifically, Defenders sought an injunction to require the Secretary to restore the 1978 Rule. *Id.*

174 *Id.* at 2138.

The Court has long permitted organizations to premise standing upon injuries suffered by their members. *See*, International Union, United Auto., Aerospace, and Agric. Implement Workers v. Brock, 477 U.S. 274, 281 (1986) (citations omitted) (noting that it is permissible for an association to have standing as a representative of its members); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 342 (1977) ("If the Commission were a voluntary membership organization . . . its standing to bring this action as the representative of its constituents would be clear under prior decisions of this Court.").

175 *See Defenders of Wildlife*, 112 S. Ct. at 2138. The affiants alleged that they had already visited the habitat of an endangered species, that they intended to return to those habitats for additional observation in the future, and that the regulation injured them because it permitted federal agencies to fund projects that threatened to harm endangered species and their habitats. *Id.*

176 *Id.* at 2146.

177 *See* 16 U.S.C. 1540(g) (1988). See *supra* note 172 for the text of Section 1540(g).

178 *See* Pierce, *supra* note 168, at 1179 ("If, as *Defenders* suggests, the Court now believes that standing creates a judicially enforceable limit on congressional discretion, rather than a prudential limit on judicial discretion, both the reasoning and results of the Court's prior statutory standing cases are in grave doubt.").

179 *Defenders of Wildlife*, 112 S. Ct. at 2134-35. Justices Kennedy and Souter did not join with Part III-B of the opinion, which concerned the issue of redressability. *Id.* at 2134, 2140.

tice used six main lines of reasoning in concluding that Defenders lacked standing.[180] First, Justice Scalia determined that there was insufficient proof of imminent, judicially cognizable injury in fact to the plaintiff.[181] Second, the Justice found that the statute's language explicitly granting standing to "any person" was unconstitutional as applied in this context.[182] Third, the Court rejected the ecosystem nexus, animal nexus, and professional nexus as theories of standing to demonstrate injuries to the plaintiff.[183] Fourth, the

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180 Pierce, *supra* note 168, at 1173.

181 *Defenders of Wildlife*, 112 S. Ct. at 2138. The Court began the analysis of this issue by enumerating the characteristics of a judicially cognizable injury. *See id.* at 2136 (citation omitted). The injury, wrote the Court, must be "concrete and particularized," as well as "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citations and quotation omitted). The Court opined that the affidavits failed to meet these requirements due to a lack of temporal proof. *Id.* at 2138. An expression of intent to visit and observe a species or its habitat in the future, the majority asserted, "is simply not enough" to meet the imminent injury standard. *Id.*; *see also* Pierce, *supra* note 168, at 1174. As Pierce points out, to meet the Court's requirements, the plaintiff was required to manifest an intent to return to the habitat on a specific date and perhaps even purchase a plane ticket as evidence of that intention. *See* Pierce, *supra* note 168, at 1174.

182 *See Defenders of Wildlife*, 112 S. Ct. at 2143, 2145 (citations omitted). The Court noted:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" . . . is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed". . . . We have always rejected that vision of our role.

*Id.* (citing U.S. CONST. art. II, § 3) (other citations and quotation omitted).

This marks the first time that the Supreme Court declared unconstitutional a statute that created a specific class of potential plaintiffs and authorized the members of that class to sue for judicial review of an agency action that harmed the interests of that class. *See* Pierce, *supra* note 168, at 1178. Rather, the Court had previously respected the intent of Congress to grant standing to particular groups of plaintiffs with similar interests in specific agency proceedings. *Id.* (citations omitted). The radical change presented by Justice Scalia's opinion was demonstrated by Cass Sunstein, who recounted the history of the law of standing in an effort to document the extent of the Court's departure from it. *See generally* Sunstein, *supra* note 114. If the Court now deems it appropriate to use standing to enforce limitations on congressional discretion, as *Defenders of Wildlife* suggests, rather than to simply use standing as a prudential limitation on judicial discretion, then all previously decided statutory standing cases may be in doubt. Pierce, *supra* note 168, at 1179.

183 *Defenders of Wildlife*, 112 S. Ct. at 2139-40. Defenders advanced three "nexus" theories in support of its argument that its members would suffer legally redressable harm from projects adversely affecting endangered species. *Id.* at 2139. The theory of the "ecosystem nexus" is that a project harming any portion of an integrated ecosystem also harms anyone who uses any part of that ecosystem. *Id.* The "animal nexus" theory hypothesizes that any project having a negative impact on an endangered species also injures anyone having an interest in observing the species at any location, such as a zoo. *Id.* Finally, the "vocational nexus" theory proposes that a project that adversely affects the survival of an endangered species injures anyone who has a pro-

majority concluded that the judicial action prayed for by the suit would not redress the injuries alleged.[184] Fifth, Justice Scalia articulated that the procedural injury complained of by the plaintiff was an insufficient basis upon which to premise standing.[185] Finally, the Court enunciated, granting judicial review of the plaintiff's claims would do a disservice to the "take care" clause and principle of separation of powers.[186]

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fessional interest in that species. *Id.* The majority rejected these theories, characterizing the animal nexus and vocational nexus thoeries as "beyond all reason." *Id.*

184 *Id.* at 2140. This is Part III-B of the opinion, where Justice Scalia was joined by Chief Justice Rehnquist and Justices White and Thomas. *Id.* at 2134.

First, Justice Scalia stated, the plaintiff failed to implead the agencies that funded the offending projects. *Id.* at 2140. Thus, the Justice continued, any relief granted would affect only the Secretary of the Interior and not the other agencies involved. *Id.* Justice Scalia posited that, at most, the Court could order the Secretary to revise the regulation to require consultation with respect to foreign projects, but this requirement would only apply to those agencies that were bound to comply with the Secretary's regulation. *Id.* As this was an open question, the Justice opined, the underlying suit would not redress Defenders' injuries. *Id.* ; *see* Pierce, *supra* note 168, at 1183-84 (stating that this reasoning is at odds with precedent, and "ignores the reality that all federal agencies routinely conform their conduct to decisions of the Supreme Court").

