Catholic University Law Review

Volume 40
Issue 2 *Winter 1991*

Article 8

1991

Lujan v. National Wildlife Federation: The Supreme Court Tightens the Reins on Standing for Environmental Groups

Sarah A. Robichaud

LUJAN v. NATIONAL WILDLIFE FEDERATION: THE SUPREME COURT TIGHTENS THE REINS ON STANDING FOR ENVIRONMENTAL GROUPS

Federal standing confers a right to sue on those parties falling within the doctrine's limiting provisions.[1] Limiting provisions include article III of the United States Constitution, which restricts federal jurisdiction to the resolution of "[c]ases" and "[c]ontroversies,"[2] and section 702 of the Administrative Procedure Act (APA), which guarantees court access to those "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[3] Additionally, various "citizen suit" provisions of environmental statutes allow for federal jurisdictional standing.[4] Although federal standing provisions appear explicit, general dissatisfaction surrounds the doctrine.[5] Until recently, environmental organizations considered standing

1. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:1 (2d ed. 1983). Standing determines if a party may properly seek review, and does not touch on the merits of the case. *See also* Flast v. Cohen, 392 U.S. 83, 99-100 (1968) ("When standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justicable."); 5 J. STEIN, G. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW § 50.01 (1988) (standing focuses on the right of a party to seek judicial review, and not on the merits of a case).

2. U.S. CONST. art. III, § 2, cl. 1. In the federal courts, standing may be raised at any stage of the litigation. The doctrine is distinct from the concept of ripeness, which considers whether the issue before the court is fit for review. *See* 4 K. DAVIS, *supra* note 1, § 25:1.

3. 5 U.S.C. § 702 (1988). Courts generally read the APA broadly in construing standing. *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 156-57 (1970). Nevertheless, Justice Scalia, author of the majority opinion in Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990), considers that interpretation to be a misreading of section 702 of the APA. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 889 (1983).

4. Congress, through statutory citizen suit provisions, confers standing limited only by article III constitutional requirements. *See, e.g.*, Endangered Species Act § 11, 16 U.S.C. § 1540(g) (1988) (any person may commence a civil suit on his own behalf); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (1988) (same); Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365 (1988) (same). Typically, standing provisions of environmental statutes limit standing for preenforcement challenges to those persons participating in agency rulemaking. *See* Clean Air Act § 307, 42 U.S.C. § 7607 (1988); *see also* 4 K. DAVIS, *supra* note 1, § 244 (citizen suit provisions in environmental statutes allow "any person" or "any citizen" who is adversely affected by agency action to challenge the action).

5. *See* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 425 n.1 (1974); 4 K. DAVIS, *supra* note 1, § 24:1.

a fairly easy requirement to satisfy.[6] Standing for environmental litigants was well established in the 1970's.[7]

Courts today, however, thoroughly consider standing requirements for environmental organizations.[8] Environmental groups now must show injury in fact with greater specificity than the federal courts previously required.[9] Current judicial restraint has altered the focus of standing requirements,[10] has led to uncertainty, and has posed new challenges for future environmental litigants.[11]

In *Lujan v. National Wildlife Federation,*[12] the United States Supreme Court strictly enforced standing requirements for the environmental liti-

6. *See* Sierra Club v. Morton, 405 U.S. 727 (1972), discussed *infra* text accompanying notes 81-90. *Sierra Club* was the culmination of a trend among circuits recognizing aesthetic and recreational injury as sufficient to demonstrate standing. *See* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970) (health interest regarding DDT sufficient to demonstrate standing to challenge the failure of the Secretary of Agriculture to restrict DDT use); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 615-16 (2d Cir. 1965) (aesthetic and recreational interests affected by hydroelectric project sufficient to demonstrate standing), *cert. denied,* 384 U.S. 941 (1966); Crowther v. Seaborg, 312 F. Supp. 1205, 1211-18 (D. Colo. 1970) (property owners near proposed atomic blast were persons adversely affected by action of the Atomic Energy Commission); *see also* Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111-12 (D.C. Cir. 1971) (courts may require agencies to comply with the National Environmental Policy Act). Justice Scalia contends that *Calvert Cliffs'* "began the judiciary's long love affair with environmental litigation." Scalia, *The Doctrine of Standing, supra* note 3, at 884.

7. *See Data Processing,* 397 U.S. at 152 (1970) (holding that a plaintiff must allege "injury in fact, economic or otherwise").

8. *See, e.g.,* Wilderness Soc'y v. Griles, 824 F.2d 4, 16 (D.C. Cir. 1987) (environmental organization lacks standing to challenge Bureau of Land Management policy concerning Alaskan federal lands because the organization did not allege specific tracts of land that its members visited or intended to visit); National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 332 (D.D.C. 1988) (affidavits of two organization members fail to confer standing because the affidavits were vague, conclusory, lacked factual specificity, and did not show injury in fact), *rev'd,* 878 F.2d 422 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

9. *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

10. *See id.* at 3190-91. In the majority opinion, Justice Scalia emphasized that the APA requires a controversy to be "reduced to more manageable proportions, and its factual components fleshed out, by some concrete action." *Id.* at 3190. He noted that the land withdrawal review program requires further Department of Interior action—such as granting a mining permit—before affidavits can contest the validity of the agency's land classification. *Id.* at 3190-91 n.3. That reasoning narrows the grounds on which environmental plaintiffs may demonstrate standing. Justice Scalia's reasoning would require actual mining and physical use as prerequisites to standing, as opposed to simply granting a mining permit and potential mining.

11. *See* Glennon, *Will the Real Conservatives Please Stand Up?,* A.B.A. J., Aug. 1990, at 49-50. Professor Glennon has noted that the current interpretation of rules regarding standing to sue, mootness, and ripeness "reflects a higher degree of judicial scrutiny." That scrutiny results from use of liberal judicial methods to reach politically conservative results. *Id.*

12. 110 S. Ct. 3177 (1990).

gants,[13] greatly reducing the ease with which environmental groups satisfied standing requirements in the past.[14] In *Lujan*, the National Wildlife Federation (NWF) challenged a Department of Interior (Interior) program that opened federal lands for mining and drilling activities.[15] NWF members filed affidavits indicating that they used land " 'in the vicinity' " of the land opened to mining and drilling.[16] The *Lujan* Court held that affidavits stating that NWF members used "unspecified portions of an immense tract of territory"[17] for recreation were insufficient to demonstrate standing.[18] Further, the Court held that the extent to which NWF could show standing must be based upon the organization's allegations that members suffered injury.[19]

Notably, the Court also rejected four additional affidavits submitted by the NWF, holding that Interior's "land withdrawal review program"[20] was not agency action within the meaning of the APA.[21] The Court interpreted

13. *Id.* at 3187-89.

14. *Id.* at 3194. The Court held that the NWF, through the affidavits of its members, failed to allege any specific agency action that caused injury.

15. *Id.* at 3182-84.

16. *Id.* at 3184.

17. *Id.* at 3189.

18. *Id.* The affidavits, which two members signed under oath, stated that their " 'recreational use and aesthetic enjoyment of federal lands . . . have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department.' " *Id.* at 3187. One affidavit claimed that the agency had opened the South Pass-Green Mountain area of Wyoming to the staking of mining claims and oil and gas leasing, an action which threatened the aesthetic beauty and wildlife habitat potential of these lands. *Id.* at 3187-88. The second affidavit claimed substantially the same injury and use of land " 'in the vicinity of Grand Canyon National Part [sic], the Arizona Strip (Kanab Plateau), and the Kaibab National Forest.' " *Id.* at 3187. While the district court accepted the rationale that standing could exist for recreational purposes and aesthetic enjoyment, the district court noted that the approximately 4500 acres opened for mining were located within a two million acre area of land, "the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining." National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 331 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990). The district court concluded that the two affidavits contained only a "bare allegation of injury," because there was no evidence that the members' recreational use and enjoyment extended to the particular 4500 acres of the 2 million affected by the termination. *Id.* at 331-32. The Supreme Court agreed that the affidavits insufficiently alleged injury. *Lujan*, 110 S. Ct. at 3194.

19. *Lujan*, 110 S. Ct. at 3187-89.

20. *Id.* at 3189.

21. *Id.* at 3189-93. The Court drew a parallel between the Departments of Interior and Defense to the highlight the vagueness of the term "land withdrawal review program." The Court explained that the term was as all-encompassing as "weapons procurement program" and, therefore, just as vague and unidentifiable. *Id.* at 3189; *see also infra* note 25 (discussing the land withdrawal review program and its history).

the APA to require concrete controversies of manageable proportions,[22] and to require that a claimant allege facts showing a harmful or potentially harmful situation that demonstrates the applicability of the challenged regulation to the situation.[23] Accordingly, the Court refused to intervene because the land withdrawal review program was not a final agency action with "an actual or immediately threatened effect."[24]

Lujan arose out of the controversy surrounding the Bureau of Land Management's (BLM) land withdrawal review program.[25] As an agency within Interior, the BLM must comply with the Federal Land Policy and Management Act of 1976 (FLPMA),[26] which retains "public lands for multiple use management."[27] Provisions of FLPMA direct the Secretary of the Interior to inventory all public lands and their values,[28] to require land use planning,[29] and to subject existing classifications of public lands to review, modification, or termination.[30] Pursuant to FLPMA, the BLM reclassified land in Wyoming and Arizona in 1984, returning some of the land to the public domain and making some of the land available for mining and other activities.[31]

In response, the NWF challenged the termination of protection restrictions and sought an injunction to prevent mining on the lands.[32] The NWF claimed that "the reclassification of some withdrawn lands and the return of others to the public domain would open the lands up to mining activities,

22. *Lujan*, 110 S. Ct. at 3190.

23. *Id.*

24. *Id.* at 3191 (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164-66 (1967)).

25. *Id.* at 3182-83. Originally, Congress allowed only the President to exempt public lands from statutes which permitted citizens to acquire title to large tracts of federally owned land. The President could remove federal land from the public domain and exclude public land from statutory restrictions. *Id.* at 3182. For example, the Pickett Act, 43 U.S.C. § 141 (1970), *repealed*, 90 Stat. 2792 (1976), authorized the President to exempt lands from the Mining Law of 1872, 30 U.S.C. § 22, and the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. § 181. At his discretion, the President could withdraw public lands from settlement, location, sale, or entry. Similarly, the Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269 (codified as amended at 43 U.S.C. § 315F) gave the Secretary of the Interior authority to classify public lands as either disposable or as retainable and manageable. *Lujan*, 110 S. Ct. at 3182. Because of mismanagement of the land withdrawal laws, Congress repealed many of them and enacted FLPMA in their place.

26. 43 U.S.C. § 1701-1784 (1988).

27. *Lujan*, 110 S. Ct. at 3183.

28. 43 U.S.C. § 1711(a).

29. *Id.*, § 1712.

30. *Id.*, § 1712(d).

31. *Lujan*, 110 S. Ct. at 3182.

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

thereby destroying their natural beauty."[33] Interior sought dismissal of the case for failure to state a claim, arguing that the NWF had failed to demonstrate standing.[34] The United States District Court for the District of Columbia denied Interior's motion and granted the NWF's motion for a preliminary injunction prohibiting Interior from eliminating or altering any withdrawal or reclassification of lands in the public domain.[35]

The United States Court of Appeals for the District of Columbia Circuit upheld the lower court's order and remanded the case for further proceedings.[36] Upon remand, Interior again sought dismissal of the complaint, arguing that based on the affidavits of its members, the NWF lacked standing.[37] Following the district court's request for additional briefing,[38] the NWF submitted four additional affidavits to satisfy standing requirements.[39] The district court rejected the affidavits as untimely and granted Interior's motion for summary judgment.[40]

---

33. *Lujan*, 110 S.Ct. at 3183-84. The NWF claimed that the program violated three laws. First, the organization asserted that Interior's failure to adequately develop and maintain the lands and to consider multiple uses aside from mining the lands violated sections 202 and 302 of FLPMA, 43 U.S.C. §§ 1712(a), 1732(a), and that Interior's failure to notify the public of its decision violated sections 102, 202, and 309 of FLPMA, 43 U.S.C. §§ 1701(a)(5), 1712(c)(9), 1712(f), 1739(e). Second, the group alleged violations of the National Environmental Policy Act stemming from Interior's failure to report adequately the environmental impact of the proposed action as required under 42 U.S.C § 4332(2)(C) (1988). Third, the NWF argued that Interior's action was in violation of the APA as an abuse of discretion under 5 U.S.C. § 706 (1988). *Id.* at 3184.

34. National Wildlife Fed'n v. Burford, 676 F. Supp. at 277.

35. *Id.* at 277-79.

36. National Wildlife Fed'n v. Burford, 835 F.2d 305, 327 (D.C. Cir. 1987). On petition for rehearing, the Circuit Court for the District of Columbia vacated the district court's injunction, but denied Interior's motion to dismiss for lack of standing. National Wildlife Fed'n v. Burford, 844 F.2d 889, 890 (D.C. Cir. 1988).

37. National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 329 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

38. *Id.* at 328.

39. *Id.* at 328 n.3.

40. *Id.* A federal court grants summary judgment to a moving party under Rule 56 "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56. Rule 56 requires a party to "set forth specific facts showing that there is a genuine issue for trial" to defeat a motion for summary judgment. *Id.; see also* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (where elements essential to a party's case are not established, the moving party is entitled to summary judgment as a matter of law). The earlier district court and circuit court decisions passed upon a 12(b) motion. Hence, neither case controlled the district court's decision with respect to the Rule 56 motion. The district court found that the two original affidavits that members of NWF submitted were insufficient to demonstrate standing. *Burford*, 699 F. Supp. at 332.

Reversing the district court's decision, the circuit court held that the original affidavits were sufficient to demonstrate standing[41] and that the district court had abused its discretion in refusing to consider the additional affidavits.[42] The District of Columbia Circuit concluded that "standing to challenge individual classification and withdrawal decisions conferred standing to challenge all such decisions under the land withdrawal review program."[43]

In *Lujan,*[44] the United States Supreme Court, in turn, reversed the circuit court's decision.[45] The Court held that the NWF members' original affidavits were insufficient to demonstrate standing within the meaning of the APA.[46] Justice Scalia, writing for the majority, determined that the land withdrawal review program was a collection of provisions that were too broad to be interpreted as a federal agency action that adversely affects or aggrieves a person.[47] Justice Scalia agreed that the affidavits showed that the NWF was arguably within the zone of interests that the APA protects[48] and that recreational use and aesthetic enjoyment are protectable interests; however, the affidavits failed to aver a specific harm.[49] The factually flawed affidavits therefore prevented Justice Scalia from finding a genuine issue of fact for trial as required under Federal Rule of Civil Procedure 56(e).[50]

In his dissent, Justice Blackmun[51] argued strongly that the affidavits "were sufficient to establish the standing of the National Wildlife Federa-

41. National Wildlife Fed'n v. Burford, 878 F.2d 422, 430 (D.C. Cir. 1989), *rev'd sub nom.*, Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

42. *Id.* at 433.

43. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3185 (1990). The District of Columbia Circuit also held that its prior finding that the NWF had standing acted as the law of the case on remand. *Burford,* 878 F.2d at 433. The Supreme Court subsequently granted certiorari, 110 S. Ct. 834 (1990), and denied standing, 110 S. Ct. 3177, 3194 (1990).

44. 110 S. Ct. 3177 (1990).

45. *Id.* at 3194. The Court divided five to four. Justice Scalia, writing for the majority, was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy.

46. *Id.* at 3187-89.

47. *Id.* at 3189. The APA confers standing only if a person is adversely affected or aggrieved. 5 U.S.C. § 702 (1988); *see* 49 Fed. Reg. 19,904-05 (May 10, 1984) (delineating BLM orders regarding the land management program).

48. *Lujan,* 110 S. Ct. at 3187. Justice Scalia conceded that the recreational and aesthetic interests allegedly injured were interests that the APA was intended to protect and assumed that NWF satisfied the associational standing requirements specified in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). *Id.; see infra* note 105 (discussing associational standing).

49. *Lujan,* 110 S. Ct. at 3189.

50. *Id.* Justice Scalia refused to assume that the general averments in the affidavits included the specific facts necessary to avoid summary judgment. *Id.* at 3188.

51. Justices Brennan, Marshall, and Stevens joined the dissent. *Id.* at 3194 (Blackmun, J., dissenting).

tion."[52] He concluded that the majority failed "to recognize . . . the principle that procedural rules should be construed pragmatically, so as to ensure the just and efficient resolution of legal disputes."[53]

This Note examines the development of standing requirements for environmental groups suing on behalf of their members. It first examines the test that courts use to determine standing under article III of the Constitution and under the APA. This Note then analyzes *Lujan v. National Wildlife Federation* in light of a recent wave of cases denying standing to environmental plaintiffs and considers the reasoning of Justice Scalia's opinion. This Note concludes that the Court's current trend toward judicial restraint will force environmental litigants to consider essential facts and technical details to ensure that they satisfy standing requirements.

I. REQUIREMENTS FOR STANDING

To have standing to sue in federal court, a party must satisfy a two-pronged test. The first prong entails constitutional requirements, and the second prong involves prudential considerations.[54] The constitutional prerequisites are the article III requirements of injury, causation, and redressability.[55] To satisfy prudential requirements, courts determine whether the type of interest raised is one that Congress intended to protect under an applicable statute, even though standing may not be clearly granted on the face of that statute.[56]

Federal standing ensures that only a person who is sufficiently affected by an action may challenge the action.[57] The doctrine is intended to protect

52. *Id.* The dissent contended that the district court had abused its discretion by failing to consider supplemental affidavits that the NWF filed.

53. *Id.* at 3201.

54. *See,* Association of Data Processing Serv. Orgs., v. Camp, 397 U.S. 150, 153 (1970); 4 K. DAVIS, *supra* note 1, § 24:5 (although requiring constitutional and prudential requirements to satisfy standing requirements complicates the standing issue, both are necessary).

55. 5 J. STEIN, G. MITCHELL & B. MEZINES, *supra* note 1, § 50.02-03 (standing requires both injury in fact and that the plaintiffs arguably are within the zone of interest that the statute at issue seeks to protect).

56. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 252 (1988). Congress may confer standing through a statute by using citizen suit provisions permitting review. *See supra* note 4. Those provisions eliminate the prudential requirements for standing, but tend to echo the article III requirements for standing. *See also* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982) (the alleged injury must fall within the zone of interests to be protected by the statute in question).

57. 4 K. DAVIS, *supra* note 1, § 24:10 (explaining that injury is the central issue in a standing dispute); *see also* 5 J. STEIN, G. MITCHELL & B. MEZINES, *supra* note 1, § 50.02 (an injury, or a personal stake in the outcome of the proceeding, ensures that only true adversaries will meet in court and may be established by a detrimental economic, conservational, aesthetic, recreational, spiritual, or environmental interest). Additionally, standing maintains a neces-

against improper plaintiffs.[58] Arguments regarding whether and how well a plaintiff proves injury in fact to a protected interest are central issues in standing disputes.[59]

Until 1970, courts generally granted standing only when a plaintiff demonstrated a personal stake in the outcome of the case.[60] The test for standing, however, was unclear because courts did not follow a precise definition of standing requirements.[61] Thus, the traditional, narrowly defined standing analysis was changed. In *Association of Data Processing Service Organizations v. Camp*[62] and *Barlow v. Collins*,[63] both decided in 1970, the United States Supreme Court adopted standing requirements that are still used today.[64] Writing for the majority in both cases, Justice Douglas em-

---

sary separation of powers by limiting the "role of the courts in a democratic society." Warth v. Seldin, 422 U.S. 490, 498 (1975).

58. 4 K. DAVIS, *supra* note 1, § 24:2.

59. Proof of standing enables a person to seek redress in court for injuries incurred as a result of unlawful action. *See* 4 K. DAVIS, *supra* note 1, § 24:2. At the same time, standing is a useful tool to prevent those who have not been injured from pursuing a remedy in court. *See id.*

60. Courts historically have held that a "vital controversy" was necessary for standing. Chicago & G. T. R. v. Wellman, 143 U.S. 339, 345 (1892). Courts also have held that a party "must be interested in and affected adversely by the decision." Braxton County Court v. West Virginia, 208 U.S. 192, 197 (1908). In 1970, the Supreme Court reinterpreted and clarified standing requirements in Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970).