Second, Justice Scalia wrote that the Court could not redress the injury because federal agencies only provide a fraction of the aggregate financing required for foreign projects. *Defenders of Wildlife*, 112 S. Ct. at 2142. Thus, the Justice concluded, the prayed for relief would not redress the injury because the plaintiffs did not indicate that the relevant projects would be suspended or produce less harm if federal agency funding were discontinued. *Id.*

The dissent, however, noted that the partial funding of one of the challenged projects amounted to $170 million in aid to a country whose annual gross national product was only six billion dollars. *See id.* at 2157 (Blackmun, J., dissenting) (citations omitted). Also, Justice Blackmun declared, an agency could exert considerable influence over the manner in which a project proceeds without providing 100% of the funding. *Id.* at 2156-57 (Blackmun, J., dissenting).

185 *Id.* at 2142-43. The Court noted that the court of appeals characterized Defenders's injury as procedural. *Id.* at 2142. A person, the majority concluded, cannot obtain judicial review of an agency action based only upon injury done to a procedural right. *Id.* at 2143; Pierce, *supra* note 168, at 1185. The majority qualified this conclusion in several ways, however, raising questions about how such a holding would apply in other contexts. Pierce, *supra* note 168, at 1185-86; *see Defenders of Wildlife*, 112 S. Ct. at 2142-43; Pierce, *supra* note 168, at 1185-86 (describing the restrictions that the Court placed on its conclusion).

186 *Defenders of Wildlife*, 112 S. Ct. at 2145 (quoting U.S. CONST. art. 2, § 3). The Court first examined cases that denied plaintiffs the opportunity to challenge government conduct on constitutional grounds when they failed to premise their suits on statutes authorizing judicial intervention. *Id.* at 2143-44 (citing Whitmore v. Arkansas, 495 U.S. 149, 160 (1990); Allen v. Wright, 468 U.S. 737, 754 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982); Schlesinger v. Reservists Comm., 418 U.S. 208, 220 (1974); United States v. Richardson, 418 U.S. 166, 176-77 (1974); Doremus v. Board of Educ., 342 U.S. 429, 434 (1952); *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam); Frothingham v. Mellon, 262 U.S. 447, 488 (1923); Fairchild v. Hughes, 258 U.S. 126,

Of these reasons, only the first two commanded the full support of the six Justices who joined in portions of the majority opinion.[187] Thus, under the Court's analysis, the grant of standing under the ESA failed for two interrelated reasons.[188] First, according to the majority, no citizen could meet the Article III injury in fact element if the only injury suffered was from intangible harm that resulted from the failure of the executive branch to follow the law.[189] Second, Justice Scalia opined, such suits would violate the Article II principle that it is the executive's role to "take care that the laws be faithfully executed."[190]

Justice Kennedy, joined by Justice Souter, concurred with the judgment of the Court, condemning the ESA citizen suit provision as constitutionally flawed.[191] The Justice agreed with the majority in part, stating that Congress can specifically define what injuries or events give rise to claims under a particular statute where none may previously have existed.[192] The Justice acknowledged, however, that there are limits to Congress's power to confer upon plaintiffs the right to challenge an agency action in court.[193] The concurrence also underscored the need for a concrete showing of

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129-30 (1922)). The reasoning in those cases, opined the Court, extended to situations where a statute explicitly authorizes judicial review of agency actions. *Defenders of Wildlife*, 112 S. Ct. at 2144-45; *see* Pierce, *supra* note 168, at 1187 (citing *Defenders of Wildlife*, 112. S. Ct. at 2144-45) (stating that "the Court for the first time transposed this method of avoiding judicial involvement in some classes of disputes into contexts in which Congress has limited agency action by statute and has explicitly called on federal courts to enforce that statutory limit against agencies").

187 Pierce, *supra* note 168, at 1174.

188 Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1797 (1993).

189 *Id.*; *see Defenders of Wildlife*, 112 S. Ct. at 2143 (rejecting the proposition that the "injury in fact" element of the standing test could be satisfied by "congressional conferral upon *all* persons . . . [a] right to have the Executive observe the procedures required by law").

190 Krent & Shenkman, *supra* note 188, at 1797; *Defenders*, 112 S. Ct. at 2145 (quoting U.S. CONST. art. II, § 3); *see* Sunstein, *supra* note 114, at 215-20 (demonstrating how the opinion in *Defenders* can be interpreted as the logical outgrowth of Justice Scalia's writings on the separation of powers aspects of standing). *See generally*, Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L. J. 1141 (1993) (criticizing Justice Scalia's position on standing and the separation of powers); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (setting forth then-Judge Scalia's position on the interaction of the standing doctrine and the principle of the separation of powers).

191 *Defenders*, 112 S. Ct. at 2146, 2146-47 (Kennedy, J., concurring).

192 *Id.* at 2146-47 (Kennedy, J., concurring) (citation omitted). Justice Kennedy wrote 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 and I do not read the Court's opinion to suggest a contrary view." *Id.* (citation omitted).