61. *See* Baker v. Carr, 369 U.S. 186, 204 (1962) (requiring a personal stake in the outcome as the requirement for standing); *cf.* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140-41 (1951) (requiring a legal interest or legally protected right to be at stake); Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (same). In *Data Processing*, the Court distinguished the legal interest test and the zone of interest test. The Court explained that the legal interest test related to the merits, whereas the zone of interest test questions "whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153.

62. 397 U.S. 150 (1970) (finding that data processing companies have standing to challenge federal regulations allowing banks to sell identical services because the companies would lose profits due to the federal agency action).

63. 397 U.S. 159 (1970) (holding that tenant farmers had standing to challenge Department of Agriculture regulations which affected the farmers' subsidy payments because the agency action caused monetary injury).

64. *See* Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987) (trade association representing securities brokers had standing under the *Data Processing* analysis to allege that bank discount brokerage offices were branches subject to geographical restrictions); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (an organization supporting separation of church and state was not sufficiently injured under the *Data Processing* test to challenge a government transfer of surplus property to a religious organization); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1975) (health care organization lacked standing under *Data Processing* test to challenge an IRS Revenue Ruling ending free medical care to indigents); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (students satisfied standing require-

phasized the Court's dissatisfaction with the traditional standing analysis.[65] For example, the Court criticized the use of the legal interest test to determine standing, and argued for an expansion of the class of people who may protest an administrative action.[66] Accordingly, the Court in *Data Processing* replaced the legal injury test with a two-part "zone of interest" analysis.[67] Under the current standing test, the plaintiff must show that the defendant caused the plaintiff injury in fact, economic or otherwise.[68] In addition, the plaintiff's interest must be arguably within the zone of interest that the statute or constitutional provision in question protects.[69] In effect, while the Court retained an injury in fact requirement, it substituted the zone of interest test for the legal interest test used in prior decisions.[70]

A. The First Prong of the Standing Test: Constitutional Requirements

Article III limits federal court jurisdiction to "[c]ases" and "[c]ontroversies."[71] Article III requires a plaintiff to satisfy three elements in order to demonstrate standing.[72] First, the plaintiff must show injury in fact. The plaintiff must also show that the defendant's action caused, or likely caused, the injury. Finally, the plaintiff must show that the injury is one that the court may redress.[73]

---

ments of *Data Processing* and, thus, could challenge Interstate Commerce Commission rates adversely affecting the recreational and aesthetic interests of the students).

65. *See Data Processing*, 397 U.S. at 151.

66. *Id.* at 153-54; *see also Barlow*, 397 U.S. at 166-67 (explaining that judicial review of administrative action is the rule, "and nonreviewability an exception which must be demonstrated").

67. *Data Processing*, 397 U.S. at 152-54.

68. The Court found that competition by national banks would injure the data processing services and that the Court could redress that injury. *Id.* at 152-53; *see also Barlow*, 397 U.S. at 164-65.

69. *Data Processing*, 397 U.S. at 153; *Barlow*, 397 U.S. at 164-65.

70. The Supreme Court demonstrated its new approach in *Data Processing*. *See infra* text accompanying notes 142-49. In *Barlow*, the Court found that tenant farmers had a personal stake in the outcome of the case and were within the zone of interests to be protected by the statute because the Food and Drug Act of 1965 directs the Secretary of Agriculture to protect the interests of tenant farmers. *Barlow*, 397 U.S. at 164-65.

71. U.S. CONST. art. III, § 2, cl. 1.

72. *See* 4 K. DAVIS, *supra* note 1, § 24:2.

73. For a concise summary of the article III requirements for standing, see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-72 (1981).

1. Injury in Fact

The courts consistently require parties to show actual or imminent injury from the defendant's actions.[74] Additionally, courts recognize that a threatened injury, as well as an actual injury, may satisfy standing requirements. For example, in *Duke Power Company v. Carolina Environmental Study Group, Inc.*,[75] the United States Supreme Court held that plaintiffs challenging a federal monetary damage cap on a nuclear power plant disaster sufficiently demonstrated standing.[76] The Court decided that immediate, adverse effects resulting from construction of a nuclear power plant, as opposed to a future full-scale nuclear disaster, were adequate to satisfy the injury in fact prerequisite for standing.[77] Immediate injury included the thermal pollution of nearby lakes and radiation emissions resulting from plant operations.[78] Therefore, the Court adhered to the injury in fact requirement for standing, while recognizing that imminent, as well as actual, injury satisfied the first prong of the standing test.[79]

Environmental groups seized the day with the ambiguous "economic or otherwise" wording of the *Data Processing*[80] decision. By 1972, in *Sierra Club v. Morton*,[81] the Court recognized that injury to aesthetic and recreational interests fulfilled standing requirements.[82] In *Morton*, the Sierra Club challenged the construction of a ski resort in prime wilderness area adjacent to Sequoia National Park in California.[83] The Sierra Club asserted standing under section 701 of the APA, alleging " 'a special interest in the conserva-

74. *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3185-86 (1990); Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987) (trade organization representing securities brokers sufficiently injured by the Comptroller of the Currency's action to allege standing); *Valley Forge*, 454 U.S. at 485 (organization dedicated to separation of church and state was not injured by a government grant of land to a church organization and was, therefore, denied standing); Humane Soc'y of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988) (environmental organization was sufficiently injured by the Fish and Wildlife Service action expanding hunting on wildlife refuges to have standing).

75. 438 U.S. 59 (1978).

76. *Id.* at 81. The plaintiffs unsuccessfully attacked the Price Anderson Act § 1, 42 U.S.C. § 2012(i) (1988) as unconstitutional. *Duke*, 438 U.S. at 93-94. The Court may have tread lightly over the standing issue to assess quickly the constitutionality of the Act. *Cf. Valley Forge Christian College*, 454 U.S. at 478-87 (where the Court rigorously applied each prong of the standing test to find that taxpayers failed to identify a personal injury that would allow them to challenge government disposal of surplus property to a church-related college). *See infra* notes 162-67 and accompanying text.

77. *Duke*, 438 U.S. at 73.

78. *Id.*

79. *Id.* at 72-74.

80. 397 U.S. 150, 152 (1970).

81. 405 U.S. 727 (1972).

82. *Id.* at 734; *see also supra* note 6 (discussing *Sierra Club*).

83. *Sierra Club*, 405 U.S. at 729.

tion and the sound maintenance of the national parks, game refuges and forests of the country.' "[84] The group argued that development would injure the ecology of the area and prevent aesthetic enjoyment for future generations.[85]

The Supreme Court refused to formulate a special standing test for environmental groups and denied the Sierra Club standing. Instead, the Court held that standing to bring a suit in federal court exists only if the party suffered or would suffer injury, whether economic or otherwise.[86] The Court explained that an organization needs more than "injury to a cognizable interest" to demonstrate standing.[87] The Court found that the Sierra Club did not show individualized harm or concrete injury because the organization failed to allege that the development of a ski lodge in the Sierra Nevada Mountains would adversely affect it or its members.[88] Therefore, while the Court in *Sierra Club* broadened the scope of standing to recognize aesthetic and recreational interests,[89] the Court reinforced the injury in fact requirement to limit standing to parties whose interests have been or will be affected.[90] Thus, as a result of *Sierra Club,* environmental groups must provide evidence that they or their members have already suffered or will directly suffer harm.

A second case, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),*[91] decided shortly after *Sierra Club,* further prompted environmental groups to seek their day in court.[92] The case arose from an

84. *Id.* at 730.

85. *Id.* at 734.

86. *Id.* at 734, 738-39. *See* Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966) (conservationists had standing to challenge hydroelectric project without showing economic injury where a direct, personal interest that is aesthetic, recreational, and conservational is at stake).

87. *Id.* at 734-35. The injury alleged in *Sierra Club* was not factually specific enough to demonstrate standing. *See also* Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir. 1971) (denying a corporation standing to protect the public interest in the San Fransisco Bay area because the corporation did not assert infringement of any of its rights or properties and granting standing to individual plaintiffs because they benefited personally from the fish and wildlife which the threatened action would destroy), *cert. denied,* 402 U.S. 908 (1971).

88. *Sierra Club,* 405 U.S. at 734-36. *Id.* at 735. According to the Court, the affidavits did not state that Sierra Club members used the land in a way that the proposed action would affect. Justice Douglas dissented, urging the Court to fashion a federal standing rule allowing a court-appointed representative to litigate environmental issues in the name of the inanimate object about to be despoiled. *Id.* at 741, 750 n.8 (Douglas, J., dissenting).

89. *Id.* at 734 (majority opinion).

90. *Id.* at 734-35.

91. 412 U.S. 669 (1973).

92. *SCRAP* is considered "the zenith in standing law for environmental groups." Comment, *Standing for Environmental Groups: An Overview of Recent Developments in the D.C. Circuit,* 19 ENVTL. L. REP. 10289, 10291 (1989). The Comment notes not only the impor-

alleged violation of the National Environmental Policy Act of 1969 (NEPA), which requires federal agencies to prepare an environmental impact statement concerning any major agency actions significantly affecting the environment.[93] In *SCRAP,* the Interstate Commerce Commission (ICC) proposed a 2.5% surcharge on freight rates to produce increased revenues.[94] A group of law students challenged the action, asserting that the ICC had failed to prepare the environmental impact statement that NEPA required.[95] The students argued that the ICC unlawfully approved unreasonably high freight rates for recycled goods, leading to a decrease in recycling and an increase in public park litter. The students alleged aesthetic and recreational injury.[96] The United States Supreme Court found sufficient allegations of injury within section 702 of the APA[97] and, therefore, concluded that the students had demonstrated standing.[98] The Court distinguished *Sierra Club*[99] by explaining that the Sierra Club had failed to allege a specific injury, while *SCRAP* had not.[100] The Court reaffirmed its acceptance of aesthetic and recreational injury to satisfy standing requirements in *SCRAP,* and the Court has never formally overruled that case.[101] Subsequent deci-

---

tance of *SCRAP* for environmental organizations seeking to demonstrate standing, but also the difficulty that now faces environmental litigants seeking their day in court.

93. National Environmental Policy Act § 102, 42 U.S.C. § 4332(2)(C)(i)-(v) (1988).

94. *SCRAP,* 412 U.S. at 674.

95. *Id.* at 678-79.

96. *Id.* at 675-78.

97. 5 U.S.C. § 702 (1988).

98. *SCRAP,* 412 U.S. at 685.

99. 405 U.S. 727 (1972).

100. The *SCRAP* Court noted that "unlike the petitioner in *Sierra Club,* the environmental groups here had alleged that their members used the forests, streams, mountains and other resources in the Washington area and that this use was disturbed by the environmental impact caused by nonuse of recyclable goods." *SCRAP,* 412 U.S. at 682; *cf.* Sierra Club v. Morton, 405 U.S. 727, 730 (Sierra Club simply alleged "a special interest in the conservation and the sound maintenance of the national parks" instead of a direct injury to its members.). Some commentators argue that the Court did not strictly enforce standing requirements in *SCRAP* because denying standing under the circumstances of the case "would have appeared to resolve the merits by supposition and to abridge a litigant's day in court." Albert, *supra* note 5, at 490.

101. Today, environmental groups generally sue on behalf of their members. *See, e.g.,* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990). Organizations generally allege injury to recreational and aesthetic interests of their members to demonstrate standing. Additionally, for an organization to represent its members, the group must satisfy the test in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). *See infra* note 104 (discussing the *Hunt* test). An organization may also sue on its own behalf, but only if the organization suffers actual injury. *See* National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 330 (D.D.C. 1988), *rev'd,* 878 F.2d 422 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

sions, however, have eroded the ease with which plaintiffs like those in *SCRAP* may satisfy the standing requirement.[102]

2. *Causation*

To satisfy constitutional standing requirements, a plaintiff must show that the injury claimed was "fairly traceable to the defendant's acts or omissions."[103] The challenged action need not directly impact the plaintiff, but a plaintiff must "show that there is a substantial likelihood that the defendant's action would result in the injury claimed."[104] The causation require-

102. Additional cases considering recreational, aesthetic, and health interests include Humane Society of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988) (environmental group has standing to challenge the expansion of hunting in national refuges, because hunting depletes the animal supply, thereby affecting group members' aesthetic interests); Alaska Fish & Wildlife Fed'n and Outdoor Council, Inc. v. Dunkle, 829 F.2d 933 (9th Cir. 1987) (organization had standing to challenge migratory bird hunting in Alaska because members used the affected resources, the decrease in migratory bird population consequently injured the members, and preventing extinction was germane to the organization's purpose), *cert. denied*, 485 U.S. 988 (1988); Montgomery Envtl. Coalition v. Costle, 646 F.2d 568, 576-78 (D.C. Cir. 1980) (concerned citizens interested in protecting the environment had standing to challenge permits issued to sewage treatment plants under the *Sierra Club* test); Committee for Auto Responsiblity v. Solomon, 603 F.2d 992, 997-99 (D.C. Cir. 1979) (environmental organization had standing to challenge harm, actual or threatened, to health and conservational interests stemming from the failure of the General Services Administration to prepare an environmental impact statement), *cert. denied*, 445 U.S. 915 (1980). *Cf.* Wilderness Soc'y v. Griles, 824 F.2d 4 (D.C. Cir. 1987) (environmental organization lacked standing to challenge BLM policy because the organization failed to show that its members used or intended to use the land in question).

103. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977).

104. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 77-78 (1978). The Court's causation requirement is generally an accepted requirement to satisfy the constitutional requirements for standing in a federal court. One aspect of the causation requirement, however, remains unclear. In certain instances, Congress indicates within a statute the particular results that a statute is intended to produce. Courts have relied on such congressional determinations to satisfy the causation element of standing. Yet, the degree of deference that federal courts afford congressional determinations of causation is unclear. In *Center for Auto Safety v. Thomas*, 847 F.2d 843, *vacated*, 856 F.2d 1557 (D.C. Cir. 1988) the Center for Auto Safety challenged the Environmental Protection Agency's formula for calculating auto fuel efficiency. After a panel of the court unanimously granted standing, the United States Court of Appeals for the District of Columbia Circuit granted a rehearing *en banc* to determine if the Center for Auto Safety had standing. *Id.* at 847. The court divided evenly on that question. *Id.* at 844. Five judges would have deferred to congressional determinations of causation. *Id.* at 856. Those judges contended that the legislature intended the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended at 42 U.S.C. § 6201-6422 (1988)) to create a system of penalties and credits for fuel efficiency to provide an incentive for the auto industry to comply with tougher fuel efficiency guidelines to avoid paying fines. *Thomas*, 847 F.2d at 850-51. The judges argued that congressional determinations should be favored over judicial predictions, and that congressional fact-finding should be given significant weight when assessing the impact and injury of a congressional regulatory scheme. *Id.* at 863. Conversely, the *Thomas* dissent argued that the Center for Auto Safety failed to

ment for standing originated in *Flast v. Cohen,*[105] in which the Court required a nexus between the plaintiff's status and "the precise nature of the constitutional infringement alleged."[106] In *Flast,* taxpayers challenged the Elementary and Secondary Education Act of 1965 (ESEA),[107] arguing that taxes earned from ESEA were used for religious education in violation of the establishment clause of the first amendment.[108] The Court found the link between the taxpayer's status and the claim that they asserted sufficient to demonstrate standing.[109] First, the Court determined that the taxpayers established a link between their status as taxpayers and "the type of legislative enactment attacked."[110] Next, the Court found that the taxpayers established a nexus between their status as taxpayers and "the precise nature of

---

demonstrate concrete or specific injury, and asserted that the plaintiffs needed a more tangible claim than " '[i]ts institutional interests in promoting conservation in this and other industries are adversely affected.' " *Id.* at 867 (quoting Opening Brief for Petitioners at 5). The Center for Auto Safety sued as an organization representing automobile consumers, and claimed associational standing on behalf of the consumers. *Id.* at 848. The test for a group seeking to represent its members was established in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 342-43 (1977). The *Hunt* Court held that a voluntary membership organization has standing if its members would otherwise have standing to sue in their own right, if the interests it seeks to protect are germane to the organization's purposes, and if neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. A group may also sue on its own behalf for injury to its activities and functions if there is actual impact on the group. *Id.* at 343. For a detailed analysis of organizational standing, see International Union, United Auto v. Brock, 477 U.S. 274, (1986) (reaffirming *Hunt*). The *Brock* Court required a plausible relationship between the interests of litigants and the statutory policies at issue. *Id.* at 288. The *Hunt* analysis was again affirmed in Pennell v. City of San Jose, 485 U.S. 1, 7 (1988). The question as to the weight given to congressional determinations of causation remains unresolved.

105. 392 U.S. 83 (1968).

106. *Id.* at 102; *see also* United States v. Richardson, 418 U.S. 166, 174-75 (1974) (plaintiff's generalized grievance is insufficient to demonstrate standing because there is no logical nexus between the asserted status of the taxpayer and the claimed failure of Congress to require the President to supply a more detailed report of CIA expenditures).

107. 20 U.S.C. § 241 (1965). Historically, the Supreme Court refused standing on the basis of taxpayer status. *See* Massachusetts v. Mellon, 262 U.S. 447 (1923). *Flast* allowed taxpayer standing upon finding that the taxpayer satisfied a two-part test. *See infra* notes 110-11 and accompanying text. Since *Flast,* the requirements for taxpayer standing have been strictly enforced. *See* United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (taxpayers lack standing due to mere generalized interest in United States' involvement in Vietnam and their failure to establish a nexus between their statutes as taxpayers and the constitutional infringement alleged).

108. *Flast,* 392 U.S. at 85.

109. The *Flast* Court distinguished *Mellon,* explaining that although the plaintiff in that case established the nexus between its status as a taxpayer and the type of legislation attacked, it failed to establish a link between its taxpayer status and the nature of the constitutional infringement alleged. *Flast,* 392 U.S. at 105.

110. *Id.* at 102.

the constitutional infringement alleged."[111] Accordingly, the taxpayers had standing to sue because their injury as taxpayers was directly traceable to the statute challenged.

In addition to the nexus between the injury and the challenged action, the Court also required a prospective plaintiff to suffer immediate or threatened injury in order to satisfy the causation prong of the standing requirement. Further, the injury must be traceable to the party sued. In *Warth v. Seldin,*[112] a nonprofit housing corporation claimed standing to challenge the zoning ordinance of a town as discriminatory against low and moderate-income persons and minority groups. The Court rejected this argument, explaining that, in addition to a case or controversy requirement, a plaintiff must show a causal relation between the practices of the defendant and the injury to the plaintiff.[113] The Court, finding that the inability to locate low-income housing was unrelated to the alleged zoning ordinance violations,[114] refused to allow the plaintiff to assert the rights of unidentified members of the class it attempted to represent.[115] Not only must a plaintiff show that the injury by the defendant harms the plaintiff, the Court held, but the plaintiff also must be the person who benefits from judicial intervention.[116] The Court concluded that, "[u]nless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.' "[117]

---

111. *Id.*

112. 422 U.S. 490, 493 (1975).

113. *Id.* at 499-501.

114. *Id.* at 502.

115. *Id.*

116. *Id.* at 508.

117. *Id.* at 502 (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)). In *Simon v. Eastern Kentucky Welfare Rights Organization*, several welfare organizations and indigent people argued that an Internal Revenue Service (IRS) Revenue Ruling caused them injury by giving hospitals a tax incentive to end free medical care. 426 U.S. 26, 33 (1976). Relying on Sierra Club v. Morton, 405 U.S. 727 (1972), the *Simon* Court emphasized that an actual injury is necessary to demonstrate standing in a federal court and refused to find that the IRS action directly injured the plaintiffs. *Simon,* 426 U.S. at 37-39. The Supreme Court further addressed the causation requirement in the zoning case of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). The City of Arlington Heights denied a nonprofit developer the rezoning permit needed to build integrated, multiple family low and moderate-income housing units. *Id.* at 254. The developer filed suit, arguing that the denial was racially discriminatory, and the city challenged the developer's standing to bring the suit. *Id.* at 258-60. The Court held that the developer demonstrated standing because the economic and non-economic injury it suffered was a direct consequence of Arlington Heights' rezoning permit denial. *Id.* at 262-63. The Court found that the developer's interest was not merely an abstract, generalized concern. Instead, the availability of suitable low-cost housing was a specific project that denial of a zoning point could injure. *Id.* at 263. Additionally, the Court found

3. Redressability

In addition to alleging an actual injury, for a plaintiff to demonstrate standing under the Constitution, the relief that a plaintiff requests must be likely to remedy the alleged injury.[118] Requiring "actual injury redressable by the court"[119] assures that a case is decided "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[120]

---

that one minority who sought low-income housing and would qualify for the housing the developer wanted to build was sufficient to demonstrate standing. *Id.* at 264.