193 *Id.* at 2147 (Kennedy, J., concurring)

some injury upon which to premise a citizen suit.[194]

The constitutional flaw identified by the concurrence, however, is different from that identified by the majority and is easy to correct.[195] Justice Kennedy explicitly acknowledged that Congress has the power to confer standing by statute.[196] To resolve the constitutional objections raised by the majority, the Justice implied that Congress must identify a general public interest in or benefit derived from endangered species and demonstrate how the loss of those species constitutes an injury to a citizen that the judiciary must protect.[197]

Key to resolving the difficulties expressed by Justice Kennedy's concurrence are the "novel" nexus theories of standing proposed within the plaintiffs' affidavits, such as the ecosystem nexus theory and the geographic nexus theory.[198] The majority opinion rejected these theories as "beyond all reason."[199] Justices Blackmun, O'Connor, and Stevens accepted the theories, and Justices Kennedy and Souter suggested that under different circumstances they may be of substantial merit.[200] Despite the insufficient factual record before the Court in this case, asserted Justice Kennedy, there

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194 *Id.*

195 Pierce, *supra* note 168, at 1181.

196 *Defenders of Wildlife*, 112 S. Ct. at 2146-47 (Kennedy, J., concurring). The Justice opined that Congress must "identify the injury . . . and relate the injury to the class of persons entitled to bring suit." *Id.* at 2147 (Kennedy, J., concurring).

197 *See id.* ESA's citizen suit provision, stated Justice Kennedy, fails to satisfy these minimum requirements "because while the statute purports to confer a right on 'any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter,' it does not of its own force establish that there is an injury in 'any person' by virtue of any 'violation.'" *Id.* (quoting 16 U.S.C. § 1540(g)(1)(A) (1988)) (alteration in original).

198 *See* Brief for Respondents at 26-30, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (No. 90-1424). Under the geographic nexus theory, Defenders's members have standing because they were present at the project sites to study endangered species and their habitats. *Id.* at 26. Because those projects "may affect" the species and habitats in the area, consultation under section 7 of the ESA is required. *Id.* The ecosystem nexus theory of standing is based upon Congress's declaration of purpose in the ESA "'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . .'" *Id.* at 27 (quoting 16 U.S.C. § 1531(b) (1988)). Defenders interpreted this language as a Congressional manifestation of intent to address the problem of decrease animal species at the ecosystem level. *Id.*

199 *Defenders of Wildlife*, 112 S. Ct. at 2139. The Court stated that "[s]tanding is not 'an ingenious academic exercise in the conceivable,' but . . . requires . . . a factual showing of perceptible harm." *Id.* (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688 (1973)).

200 *See id.* at 2154 (Blackmun, J., dissenting); *Id.* at 2147 (Stevens, J., concurring); *Id.* at 2146 (Kennedy, J., concurring) (citation omitted).

was no need to foreclose the possibility that nexus theories similar to those proposed by Defenders' affidavits would support a standing claim in a future case.[201] Justice Blackmun was also receptive to the plaintiff's theories of environmental standing.[202]

This suggests that the majority of the Court does not share Justice Scalia's characterization of the theories as "beyond all reason."[203] Therefore, most members of the Court would likely accept a legislative finding that the theories adequately describe injuries which the ESA seeks to protect and would not find the statute unconstitutional when applied to protect those interests.[204] To find the ESA unconstitutional after such a legislative endorsement of the nexus theories, the Court would have to declare the legislative adoption of widely accepted theories of biodiversity "irrational."[205] Such a finding would require the Court to reject "the commonsense notion that a biologist who has devoted a lifetime to study of the Asian leopard is injured when the last leopard meets its demise."[206] Thus, to overcome the votes against standing in *Defenders of Wildlife*, Congress need only explicitly define the class of injured plaintiffs as those having a nexus with the area, animal, or ecosys-

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201 *Id.* Justice Kennedy, evincing an unwillingness to dismiss the nexus theories entirely, referred to *Japan Whaling Association v. American Cetacean Society* and quoted the following passage: "respondents . . . undoubtebly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting." *Id.* (quoting Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986)).

202 *Id.* at 2154 (Blackmun, J., dissenting). Crucial to Justice Blackmun's differing opinion with respect to this matter, and to the ecosystem nexus theory in particular, was the Justice's understanding that ecosystems and species suffering environmental harm are often geographically distant from the area where the challenged action occurred. *Id.* The very nature of environmental injuries, explained the dissent, proves the majority opinion incorrect. *Id.* "Environmental destruction," wrote the Justice, "may affect animals travelling over vast geographical ranges . . . or rivers running long geographical courses." *Id.* (citing *Japan Whaling*, 478 U.S. at 231 n.4; Arkansas v. Oklahoma, 112 S. Ct. 1046, 1050, 1061 (1992)). In *Japan Whaling*, opined Justice Blackmun, the Court acknowledged the harm to American whale watchers that resulted from Japanese whaling activities. *Id.* (citing *Japan Whaling*, 478 U.S. at 231 n.4). Second, the Justice referred to *Arkansas v. Oklahoma*, in which the Court recognized harm suffered by Oklahoma residents due to the emissions of a wastewater treatment plant 39 miles upstream from the Oklahoma border. *Id.* (citing Arkansas v. Oklahoma, 112 S. Ct. at 1050, 1061). In conclusion, the Justice noted, the Court should not use a plaintiff's inability to pinpoint the precise location of an animal's slaughter or the point source of a toxic waste emission to deny a finding of injury. *Id.*

203 *See supra* notes 198-202 and accompanying text (describing the position of Justices Kennedy, Souter, Stevens, Blackmun, and O'Connor in support of the "nexus" theories of standing); *Defenders*, 112 S. Ct. at 2139.

204 Pierce, *supra* note 168, at 1183.

205 *Id.* (citation omitted).

206 *Id.*

tem threatened by the offending agency action.[207]

Justice Blackmun, joined by Justice O'Connor, dissented in *Defenders of Wildlife*, insisting that the majority had launched a "slash-and-burn expedition through the law of environmental standing."[208] The dissent rested upon two primary objections to the majority opinion.[209] First, the dissent posited, Defenders raised a genuine issue of fact as to injury and redressability sufficient to survive the motion for summary judgment.[210] Second, the dissent rejected the majority view that a procedural injury defined by Congress is an insufficient premise upon which to base standing.[211] Above all, Justice Blackmun's opinion evinced a fear that the Court is placing new restrictions on Congress's constitutionally rooted authority to provide for citizen suits stemming from procedural injuries.[212]

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207 *See Defenders*, 112 S. Ct. at 2147 (Kennedy, J., concurring).