In Allen v. Wright, 468 U.S. 737, 752-53 (1984), the parents of black students challenged the IRS's failure to deny tax-exempt status to private schools which discriminated on the basis of race. The Court held that the plaintiffs showed insufficient injury to satisfy the standing requirements of the *Data Processing* test because the injury was not traceable to government action. *Id.* at 752-53.

The Court found the the "children's diminished ability to receive an education in a racially integrated school" to be a cognizable injury. *Id.* at 756. The Court held, however, that the claim was not fairly traceable to the challenged government conduct because a change in tax-exempt status for a school would not necessarily change the school integration policies. *Id.* at 753, 758-59. Without causation or traceability, the *Allen* Court warned that there would be an abundance of suits challenging "the particular programs agencies establish to carry out their legal obligations," instead of challenges to "specifically identifiable Governmental violations of law." *Id.* at 759. The Court, therefore, denied standing because the plaintiffs requested nationwide relief and failed to allege direct injury traceable to IRS actions. *Id.* at 766. Justice Brennan stated in dissent that "[b]y relying on generalities concerning our tripartite system of government, the Court is able to conclude that the respondents lack standing to maintain this action without acknowledging the precise nature of the injuries they have alleged." *Id.* at 767 (Brennan, J., dissenting). Justice Brennan argued that the parents, suing on behalf of their minor children, alleged injury sufficient to demonstrate standing. *Id.* at 771. He found the injury fairly traceable to the challenged governmental action reasoning that the inability of the children "to receive an education in a racially integrated school is directly and adversely affected by the tax-exempt status granted by the IRS to racially discriminatory schools in their respective school districts." *Id.* at 774. Additionally, Justice Brennan criticized as too narrow the Court's interpretation of standing requirements based on the enforcement of separation of powers. *Id.* at 782. He commented that the "the causation component of the Court's standing inquiry is no more that a poor disguise for the Court's view of the merits of the underlying claims." *Id.*

118. 5 J. STEIN, G. MITCHELL & B. MEZINES, *supra* note 1, § 50.02, at 50-20 to 50-23; *see also* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. 454 U.S. 464, 472 (1982).

119. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976); *see* Baker v. Carr, 369 U.S. 186, 204 (1962) (requiring "a personal stake in the outcome of a controversy" for the plaintiff to have standing).

120. *Valley Forge,* 454 U.S. at 472 (denying standing to an organization dedicated to protecting the separation of church and state because its injury did not result from an alleged constitutional error and therefore was not redressable by the court). By avoiding debate on an issue that it cannot redress, a court insures that the legal questions presented are resolved and maintains separation of powers among the branches of government. *Id.*

In *Watt v. Energy Action Educational Foundation,*[121] the United States Supreme Court held that the State of California had standing to challenge the bidding systems for offshore oil and gas exploration chosen by the Department of the Interior.[122] In the 1978 amendments to the Outer Continental Shelf Lands Act of 1953, Congress revised the bidding system and provided that coastal states adjoining outer continental shelf leases would receive part of the lease revenues from offshore bidding.[123] California alleged that the amended bidding system was not producing a fair market return.[124] Therefore, because California had a direct financial stake in offshore leasing, the state would suffer a direct injury as a result of the Department of the Interior's actions.[125] Additionally, California asserted that a fairly traceable causal connection existed between the injury claimed and the Department of the Interior's challenged conduct.[126]

The government argued that the relief sought, experimental use of noncash bonus bidding systems to increase exploration off the California coast, would not redress the alleged injury because the government would not be required to use those bidding systems on leases adjacent to California.[127] The Court found, however, that if the Court granted the relief that the state sought, the injury would be remedied.[128] The Court agreed with California's assertion that by failing to test the noncash bonus bidding systems, the Secretary of the Interior had "breached a statutory obligation to determine through experiment which bidding system works best."[129] The Court reasoned that only by experimenting with different bidding systems could the

121. 454 U.S. 151 (1981).

122. *Id.* at 160-62. Interior is authorized to lease tracts of the Outer Continental Shelf for oil and gas exploration pursuant to the Outer Continental Shelf Lands Act of 1953, § 1337 (the Act), 43 U.S.C. § 1331 (1988). Congress amended the Act in 1978 due to the United States' dependence on foreign oil and increased petroleum prices. Pub. L. 95-372, 92 Stat. 629 (1978). In 1978 the bidding system for exploration rights also changed to allow a greater number of companies to take part in exploration. *Energy Action,* 454 U.S. at 154. Currently, the Secretary of the Interior chooses the bidding system needed to lease Outer Continental Shelf tracts by experimenting with a group of ten authorized bidding systems. *Id.* at 155. In *Energy Action,* however, the Secretary failed to test all ten of the authorized bidding systems as required under the Act. *Id.* at 157. Consumer groups, government entities and private citizens alleged that the Secretary abused his discretion in choosing bidding systems, because the chosen bidding system failed to generate adequate competition as required by the Act. *Id.* at 158.

123. *Energy Action,* 454 U.S. at 160.

124. *Id.* at 161.

125. *Id.*

126. *Id.; see also* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977) (denial of rezoning permit injures low-income housing developer and this denial is an injury redressable by the court).

127. *Energy Action,* 454 U.S. at 161.

128. *Id.* at 162.

129. *Id.* at 161.

Secretary of the Interior find the most profitable system. Thus, such experimentation would redress the alleged financial injury.[130] Accordingly, *Energy Action* demonstrates that, in addition to injury and causation, a plaintiff must show that its injury is judicially redressable.

If the relief requested will not remedy the plaintiff's injury, standing will be denied. In *Gonzales v. Gorsuch,*[131] a private citizen alleged that the Environmental Protection Agency (EPA) improperly approved funding for a San Francisco Bay clean water plan.[132] The United States Court of Appeals for the Ninth Circuit denied Gonzales standing because the injunction that Gonzales sought against expenditures would not redress his inability to use the polluted San Francisco Bay.[133] The Court recognized that the personal interest at stake for Bay users was sufficient to meet the *Duke* test of injury in fact,[134] and that Congress intended the Federal Water Pollution Control Act to grant standing to a nationwide class.[135] Yet, the Court determined that Congress did not intend to "confer standing to seek relief that will not actually redress the injuries the parties have incurred."[136] In *Gonzales,* any relief granted would not prevent or redress the claimed injury to the area's waters.[137] While the *Energy Action* and *Gonzalez* holdings differ, the intent of the court is clear: a plaintiff cannot demonstrate standing unless the relief requested from the court will remedy the alleged injury.

B. The Second Prong of the Standing Test: Zone of Interest Test

In addition to constitutional requirements, courts impose prudential limits on persons seeking standing.[138] Courts use prudential requirements to deny standing when clear statutory grounds for standing do not exist.[139] To satisfy prudential requirements for standing, a plaintiff " 'must assert his own

130. *Id.* at 162.

131. 688 F.2d 1263 (9th Cir. 1982).

132. *Id.* at 1264-65. Gonzales alleged that EPA expenditures were improper because the agency expended some of the money for contracts unrelated to water pollution contravening the Federal Water Pollution Control Act, § 208, 33 U.S.C. § 1288 (1988). *Gonzales,* 688 F. Supp. at 1265.

133. *Gonzales,* 688 F.2d at 1267.

134. *Id.* at 1266-67; *see supra* notes 73-79 and accompanying text.

135. *Id.* at 1266.

136. *Id.* at 1267-68.

137. *Id.* at 1268.

138. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). Congress may eliminate prudential requirements for standing and confer standing through a statute subject only to article III requirements. *See supra* note 4.

139. Fletcher, *supra* note 55, at 250-51.

legal rights and interests,' " and not those of a third party.[140] Furthermore, the interests must be within the zone of interests that the applicable statute or constitutional provision protects.[141]

In *Association of Data Processing Service Organizations, Inc. v. Camp*,[142] a data processing service challenged an agency ruling that authorized national banks to make data processing service available to other banks and customers. The Association of Data Processing Service Organizations asserted standing under section 702 of the APA, arguing that as competitors to new market entrants, they were "aggrieved" by the action.[143] Recognizing that interests can include economic values, the Supreme Court determined that the interest which the data processing service sought to protect was within the zone of interests that the statute in question protected.[144] Specifically, the Court found that the applicable statute protected bank competitors.[145] Consequently, *Data Processing* established three prerequisites for standing: 1) agency action must have injured the plaintiff within the meaning of a relevant statute; 2) the person must assert an interest that falls within a zone of interests that the statute protects; and 3) the person must show injury in fact.[146] While the dissent in *Data Processing*[147] contended that the injury in fact test should stand alone,[148] the two-pronged test requiring injury in fact and satisfaction of the zone of interest test is instrumental to satisfying standing.[149]

---

140. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499 (1974)).

141. *Id.* at 474-75 (quoting *Data Processing*, 397 U.S. at 153).

142. 397 U.S. 150 (1970). For an earlier discussion of *Data Processing*, see *supra* notes 60-70 and accompanying text.

143. *Data Processing*, 397 U.S. at 157.

144. *Id.* at 153-54.

145. *Id.* at 157.

146. The court noted that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." *Id.* at 154. Similarly, the court in Izaak Walton League v. St. Clair, 313 F. Supp. 1312, 1317 (D. Minn. 1970), followed *Data Processing* by construing the APA "generously and 'not grudgingly.' " Justice Scalia, who authored *Lujan*, hotly contests that philosophy. *See* Scalia, *The Doctrine of Standing*, *supra* note 3, at 881.

147. Barlow v. Collins, 397 U.S. 159, 168-69 (1970) (Brennan, J., dissenting) (Justice Brennan filed the same dissent for *Data Processing* and *Barlow*).

148. *Id.* at 168.

149. *But see* Sierra Club v. Hardin, 325 F. Supp. 99, 107 (D. Alaska, 1971) (noting the zone of interest test's imprecision and its contrariness to the original intent of the APA); *see also*, 4 K. DAVIS, *supra* note 1, § 24.17; Albert, *supra* note 5, at 495-97 (describing the cloudy purpose complicating the zone of interest test). Block v. Community Nutrition Institute, 467 U.S. 340 (1984), further illustrates the Supreme Court's use of the zone of interest test. In *Block*, milk product consumers challenged Department of Agriculture milk subsidies to dairy farmers and the Supreme Court denied standing. *Id.* at 348. The Court found that only the milk handlers, and not milk consumers, fell within the requisite zone of interest when seeking

In *Clarke v. Securities Industry Association,*[150] the Court eased standing requirements somewhat by holding that the zone of interest should be read broadly. In *Clarke,* a trade association demonstrated standing to challenge a decision of the Comptroller of the Currency.[151] Two national banks applied to the Comptroller to open offices offering public discount brokerage services, and the Comptroller granted the application.[152] A trade association challenged the Comptroller's decision to allow banks to provide discount brokerage services at branch offices and outside the banks' home states.[153] The challenge was based on the National Bank Act, which limits a national bank's business to its headquarters and home state branches.[154] The trade association alleged that the discount brokerage offices are branches subject to National Bank Act geographic restrictions.[155]

The Court found that the trade association suffered injury. Its inquiry, however, did not cease with that finding. The Court also asked whether the trade association's interest was within " 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' "[156] The Court recognized that the phrase "a relevant statute" in section 702 of the APA[157] should be interpreted broadly to enlarge " 'the class of people who may protest administrative action' " while at the same time excluding people whose interests are not regulated by the statute.[158] The Court determined that the purpose of the statute was to prevent banks from monopolizing

judicial review of the Secretary of Agriculture's pricing orders pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. §§ 601-626 (1988). *Id.* The Court found that in the AMAA, Congress clearly meant to leave the enforcement of the law to the Secretary of Agriculture, milk handlers, and milk producers to establish a successful system to market agricultural products, and not to milk consumers. *Id.* at 346-48. Therefore, milk consumers' interests did not fall within the zone of interest to be protected by the AMAA and they had no standing to sue. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); *supra* notes 73-78 and accompanying text.

150. 479 U.S. 388 (1987).

151. *Id.* at 403. The trade association represented securities brokers, underwriters, and investment bankers. *Id.* at 392.

152. *Id.* at 390-31.

153. *Id.* at 392.

154. *Id.* at 391; 12 U.S.C. § 81 (1988).

155. 479 U.S. at 392-93.

156. *Id.* at 396 (quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)); *see also* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986) (a whale watch/study group is within the zone of two statutory amendments designed to guard against animal depletion); National Audubon Soc'y v. Hester, 801 F.2d 405, 407 n.2 (D.C. Cir. 1986) (observing and studying wild animals and birds is within the zone arguably to be protected by the Endangered Species Act).

157. 5 U.S.C. § 702 (1988).

158. *Clarke,* 479 U.S. at 397 (quoting *Data Processing,* 397 U.S. at 154). In view of Congress' intent to prevent bank monopolies, and the competition between the trade association's members and the banks seeking to provide discount brokerage services, the Court found that

"control over credit and money through unlimited branching,"[159] and that the trade association fell within the zone of interest.

Accordingly, the Court has recognized the zone of interest test as a necessary requirement for federal standing and as a potential limit on standing.[160] Further, case law reflects that the Court will read the zone of interest requirement broadly to allow more parties to satisfy the zone of interest test.[161]

II. MODERN STANDING: COURTS NARROW THEIR FOCUS

Although organizational plaintiffs attempting to demonstrate standing in the 1970's enjoyed broad judicial interpretation of standing requirements, courts since have narrowed the circumstances under which organizations may demonstrate standing. An example of the United States Supreme Court's more stringent stance on standing requirements is *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*[162] In *Valley Forge,* an organization dedicated to the separation of church and state contested a grant of surplus federal property to a church-related group as a violation of the establishment clause of the first amend-

---

the trade association's interest was plausibly related to the National Bank Act and therefore satisfied the zone of interest test. *Id.* at 403.

159. *Id.*

160. *Id.* at 395.

161. The *Clarke* Court, considering the *Data Processing* decision, recognized that Congress had not intended to grant standing to every person who suffered injury in fact by enacting § 702 of the APA. In *Clarke,* the Court pointed out that to solve that potential problem, the *Data Processing* decision supplied "a gloss on the meaning of § 702," by adding to the injury in fact requirement the zone of interest test. *Id.* at 395-96. The United States Court of Appeals for the District of Columbia Circuit gave a shorter definition of the zone of interests test in Humane Society of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988). The court, citing *Clarke,* determined that a plaintiff must demonstrate " 'a plausible relationship' " between its interests and the overall policies of the statute to be within the zone of interests of the applicable statute. *Id.* at 60-61 (citing *Clarke*, 479 U.S. at 401-03). The *Hodel* court found that the Humane Society's interest in challenging expanded hunting in wildlife refuges was within the zone of interests that the Endangered Species Act and Refuge Acts protected. *Id.* at 60-61. The court will look to congressional intent when considering the zone of interest test. The court in Hazardous Waste Treatment Council v. United States Environmental Protection Agency, 861 F.2d 270, 273 (D.C. Cir. 1988), *cert. denied,* 109 S. Ct. 3157 (1989), held that a national trade organization of firms which treat hazardous waste and manufacture equipment to treat hazardous waste had standing to challenge an EPA regulation. The organization argued that the regulation was neither fully comprehensive nor adequately strict to comply with the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992 (1988). *Id.* at 272. In considering whether plaintiffs satisfied the zone of interests test, the court presumed that Congress intended RCRA to be a comprehensive framework for EPA regulation of hazardous waste. *Id.* at 271. Accordingly, parties were "regulated" under the zone test only if the particular regulatory action being challenged regulated the parties. *Id.*

162. 454 U.S. 464 (1982).

ment.[163] The Court held that an interest in church-state affairs or status as a taxpayer is not sufficient to demonstrate injury in fact and, accordingly, denied standing to the organization.[164] The Court explained the denial by stating that an injury must be personal and more than an injury common to every other citizen.[165] Additionally, the Court held that the plaintiffs failed to "identify any personal injury suffered by them *as a consequence* of the alleged constitutional error."[166] Although the Court reaffirmed that noneconomic injury was a cognizable injury, it insisted that the injury alleged be concrete and unambiguous.[167]

Lower courts have followed the Supreme Court's lead. In *Wilderness Society v. Griles,*[168] the United States Court of Appeals for the District of Columbia Circuit held that the Wilderness Society lacked standing to challenge the exclusion of submerged lands from the total charged against Alaskan land grants.[169] To show that agency action adversely affected or aggrieved a plaintiff within the meaning of section 702 of the APA, the court required the Wilderness Society to show injury in fact caused by methods the BLM used in surveying Alaska land to settle the outstanding land claims of Alaska Natives.[170] Additionally, the organization had to show that the injury was within the zone of interests that the Alaska Statehood Act protected.[171] The court recognized that threatened injury is sufficient to demonstrate standing in two circumstances: first, where government action is taken directly against a plaintiff; and second, where the government action acts directly against a third party whose subsequent response will injure a plaintiff.[172] The court acknowledged that the case at hand involved the latter situa-

163. *Id.* at 468-69. The Americans United for Separation of Church and State challenged the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 471-544. Pursuant to that Act, under 40 U.S.C. § 484(k)(1) (1988), the Secretary of Health, Education and Welfare (now the Secretary of Education) disposed of surplus government property for educational use. *Valley Forge,* 454 U.S. at 467. When surplus land was conveyed to Valley Forge Christian College, the organization brought suit. *Id.* at 467-69.

164. *Valley Forge,* 454 U.S. at 486. The Americans United for Separation of Church and State alleged an unfair and unconstitutional use of their tax dollars. *Id.* at 476.

165. *Id.* at 472.

166. *Id.* at 485 (emphasis in original).

167. *Id.* at 486-87.

168. 824 F.2d 4 (D.C. Cir. 1987).

169. *Id.* at 12. BLM surveyed the land pursuant to the Alaska Statehood Act. *Id.* at 7. The Alaska Statehood Act granted over 100,000,000 acres of land to the state. 48 U.S.C. § 21 (1958). Additionally, the Alaska Native Claims Settlement Act authorizes the state to select portions of land from areas BLM designates to settle outstanding claims of Alaska Natives. 43 U.S.C. §§ 1610-11 (1988).

170. 824 F.2d at 11. The Wilderness Society alleged that shifting the land from federal to state and native control would injure its members who used the land.

171. *Id.*

172. *Id.*

tion.[173] The court, however, found no direct or indirect link between the Department of the Interior's action and the alleged injury to the Wilderness Society.[174] The Wilderness Society, the court explained, failed to show injury in fact because it failed to specify the federal lands that its members used.[175] Thus, the organization was unable to prove that the BLM's policy would impact them. Therefore, the court found that the plaintiffs suffered an insufficient threat of injury to demonstrate standing.[176]

By contrast, in *National Wildlife Federation v. Hodel*,[177] another District of Columbia Circuit case, the court granted standing to an environmental organization. In that case, the National Wildlife Federation (NWF) was held to have standing to challenge mining regulations that relaxed general statutory requirements for state regulators and coal mine operators.[178] Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA)[179] to protect the environment from the effects of coal mining.[180] SMCRA delegated to the Secretary of the Interior the authority to regulate mining through a permit system establishing the effects of mining on the land and subsequent performance standards.[181] In response to frequent litigation and a change in administration policy,[182] the Secretary of the Interior revised the regulations in 1983 to provide to state regulators and coal mine

173. *Id.* at 12.

174. *Id.*

175. *Id.*

176. *Id.* As in *Lujan*, the *Griles* court required the Wilderness Society to show injury with great specificity because a summary judgment motion was at issue. *Id.* at 17. Two other recent cases further illustrate that requirement. In Natural Resources Defense Council v. Burford, 716 F. Supp. 632, 638 (D.D.C. 1988), the court denied standing because federal coal mining statutes for leasing and mining coal on federal land did not actually affect the plaintiff. The plaintiffs challenged the environmental effects of the regulations but failed to produce any affidavits to support the allegations of their complaint. *Id.* at 637-38. In the second case, Idaho Conservation League v. Mumma, No. CV 88-197-M-CCL, slip op. at 5-6 (D. Mont. July 8, 1990), the court denied standing because the plaintiff's use of roadless area in national forests was too remote to challenge a forest development plan.

177. 839 F.2d 694 (D.C. Cir. 1988).