208 *Id.* at 2151, 2160 (Blackmun, J., dissenting).

209 *Id.* at 2151 (Blackmun, J., dissenting).

210 *Id.* Justice Blackmun wrote that the Court failed to apply the proper standard under Federal Rule of Civil Procedure 56(c) for showing a genuine issue of material fact for standing and instead demanded "what is likely an empty formality." *Id.* at 2152, 2153 (Blackmun, J., dissenting). Application of the proper standard, the dissent asserted, would result in a finding that the affidavits and testimony of the Defenders affiants demonstrated sufficient issues that could only be resolved at trial. *Id.* at 2152 (Blackmun, J., dissenting). Justice Blackmun declared that a reasonable fact-finder could find, based on the affidavits and testimony of the two members of Defenders of Wildlife, that either would return shortly to the the project sites. *Id.* The "injury in fact" standard, the Justice noted, would be satisfied upon such a finding. *Id.* In support of this assertion, Justice Blackmun intimated that the Court should not stand on ceremony by demanding unreasonably detailed factual presentations to demonstrate environmental injury. *See id.* at 2154 (Blackmun, J., dissenting).

211 *Id.* at 2151-52 (Blackmun, J., dissenting). Justice Blackmun asserted that Congress uses procedural rules to give the executive branch a large degree of flexibility. *Id.* at 2159 (Blackmun, J., dissenting). Espousing a different constitutional philosophy from that of the majority, the dissent complained that the Court's opinion inappropriately enlarged the domain of the executive branch. *Id.*; *see id.* at 2145. The Justice wrote that by declaring ESA's standing provision unconstitutional as applied in this case, the majority opinion "reflect[ed] an unseemly solicitude for an expansion of power of the executive branch." *Id.* at 2159 (Blackmun, J., dissenting).

Justice Blackmun criticized the majority for questioning Congress's ability to force the Executive Branch to observe procedures mandated by law. *Id.* This idea was clearly articulated in *Marbury v. Madison*, where Chief Justice Marshall wrote, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). By intimating that procedural injuries are not constitutionally cognizable, the majority subverted *Marbury*'s underlying premise. *See Defenders of Wildlife*, 112 S. Ct. at 2159, 2160 (Blackmun, J., dissenting) (quotation omitted).

212 *See Defenders of Wildlife*, 112 S. Ct. at 2151-52 (Blackmun, J., dissenting). The Justice "fear[ed] the Court seeks to impose fresh limitations on the constitutional authority of Congress to allow citizen-suits in the federal courts for injuries deemed 'procedural' in nature." *Id.* Most government conduct, according to the dissent, can

To ensure compliance with ESA, Congress declared that any person can bring suit to enforce the Act's provisions.[213] Further, the inclusion of the citizen suit provision stemmed rationally from congressional findings of fact, included in ESA, that the loss of genetic global biodiversity harms all people.[214] Therefore, Justice Scalia's rejection of standing is a direct repudiation of the validity of Congress's factual determinations with respect to injury and the rationality of the citizen suit provision.[215] In so doing, the Supreme Court encroached upon the legislative domain.[216]

## III. THE ANTICIPATED IMPACT OF JUSTICE GINSBURG

As *Defenders of Wildlife* and *National Wildlife Federation* demonstrate, the standing doctrine is particularly significant to the future of environmental law.[217] Despite Justice Scalia's attempt to use

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be characterized as procedural. *Id.* at 2158 (Blackmun, J., dissenting). Therefore, the dissent continued, most injuries that occur as the result of government conduct can at some general level be described as procedural. *Id.* Justice Blackmun stated that the majority opinion created considerable uncertainty with respect to these types of legal actions as courts seek to understand what the majority opinion meant when it declared that "'procedural' injuries are not constitutionally cognizable injuries." *Id.*

Examining ESA's procedural consultation requirement, the Justice compared it to the one approved in *Japan Whaling Association v. American Cetacean Society*, where the Court explicitly found standing to sue. *Id.* (citing Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986)). Similar to the statute at issue in *Japan Whaling*, the Justice wrote, the ESA requires consultation with the Secretary of the Interior to insure that no agency action proceeds without a full consideration of its potential effects on listed species; after consultation occurs, the agency action must be designed to avoid jeopardizing endangered species. *Id.* The dissent declared that "these action-forcing procedures are 'designed to protect some threatened concrete interest,' of persons who observe and work with endangered or threatened species." *Id.* at 2159 (Blackmun, J., dissenting) (quoting *Defenders*, 112 S. Ct. at 2143 n.8). Thus, Justice Blackmun concluded, the majority opinion's assertion that the plaintiffs were not "'seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs'" was groundless. *Id.* (quoting *Defenders*, 112 S. Ct. at 2142).

213 Brief of Amicus Curiae American Institute of Biological Sciences in Support of Respondents at 3, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (No. 90-1424); *see* 16 U.S.C. § 1540(g) (1988).

214 Brief of Amicus Curiae, American Institute of Biological Sciences in Support of Respondents at 2, Lujan v. Defenders of Wildlife at 3, 112 S. Ct. 2130 (1992) (No. 90-1424).

215 *See Defenders of Wildlife*, 112 S. Ct. at 2146; Brief of Amicus Curiae American Institute of Biological Sciences in Support of Respondents at 2, 3, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (No. 90-1424); 16 U.S.C. § 1540(g) (1988).

216 *See Defenders of Wildlife*, 112 S. Ct. at 2159 (Blackmun, J., dissenting) (citations omitted) ("[T]his Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress . . . has subjected the exercise of that power to judicial review. . . . The Court's intimation today . . . threatens this understanding upon which Congress has undoubtebly relied.").