178. *Id.* at 709.

179. Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C. § 1201-1328 (1988)).

180. *Hodel*, 839 F.2d at 701. SMCRA is enforceable at the state and federal level. *Id.* at 701. A state may begin regulation after the federal government accepts its proposed regulatory program and after the state completes an interim period of federal regulation. *Id.*

181. *Id.*

182. *See In re* Surface Mining Regulation Litigation, 627 F.2d. 1346 (D.C. Cir. 1980) (industrial and environmental groups challenged interim program regulations); *In re* Surface Mining Regulation Litigation, 456 F. Supp. 1301 (D.D.C. 1978); *In re* Surface Mining Regulation Litigation, 452 F. Supp. 327 (D.D.C. 1978); *see also In re* Permanent Surface Mining Regulation Litigation, 653 F.2d. 514 (D.C. Cir. 1981) (*en banc*) (rejecting a challenge to the Secretary of the Interior's rule-making power).

operators greater flexibility in complying with SMCRA's general provisions.[183] The NWF alleged injury due to the Secretary of the Interior's "deletion of the regulatory minimums" from SMCRA.[184]

To show that the organization's injury was fairly traceable to the revisions of SCMRA, the NWF identified at least one person living in a state that the new mining standards directly affected.[185] The NWF also claimed that the lack of information required for mining permits could cause, and had caused, environmental degradation.[186] The mining industry argued that the NWF lacked standing to challenge the regulations until the Secretary of the Interior issued a decision unfavorable to the group.[187] Rejecting that argument, the court held that the NWF adequately demonstrated the existence of a case or constroversy and, therefore, possessed standing to challenge the Department of the Interior's currently operative rules.[188] *Hodel* reveals that, while courts today strictly enforce standing, plaintiffs who clearly and forcefully prove each facet of the standing test will enjoy federal court jurisdiction.

III. LUJAN V. NATIONAL WILDLIFE FEDERATION

In *Lujan v. National Wildlife Federation,*[189] the Court exercised its power over the technical aspects of standing while at the same time enforcing constitutional and prudential standing requirements.[190] As a consequence, the Court tightened the requirements necessary to challenge an agency action and narrowed the circumstances in which environmental litigants may demonstrate standing.

A. The Majority Opinion

The first part of the *Lujan* opinion addressed the portion of APA section 702 that permits an individual to seek judicial review of unlawful agency

183. 839 F.2d at 702.

184. *Id.* at 707. At a minimum, mine operators must qualify for a permit by reporting the environmental impact of their proposed operations. *Id.* at 701. Additionally, performance standards, including restoring lands following the mining operation, must be adhered to once the work is begun. *Id.* The revisions to regulations implementing SMCRA relaxed compliance requirements for mine operators. *Id.* at 702.

185. *Id.* at 708.

186. *Id.*

187. *Id.* at 709.

188. *Id.* NWF's demonstration of standing was adequate because the group challenged "currently operative rules that require no act of administrative discretion to affect environmentalist plaintiffs." *Id.*

189. 110 S. Ct. 3177 (1990).

190. *Id.* at 3185-93.

actions that adversely affect the individual.[191] The NWF argued that the Department of the Interior's opening of the lands to oil and mining leasing sufficiently aggrieved NWF members to allow the injury to fall within the zone of interests that the FLPMA sought to protect.[192] Specifically, in their initial affidavits, two NWF members alleged recreational and aesthetic injury because they used land "in the vicinity of" proposed mining and oil and gas leasing.[193] The Court agreed that recreational and aesthetic interests are types of interests that FLPMA and NEPA are designed to protect. The Court also agreed that the " 'adverse effect' or 'aggrievement' " the affidavits established was within the meaning of the relevant statute and, therefore, met the zone of interest test.[194] The Court found, however, that section 702 of the APA contains two separate requirements: first, "the person claiming a right to sue must identify some [final] 'agency action' that affects him in the specified fashion;"[195] and second, "the party seeking review under § 702 must show that he . . . is 'adversely affected or aggrieved' by that 'action within the meaning of a relevant statute.' "[196] The Court looked to prior case law to find that the agency action by the BLM affected the recreational and aesthetic interests of NWF members.[197]

After the Court acknowledged that the interests raised were within the statute's zone of interest, the Court questioned whether, based on the affidavits, the interests were actually affected.[198] The Court relied on the lower court decisions in ruling that the facts found in the affidavits insufficiently demonstrated standing.[199] The Court noted that "some room for debate" exists with respect to the specificity of facts required on a motion for sum-

191. 5 U.S.C. § 702 (1988); *see* Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 396-397 (1987).

192. *Lujan,* 110 S. Ct. at 3185-86.

193. *Id.* at 3187.

194. *Id.*

195. *Id.* at 3185-86. Section 704 of the APA subjects to judicial review agency actions which are reviewable pursuant to statute and final agency actions. The Court found that APA § 704 was applicable in *Lujan* and, thus, held that "the 'agency action' in question must be 'final agency' action." *Id.*

196. *Id.* at 3186.

197. *Id.* at 3187. The Court, citing Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977), assumed that the recreational use and aesthetic enjoyment were sufficiently related to the purposes of the NWF to satisfy the test for associational standing. *Id.*

198. *Id.* at 3187-88.

199. *Id.* The Court agreed with the district court that the affidavits did not contain sufficient facutal allegation to withstand a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Id.* Because the government moved for summary judgment, the NWF had a greater burden to prove standing than it did in opposing a 12(b) motion to dismiss. Because the organization failed to set forth facts showing a genuine issue for trial, the Court upheld the district court's grant of summary judgment. *Id.* at 3194.

mary judgment.[200] Nonetheless, the Court found that the Federal Rules of Civil Procedure were not satisfied.[201] The Court reasoned that Rule 56 requires a court to grant summary judgment when a plaintiff fails to show that it is adversely affected or aggrieved by agency action within the meaning of a relevant statute.[202] The court of appeals had acknowledged that the affidavits were ambiguous but, based on its reading of Rule 56, resolved the ambiguity in favor of NWF and assumed that the affiants actually used the land and were, therefore, affected.[203] The Court in *Lujan,* however, rejected the appellate court's presumptions.[204] The Court indicated that although Rule 56 requires courts to resolve any factual issues in controversy in favor of the nonmoving party, the parties must specifically aver the facts to be resolved and the court may not presume the facts.[205] Because the NWF failed to specify the portion of the land its members used, and because the agency action in question dealt with almost two million acres of federal land,[206] the Court found the affidavits insufficient to support the alleged injury, and refused to presume missing facts regarding the unspecified portions of the federal land at issue.[207]

The Court also held that the district court was correct in refusing to admit the four additional affidavits because the affidavits could not suffice to challenge the entire land withdrawal review program.[208] Writing for the majority, Justice Scalia noted that the affidavits could never adequately challenge

200. *Id.* at 3189.

201. *Id.* The Court also noted the inapplicability of *SCRAP,* because that case considered a 12(b) motion to dismiss instead of a Rule 56 motion for summary judgment. *Id.; see supra* note 91-102 and accompanying text. Rule 56 states that "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." FED. R. CIV. P. 56(e).

202. *Id.* at 3187; *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (requiring summary judgment against a party which failed to allege sufficient essential elements of its case on which it would bear the burden of proof at trial).

203. *Lujan,* 110 S. Ct at 3188.

204. *Id.*

205. *Id.* at 3188-89.

206. *Id.* at 3189.

207. *Id.* Because Rule 56 requires a party to allege that specific facts to support injury, the general averments of the affidavits stating that a member "use[d] unspecified portions of an immense tract of territory" were insufficient to demonstrate standing. *Id.*

The Court found that recreational interests were sufficiently related to the purpose of the NWF to allow the organization to satisfy section 702 requirements if any of its members could satisfy those requirements.

208. *Id.* at 3189-90. Justice Scalia, seeking to maintain separation of powers among the branches, strictly enforced the requirement that a plaintiff suffer a distinct, individualized injury which the citizenry as a whole has not suffered. *See* Scalia, *The Doctrine of Standing, supra* note 3, at 894-95.

the land withdrawal review program because the program was not a final agency action within the meaning of the APA and, therefore, was not ripe for review.[209] Further agency action that directly injured the plaintiff was necessary before a successful challenge could occur.[210]

Next, the Court reasoned that the NWF would not be able to challenge even individual agency actions within the agency program.[211] Finally, the Court refused to remand the case for the court of appeals to decide whether the NWF could seek review under section 702 in its own right, as opposed to derivatively through its members.[212] Agreeing with the district court, the Supreme Court found that, even if the affidavits alleged a specific injury, the NWF had failed to identify a final agency action as the source of these injuries.[213] Because the NWF challenged the operations of the BLM in reviewing the withdrawal reclassification of public lands, instead of a distinct agency action, the Court rejected the challenge as overly broad.[214]

B. The Dissenting Opinion

Justice Blackmun's dissent rejected the Court's interpretation of standing requirements.[215] Noting the injury suffered by the NWF and the extensive litigation preceding the case,[216] the dissent argued that the Court incorrectly had asked the organization to prove standing,[217] instead of simply asking the NWF to establish the existence of a genuine issue for trial.[218] Justice Blackmun contended that because the affidavits were "sufficiently precise to enable [BLM] officials to identify the particular termination orders to which the affiants referred,"[219] the affidavits satisfied Rule 56.[220] The dissent con-

209. *Lujan*, 110 S. Ct. at 3190. Justice Scalia pointed out that for judicial review, a controversy must be narrowly proportioned and the agency action must concretely apply to the claimant's situation. Additionally, Justice Scalia contended that even if ripe, the entire program could not be challenged. Instead, congressional action was necessary to change the program. *Id.* at 3190-91. Therefore, the NWF could not simply allege general flaws in an entire program and satisfy standing requirements.

210. *Id.*

211. *Id.* Justice Scalia explained further that the affidavits had alleged simply that a corporation had filed a BLM mine permit application in hopes of mining some of the reclassified land. The permit had not yet been granted. Therefore, Justice Scalia explained, whether mining and land disturbance would actually occur, and whether an injury would be suffered was impossible to determine. *Id.* at 3190-91, n.3.

212. *Id.* at 3193-94.

213. *Id.* at 3194.

214. *Id.*

215. *Id.* at 3194 (Blackmun, J., dissenting).

216. *Id.* at 3194, 3197.