217 Robichaud, *supra* note 103, at 444 (citations omitted) (stating that "[c]urrent

standing to constrain judicial activism, the doctrine remains a crucial component of the political process.[218] Arguably, the doctrine gives the Court the very weapon that it needs to implement a less protective environmental policy than Congress intended.[219] As noted by Professor Tribe, recent decisions demonstrate the Court's willingness to let its view of the merits of a case dictate its conclusions as to standing.[220]

The trend toward constraining environmental standing runs contrary to earlier Supreme Court decisions, such as *SCRAP*[221] and

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judicial restraint has altered the focus of standing requirements, has led to uncertainty, and has posed new challenges for future environmental litigants") (footnote omitted); *see* Shinn, *supra* note 16, at 910 (contending that "[t]he *Lujan* majority misapplied the standing doctrine to reach a specific outcome"); Sunstien, *supra* note 114, at 165 (stating that *Lujan v. Defenders of Wildlife* may be "one of the most important standing cases since World War II").

218 *See* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 344 (1989) (citations omitted) (stating that "the proper role of the courts in our system of government has long been the source of considerable controversy" when the courts review administrative action).

219 *Id.* at 346. In this article, Professors Levy and Glicksman examined the Court's environmental law decisions and concluded that they exemplify the Court's shift "from activism to restraint in the regulatory context." *Id.* at 358. This shift ended the relative success that environmental litigants experienced during the early years of environmental litigation, from 1965 to 1975. *See id.* (footnote omitted). This period, however, was followed by one in which the Supreme Court abandoned institutional activism. *Id.* at 361.

The policy of judicial restraint is justified on the grounds that courts do not possess the requisite technical expertise to oversee the implementation and interpretation of complex statutes. *Id.* at 365 (citations omitted). Judicial restraint is justified on the grounds that "Congress has delegated the decisionmaking authority to the agencies." *Id.* These justifications are based on the "assumption that administrative agencies will faithfully implement statutory policies." *Id.* at 366. This assumption may or may not be valid, but the fact remains that some administrative agencies pursue policies that are inconsistent with Congress's statutorily manifested public policy objectives. *Id.* (citation omitted); *see also* Glicksman, *supra* note 115, at 253 (explaining that the federal judiciary's retrenchment with respect to the ability of environmental litigants to bring suit is due not to judicial restraint but to an attempt to dictate policy under the guise of judicial restraint).

220 LAWRENCE TRIBE, CONSTITUTIONAL CHOICES 100 (1985). Professor Tribe wrote:

> [T]he result has been the creation of special, largely unprincipled, exceptions to the basically liberal rules of standing to keep out cases of a kind the Court does not want to have to deal with. At the same time, the converse has been true: the Court has gone out of its way to consider the merits of particular cases that it wanted to decide even where the claimant's standing was at best tenuous under the standards of the formal rules.

*Id.*

221 United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

*Sierra Club*,[222] that liberalized the standing doctrine.[223] These cases reflected a pre-Justice Scalia conception of standing that did not necessarily involve a separation of powers debate.[224] The Court's central premise then was that it is the courts' duty to "say what the law is"[225] and thereby effectuate the will of Congress.[226] For example, in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*,[227] the Supreme Court defined the judicial role in protecting the natural environment as insuring that the vast federal bureaucracy does not destroy the legislative goals of Congress.[228] Moreover, in *International Primate Protection League v. Administrators of Tulane Educational Fund*,[229] the Court said that the

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222 Sierra Club v. Morton, 405 U.S. 727 (1972).

223 *See* DAVIS, *supra* note 87 at § 22.02-2 (asserting that *SCRAP* was "an all-time high in Supreme Court liberality on the subject of standing").

224 *See* Hays, *supra* note 93, at 1000 (citations omitted). Before the separation of powers doctrine became central to the definition of standing, courts granted environmental litigants access to the legal system in response to widespread social and congressional concern about environmental protection. *Id.*

225 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In *Marbury v. Madison*, the Supreme Court "emphasized the necessity for judicial protection of vested or legal rights" and stated that the role of the courts is to protect the rights of individuals. Nichol, *supra* note 70, at 1919-20 (citation omitted).

226 Hays, *supra* note 93, at 1001 (citations omitted).

227 449 F.2d 1109 (D.C. Cir. 1971). *Calvert Cliffs* represents the first time the Supreme Court interpreted the National Environmental Policy Act of 1969. *Id.* at 1111. The petitioners argued that rules adopted by the Atomic Energy Commission (Commission) governing public review of nuclear environmental issues did not comply with NEPA. *Id.* at 1111-12. The Commission argued that NEPA's requirements were so broad and vague that their actions were well within the strictures of that statute. *Id.* at 1112. The Court of Appeals for the District of Columbia stated that the judiciary can review agency decisions to insure compliance with the procedural requirements of NEPA and held that the Commission's rules violated the Act. *Id.* at 1112, 1115.

228 *Id.* at 1111. Writing for the D.C. Circuit, Judge Wright explained:

> These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress." But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.

*Id.* (citations omitted).

229 500 U.S. 72 (1991). *International Primate* arose out of the efforts of animal rights groups that sought to bar several scientific laboratories, including National Institutes of Health (N.I.H.), from using certain monkeys in federally-funded medical experiments. *Id.* at 74-75. The district court granted a temporary restraining order enjoining N.I.H. from using monkeys for medical research. *Id.* at 75-76. On appeal, N.I.H. argued that the petitioners did not have sufficient standing to seek the injunction. *Id.* at 76. The Fifth Circuit agreed and dismissed the case, holding that the

relevant standing inquiry is whether the law at issue in the controversy has conferred upon the plaintiffs a cause of action.[230] Justice Marshall further noted that standing is a question of substantive law, determined by referring to the statutory and constitutional provisions at the base of the claim.[231] This is markedly different than the tone of recent standing decisions.