217. *Id.* at 3196.

218. *Id.*

219. *Id.*

ceded that the affidavits "were not models of precision,"[221] but found that the Court was denying standing on evidence sufficient to overcome a motion for summary judgment.[222]

Justice Blackmun further asserted that the district court should have considered the four additional NWF affidavits.[223] He pointed out that the Federal Rules of Civil Procedure allow the district court "discretion in deciding whether affidavits in opposition to a summary judgement motion may be submitted after the hearing."[224] Justice Blackmun also emphasized that the district court and court of appeals repeatedly held that the NWF offered sufficient evidence of its standing.[225] He further argued that the Court should recognize the organization's standing to ensure the "just and efficient resolution of legal disputes."[226] Finally, the dissent argued that "agency action" may be broadly interpreted,[227] and in this case should be interpreted in the NWF's favor.[228] The real issue, Justice Blackmun contended, was not the scope of the agency program,[229] but whether the agency actions that allegedly violated the law were part of the agency action in question.[230] Even though the land withdrawal review program is a collection of individual agency actions making up an entire government program, the dissent pointed out that if the questioned government actions were illegal, the NWF deserved the opportunity to challenge either the entire agency program or an individual land classification within the program.[231]

IV. FUTURE OF THE LAW

Justice Scalia's philosophy on standing was determinative in the *Lujan* outcome. His view, which the Court adopted, is that limits on standing must be strictly enforced to confine the courts to their constitutionally assigned role of protecting individual rights.[232] Justice Scalia concedes that

220. *Id.*
221. *Id.* at 3195.
222. *Id.*
223. *Id.* at 3196.
224. *Id.* at 3197.
225. *Id.* at 3198.
226. *Id.* at 3201.
227. *Id.* at 3201-02.
228. *Id.*
229. *Id.* at 3201.
230. *Id.*
231. *Id.* at 3201-02.
232. Scalia, *The Doctrine of Standing, supra* note 3, at 881, 894. Justice Scalia's philosophy hinges on the doctrine of separation of powers, and "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

this narrow interpretation will clearly prevent national organizations, such as the NWF or the NAACP, which have "a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever," from demonstrating standing.[233] According to Justice Scalia, this approach prevents the "overjudicialization of the process of self-governance" which, he argues, has plagued the courts since the 1970's.[234]

In *Lujan,* Justice Scalia determined that the land withdrawal review program was not a final agency action and was, therefore, unreviewable. Justice Scalia narrowed standing requirements by demanding a specific, individualized injury. Unfortunately, groups such as the NWF cannot always show an individualized injury because the challenged action often affects the population generally, and not a particular citizen specifically.

Lujan's narrow focus will inhibit environmental litigants for several reasons. In addition to the increased difficulty in demonstrating standing, which now requires affidavits to allege specific harm to particular persons and areas, environmental litigants lacking the protection of a citizen suit provision now must file cases contesting a specific agency action rather than a broad agency program.[235] Such a case-by-case approach will impair the environmental litigant's goal of "across-the-board protection of our Nation's wildlife."[236] Although, as the *Lujan* dissent notes, the affidavits in evidence

---

other two branches should function in order to serve the interest *of the majority itself." Id.* at 894 (emphasis in original). *See generally* Marshall, *"No Political Truth:"* The Federalist *and Justice Scalia on the Separation of Power,* 12 U. ARK. LITTLE ROCK L.J. 245 (1989-90) (comparing Justice Scalia's philosophy of separation of powers to that of the framers of the Constitution). Justice Scalia's judicial philosophy also envisions a change in the way the Court uses legislative history. Courts currently examine the statutory text as well as extra-statutory materials such as committee reports, floor debates, and hearings to determine the meaning of the statute's language. *See* Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court,* 39 AM. U.L. REV. 277, 282 (1990); Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History,* 1990 DUKE L.J. 39 (1990). Today, Justice Scalia stands at the forefront of a trend which argues that committee reports do not represent the collective understanding of Congress. Scalia, *The Doctrine of Standing, supra* note 3, at 898 (emphasis omitted); *see* Costello, *supra* at 60; *see also* Wald, *supra* at 298; Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will,* 48 CONG. Q. 913, 915, 917 (1990) (because committee reports do not adequately reflect the understanding of members, "judges owe deference only to language that a majority of Congress has approved and the president, by his signature, has endorsed").

233. Scalia, *The Doctrine of Standing, supra* note 3, at 891.

234. *See id.* at 881.

235. *Lujan,* 110 S. Ct. at 3190-91. The majority recognized that citizen suit provisions "permit broad regulations to serve as the 'agency action,' and thus be the object of judicial review directly, even before the concrete efforts normally required for APA review are felt." *Id.* at 3190.

236. *Id.* at 3191.

were not "models of precision," the affidavits adequately pointed out "a genuine issue of fact as to the organization's injury."[237] The Court should not have upheld the grant of summary judgment because there was a genuine issue of fact to be considered and the NWF submitted evidence to support that issue.[238] In *Lujan,* Justice Scalia emphasized that, to demonstrate standing, a plaintiff must assert a particularized injury caused by a final agency action.[239] The *Lujan* opinion may be seen as a warning to environmental litigants because the case reverses the trend of broadly construing standing requirements in favor of requiring precise, individualized harm to demonstrate standing.

Because of the particularity of the Court's standing requirements, environmental litigants must now plead and prove standing with specificity, and show that they suffer a present injury.[240] Because the *Lujan* decision emphasized the need for immediate harm resulting from a specific agency action,[241] environmental litigants will be more successful in challenging individual agency decisions than in challenging far-reaching agency actions such as those involved in *Lujan.*[242] Environmental groups will have trouble

237. *Id.* at 3195 (Blackmun, J., dissenting).

238. *Id.* at 3196.

239. *Id.* at 3190-91 (majority opinion).

240. As the Court recently noted, the elements of standing " 'must affirmatively appear in the record.' " FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 608 (1990) (quoting Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884)).

241. *Lujan,* 110 S. Ct. at 3190-91.

242. *See* Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts,* 20 ENVTL. L. REP. 10557, 10566 (1990). There is mixed evidence as to whether courts are following the lead that Justice Scalia took in *Lujan* to narrow standing requirements. In Conservation Law Foundation v. Reilly, 743 F. Supp. 933 (D. Mass. 1990), environmental groups challenged the EPA's duty under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1988), to assess and evaluate all of the facilities listed on the Federal Agency Hazardous Waste Compliance Docket. Evaluations were to include facilities on the National Priorities List, sites most in need of attention, by statutory deadlines. *Conservation Law Found.,* 743 F. Supp. at 935. The environmental groups submitted affidavits alleging that their members live and recreate near specific sites in need of evaluation, and that EPA's delay magnified the threat of injury. *Id.* at 937. The court held that the environmental groups had standing because the affidavits raised genuine issues concerning whether members had suffered injury in fact. *Id.* at 938. The court distinguished *Lujan,* stating that the affidavits in *Conservation Law Foundation* identified specific facilities and thus the affiants were "within the scope of the foreseeable risk of identifiable harm." *Id.; see also* McNary v. Haitian Refugee Center, Inc., 59 U.S.L.W. 4128 (U.S. Feb. 19, 1991) (holding that there is a presumption favoring the interpretation of statutes that allow judicial review of agency action); Public Int. Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990) (environmental litigants were held to have standing to sue a New Jersey corporation for Federal Water Pollution Control Act violations because injury to bird-watching and recreational interests from unsightly colors and foul odors in a polluted river was traceable to the company's nearby facility); Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) (holding that the alleged harm to the Sierra Club resulting from the failure of

changing the way agencies implement congressional directives. The review of individual decisions will lead to increased litigation and will produce conflicting results that will not affect the program in question. Now, if an environmental group lacks the broad protection of a citizen suit provision, the only way the group might successfully challenge an entire agency program is by attacking specific actions within the program.[243] By doing this, an environmental group can show that, overall, the agency action violates applicable environmental statutes. Another option for environmental litigants is one with which Justice Scalia heartily agrees: encourage congressional action. After *Lujan,* it is clear that the Supreme Court would prefer organizations seeking to challenge broad agency actions to request relief from Congress, as opposed to the judiciary.[244] Congressional action could broaden the current definition of standing to allow for challenges to the type of broad agency action for which standing was denied in *Lujan.*

V. CONCLUSION

Standing determines who is entitled to a day in court and protects against improper plaintiffs. Using standing law for other purposes only results in confusion. Therefore, constitutional and prudential requirements are necessary to properly limit the court in our democratic society.

Environmental litigants today must sufficiently allege injury in fact to demonstrate standing. In addition to a directly traceable injury that is attributable to the defendant, the plaintiff must show—through a constitutional provision, statute, or common law principle—that a legal interest exists which the group may protect. Meeting these requirements protects the complex constitutional structure of separation of powers, because the judiciary accepts claims only where the claimant suffers a cognizable injury. In respecting the separation of powers, standing becomes a crucial element by which the courts determine which citizens enjoy federal court jurisdiction. Because so many environmental organizations challenge broad agency

---

the Forest Service to claim wildernesss water rights was too remote and speculative for review).

243. *See generally* Sheldon, *supra* note 242, at 10,566 (urging environmental organizations to challenge "individual actions based on individual injuries" to demonstrate that an agency is not complying with the law). As this Note went to press, the United States Supreme Court granted a writ of certiorari in Lujan v. Defenders of Wildlife, 911 F.2d 117 (8th Cir. 1990), *cert. granted,* 59 U.S.L.W. 3769 (1991). In *Defenders,* the Court will specifically address the issue of whether Defenders has standing to challenge an agency regulation even though Defenders has not challenged a specific action by the agency that issued the regulation. The resolution of the *Defenders* case by the Supreme Court will affect the ability of environmental plaintiffs, and indeed all citizens, to challenge federal regulations and programs.

244. *Lujan,* 110 S. Ct. at 3190-91.

actions that have widespread impacts, it will be harder for these groups to successfully allege the particular harm that the Court requires to demonstrate standing. Environmental litigants now must allege a direct relation between the present injury suffered because of the use of the land, and the agency action in question. *Lujan v. National Wildlife Federation* affects environmental litigants not only by reassessing the importance of accepted standing requirements, but also by stressing the need for technically correct information in each of their cases in order to enjoy federal court jurisdiction.

Sarah A. Robichaud