While it appears that recent Supreme Court cases cast a long pall over the future of environmental litigation, the confirmation of Ruth Bader Ginsburg as Supreme Court Justice provides a ray of hope for a more enlightened approach to allowing environmental plaintiffs to seek judicial review of agency decisions.[232] While sitting on the Circuit Court of Appeals for the District of Columbia, Justice Ginsburg participated in many decisions that provide insight into her judicial philosophy regarding environmental standing.[233]

In *City of Los Angeles v. National Highway Traffic Safety Administration (National Highway)*,[234] for example, the complainants challenged the National Highway Traffic Safety Administration's (NHTSA) failure to prepare an Environmental Impact Statement covering Corporate Average Fuel Economy (CAFE) standards.[235]

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petitioners lacked standing. *Id.* The Supreme Court concluded that the plaintiffs had met the constitutional requirements for standing. *Id.* at 77.

230 *See id.* The Court wrote that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *Id.*

231 *Id.*

232 David Sive, *Will Justice Ginsburg Color Court Green?*, NAT'L L.J., Oct. 11, 1993, at 22. Analyzing many of Justice Ginsburg's court of appeals decisions, Sive characterized Ginsburg's view of standing as "apparently liberal" and not "narrow." *Id.* Specifically, Sive claimed that it would be hard to imagine Justice Ginsburg endorsing Justice Scalia's technical distinction between *Defenders of Wildlife* and *Japan Whaling*. *Id.*

233 *See id.* at 18, 22-23 (discussing several of Justice Ginsburg's environmental rulings); *see, e.g.*, City of Los Angeles v. National Highway Traffic Safety Admin. (NHTSA), 912 F.2d 478, 482-83, 485 (D.C. Cir. 1990) (granting standing to two cities challenging an agency's non-compliance with NEPA); National Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718, 726 (D.C. Cir 1982), *rev'd sub nom.* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (deciding that EPA had misconstrued a statute when drafting a regulation relating to the Clean Air Act); Dellums v. United States Nuclear Regulatory Comm'n, 863 F.2d 968, 984 (D.C. Cir. 1988) (R.B. Ginsburg, J., dissenting) (stating that the court should defer to congressional findings of fact with respect to what types of injuries satisfy standing under different statutory schemes).

234 912 F.2d 478 (D.C. Cir. 1990).

235 *Id.* at 482-83. The Energy Policy and Conservation Act of 1975 sets a mandatory CAFE standard at 27.5 miles per gallon. *Id.* at 482. The NHTSA exercised its authority to adjust the CAFE standard by rulemaking, but failed to prepare environmental impact statements as required by NEPA. *Id.* (citation omitted). The Court of Appeals for the District of Columbia held that the city and state petitioners had standing to sue, but rejected their claim on the merits. *Id.* at 485, 490.

The court, including then-Judge Ginsburg, concluded that the Natural Resources Defense Council (NRDC) had standing under NEPA to challenge the CAFE standard premised upon the potential injury that would result from global warming.[236] Fully embracing the theory of geographical nexus, the D.C. Circuit held that NRDC had demonstrated that the failure to prepare an Environmental Impact Statement created the risk of an environmental injury that would directly affect NRDC members.[237] Justice Ginsburg's willingness to accept the attenuated line of causation pleaded by the plaintiffs in this case and concomitant adoption of the geographical nexus theory logically imply that Justice Ginsburg would not have sided with the majority in *Defenders of Wildlife*.[238] *National Highway* suggests that Justice Ginsburg would have granted standing under the "novel" ecosystem nexus and geographical nexus theories advanced by the plaintiffs in *Defenders of Wildlife*.[239]

Justice Ginsburg was participated as a member of the appellate panel that granted the National Wildlife Federation standing in *National Wildlife Federation v. Burford*.[240] Although the Supreme Court later reversed the D.C. Circuit's grant of standing, Justice Ginsburg did not let the general warnings contained in the Court's opinion constrain her reasoning in subsequent cases.[241] Notwithstanding *National Wildlife Federation*, Justice Ginsburg granted standing based upon an attenuated line of causation in *National Highway*.[242]

Justice Ginsburg's opinions concerning congressional fact-

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236 *Id.* at 485.

Judge Ginsburg filed a concurring opinion in *National Highway*, but agreed with the court's position on the standing issue. *Id.* at 504 (R.B. Ginsburg, J., concurring).

The court explained that "[g]lobal warming refers to an average increase in global temperatures caused by human activities," especially the emission of gases into the atmosphere where they "act like the glass in a greenhouse. Much of the build-up of carbon dioxide and other gases is a result of combustion of fossil fuels, including gasoline." *Id.* at 493 n.1.

237 *Id.* at 494 (citation omitted).

238 *See id.* (supporting, by implication, the geographical nexus theory of standing); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2139 (1992) (describing the nexus theories as "beyond all reason").

239 *See National Highway*, 912 F.2d at 494 (supporting, by implication, the geographical nexus theory of standing); *Defenders of Wildlife*, 112 S. Ct. at 2139 (describing the nexus theories as "beyond all reason").

240 878 F.2d 422, 424, 431 (D.C. Cir. 1989), *rev'd sub. nom.* Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

241 Lujan v. National Wildlife Fed'n, 497 U.S. 871, 900 (1990); Hays, *supra* note 93, at 1039.

242 *See National Highway*, 912 F.2d at 504 (citation omitted) (R.B. Ginsburg, J., concurring).

finding and its bearing on the Judicial Branch are likely to affect environmental litigation as well.[243] In *Dellums v. United States Nuclear Regulatory Commission*,[244] Justice Ginsburg expounded upon the judiciary's need to defer to Congress's informed judgment.[245] The Justice contended that resolution of the standing debate often entails a high degree of predictive fact finding into areas outside the scope of judicial expertise.[246] In these areas, Justice Ginsburg asserted, courts should not contradict the judgment of Congress unless there is a clear showing that Congress's conclusions do not meet the test of rationality.[247]

This indicates that Justice Ginsburg would not have denied standing in *Lujan v. Defenders of Wildlife*.[248] In *Defenders of Wildlife*, the Court refused to extend standing to "any person" alleging an injury deemed procedural in nature.[249] In enacting the citizen suit provision of ESA, Congress rationally concluded that "any person" is injured by loss to biodiversity, and thus may bring suit to enforce the Act's provisions.[250] Justice Ginsburg would likely have deferred to this finding and would have granted the *Defenders of Wildlife*

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243 *See* Dellums v. United Sattes Nuclear Regulatory Comm'n, 863 F.2d 968, 984 (D.C. Cir. 1988) (R.B. Ginsburg, J., dissenting) ("When Congress has determined that a certain action will acheive a given end, courts generally should defer to that judgment.")

244 863 F.2d 968 (D.C. Cir. 1988).

245 *Id.* at 984 (R.B. Ginsburg, J., dissenting). The plaintiffs in *Dellums* were "several members of Congress, three organizations opposed to apartheid and one concerned with nuclear proliferation, an exiled black South African anti-apartheid activist named Henry Isaacs, and an unemployed American uranium miner named Robert Chavez." *Id.* at 970 (footnotes omitted). They brought suit seeking review of two final orders issued by the United States Nuclear Regulatory Commission (NRC) that granted and declined to revoke licenses needed to import uranium hexaflouride into the United States from South Africa. *Id.* The plaintiffs claimed that these orders violated the Comprehensive Anti-Apartheid Act of 1986. *Id.* (citation omitted). The Court of Appeals for the District of Columbia Circuit held that all of the plaintiffs lacked standing to challenge the NRC rule. *Id.* at 980. Judge Ginsburg dissented, claiming that standing did not bar the claims of all of the petitioners. *Id.* at 987 (R.B. Ginsburg, J., dissenting).

246 *Id.* at 984 (R.B. Ginsburg, J., dissenting). Justice Ginsburg asserted that "[w]hen Congress has determined that a certain action will achieve a given end, courts generally should defer to that judgment." *Id.* In *Dellums*, opined the dissent, the court's deference should reach its zenith because Congress is legislating in the area of foreign policy, where the court lacks expertise. *Id.*

247 *Id.*

248 *See id.*; lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143, 2145 (1992). See *supra* notes 168-212 and accompanying text for a discussion of *Defenders of Wildlife*.

249 *Defenders of Wildlife*, 112 S. Ct. at 2143.

250 Brief of Amicus Curiae American Institute of Biological Sciences in Support of Respondents at 3, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (No. 90-1424). Under ESA, the three factual requirements for standing are: (1) "all persons suffer personal injury from loss of biodiversity;" (2) "that injury is incontestably tracea-

plaintiffs standing to bring suit.[251]

*Dellums* is also significant because Justice Ginsburg directly addressed the level of specificity required to establish injury for purposes of standing.[252] Justice Ginsburg asserted that the standing requirement does not require the plaintiff to plead certainty that a favorable result will redress the underlying injury.[253] Rather, the Justice explained, the pleadings must only demonstrate the mere likelihood that a favorable result will do so.[254] Reflecting upon the general lessons taught by a landmark case, a federal statute, and the Federal Rules of Civil Procedure, Justice Ginsburg opined that plaintiffs are entitled to every opportunity to amend pleadings until those pleadings are satisfactory.[255] Finally, the Justice averred that the majority was misguided in its assumption that temporal distance diminishes causation or redressibility.[256]

This philosophy is particularly applicable to environmental litigation.[257] Justice Ginsburg's decisions while on the D.C. Circuit demonstrate a willingness to find injury in fact and causation even when the harm is hard to define and the resulting damage is re-

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ble to unchecked federal agency actions violative of the Act"; and (3) that "redress results when courts enjoin violations of the Act pursuant to Section 11(g)." *Id.*

251 *See Dellums* 863 F.2d at 984 (noting that courts should defer to Congress when addressing issues outside of the judiciary's expertise).

252 *See id.* at 987 (R.B. Ginsburg, J., dissenting).

253 *Id.* at 986 (quotation and citation omitted).

254 *Id.* (quotation omitted).

255 *Id.* (citations omitted). Continuing, Justice Ginsburg described the "well-accepted view" that the judiciary must allow a plaintiff every effort to increase the level of specificity of the pleadings to attain standing, rather than deny judicial relief based on defective or insufficient initial allegations. *Id.* (citations omitted).

256 *Id.* at 986 n.7 (citations omitted). Justice Ginsburg pointed to two major cases to support this assertion. *Id.* (citing Autolog Corp. v. Regan, 731 F.2d 25, 31 (D.C. Cir. 1984) (quotation omitted); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-90 (1973)). In *Autolog*, Justice Ginsburg noted, the court was properly concerned not with the "length of the chain of causation," but rather with the plausibility of the connection between the offending action and the injury complained of by the suit. *Id.* (citing *Autolog*, 731 F.2d at 31 (quotation omitted)). Second, Justice Ginsburg referenced *SCRAP*, in which the Supreme Court granted standing even though the line of causation was attenuated. *Id.* (citing *SCRAP*, 412 U.S. at 688-90).

257 *See* Hays, *supra* note 93, at 1010. Hays stated that:

> [T]he doctrine of standing in environmental cases has developed a number of unique characteristics. Among the issues particularly relevant to standing in environmental disputes are: the types of injuries recognized; the degree to which those injuries must be specific to a particular claimant; the required geographical relationship between the claimant and the environmental harm; the certainty of threatened injury; and the causal relationship between the challenged conduct and the injury complained of.

*Id.*

mote.[258] Enmeshed in this willingness is a firmly rooted understanding of the complex nature of environmental injury and damage.[259]

## IV. CONCLUSION

The time to debate the value of a clean environment has long passed. To protect the environment, Congress must enact laws that promote and safeguard its continued existence; the Supreme Court must interpret those laws with a clear and effective environmental ethic and procedure; and the executive branch must enforce the laws in good faith along the lines drawn by the Supreme Court. Plagued by irresponsible dogmatic constraints, however, the Supreme Court is philosophically unequipped to craft an effective approach to environmental injuries.[260]

The Supreme Court's difficulty with the injury in fact element of standing stems from the judicial philosophy of Justice Scalia, who often sways the Court on environmental issues.[261] Justice Scalia views the question of standing as an essential element of the Court's attempts to constrain judicial activism and support the separation of powers.[262] Despite claims that this is part of a policy of judicial restraint, however, the Supreme Court is actually making policy decisions by using standing to screen out cases that seek relief contrary to the statutory interpretation or other goals preferred

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258 *See supra* notes 232-259 and accompanying text (discussing Justice Ginsburg's apparent position on the "injury in fact" element of the standing test).

259 *See* City of Los Angeles v. National Highway Traffic Safety Admin., 912 F. Supp. 478, 504 (D.C. Cir. 1990) (R.B. Ginsburg, J., concurring) (conceding that standing can be based upon injury to an environmental interest).

260 *See supra* notes 168-216 and accompanying text (discussing the Court's decision in *Lujan v. Defenders of Wildlife* and its flawed reasoning and result).

261 *See generally* Patti A. Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8 J. LAND USE & ENVTL. L. 343 (1993) (examining the negative effect that Justice Scalia's positions on standing and the separation of powers doctrine have had on environmental litigation).

262 Scalia, *supra* note 190, at 881 (citation omitted). Justice Scalia's thesis is that by ignoring the role of separation of powers in formulating a standing test, the court runs the risk of encroaching upon the process of self-governance. *Id.* (citation omitted). According to Justice Scalia, there is

> a functional relationship, which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself.*

*Id.* at 894; *see also* Meeks, *supra* note 261, at 355 (contending that Justice Scalia's ascension to the Supreme Court gave him the opportunity to change the law of standing to further his separation of powers goals, especially with respect to environmental law).

by the Court.[263]

Using the injury in fact test as enunciated by Justice Scalia in *Defenders of Wildlife*, a plaintiff with a widespread, concrete injury that results from government action or inaction lacks standing, even if the statute that the suit is premised upon expressly seeks to prevent that very injury.[264] Thus, the Court, rather than Congress, is deciding what is an Article III injury in fact. This is judicial activism, despite Justice Scalia's assertion to the contrary.[265]

Where plaintiffs bring a broad challenge to an agency decision or general rule, requiring hard and fast evidence of a particularized injury makes little sense.[266] Such evidence may indeed exist, but a particularized injury is not likely to illustrate the defects in an imperfect agency rule such as the one at issue in *Defenders of Wildlife*.[267] Rather, the evidence is likely to represent one minor facet of a larger problem that the government needs to address.[268] This does not meld easily with Article III's standing requirements because the injuries are often too large for the Court to incorporate into traditional notions of personal injuries.[269] In these types of situations, the Court must defer to Congress, which is better equipped to undertake the detailed fact-finding neccessary to illustrate and address such injuries.

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263 Meeks, *supra* note 261, at 380 (stating that Justice Scalia's "strict application of the separation of powers principle and disregard for the 'checks and balances' of our governmental system is in actuality, and ironically, setting up the executive branch as the predominant governmental branch"); *see also* Hays, *supra* note 93, at 1001 (noting that when a court decides not to adjudicate a case on separation of powers grounds, agency decisions and governmental policy are affected as much as when a court decides the case on the merits).

264 *See* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138, 2143 (1992).

265 Hays, *supra* note 93, at 1001 (citations omitted). Hays stated:

> The decision not to hear a case may impact agency action and governmental policy just as profoundly as a resolution of the case on its merits. Whatever the constitutional basis which ought to underlie the standing doctrine, the Court's selective use of standing doctrine has often restricted access to the federal courts without disclosing the basis for the decision it has reached. This lack of candor conceals the policymaking role of the court, a role as easily assumed by denying standing to litigate as by conferring standing and allowing a suit to continue to a decision on the merits.

*Id.* (citations omitted).

266 *See id.* at 1021 (citation omitted).

267 *Defenders*, 112 S. Ct. at 2135; *see supra* note 170 and accompanying text (discussing the agency rule challenged in *Defenders*).

268 *See generally*, Nichol, *supra* note 70, at 1929-39 (discussing the inability of the Court to address distinctions between judicially cognizable and non-cognizable interests using the current "injury in fact" element of the standing test).

269 *See supra* notes 57-100 and accompanying text (explaining Article III's standing requirements).

Congress has already legislated a solution by including citizen suit provisions in almost every environmental statute.[270] This came perhaps with the recognition that Congress could not count on the executive branch to faithfully execute the laws of the nation.[271] The decision may also reflect the legislature's understanding that the Court was actively undermining the role of the public in the protection of the environment by unnecessarily constraining standing doctrine.[272] Irrespective of the difficulties that continue to plague environmental litigation, the Supreme Court's understanding of the fundamental nature of environmental injuries must keep step with science. The Court must reflect this understanding with a change in the procedural impediments erected to constrain judicial review of agency action in the environmental arena. The realm of standing must be first in line.

*Eric I. Abraham*

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270 *See supra* note 43 (setting forth the citizen suit provisions of federal environmental statutes).

271 U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

272 In an article discussing the effects of another devastating environmental opinion authored by Justice Scalia, Professor Joseph Sax speculated that the majority opinion was specifically crafted to undermine the viability of ecological regulations. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Commission*, 45 STAN. L. REV. 1433, 1438-42 (1993).