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# THE “NEW” OLD LAW OF JUDICIAL ACCESS: TOWARD A MIRROR-IMAGE NONDELEGATION THEORY\*

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## I. Introduction

Recently, the conservative<sup>1</sup> majority of the Supreme Court forwarded its vision of the proper role of courts in two cases, namely *Lujan v. National Wildlife Federation*<sup>2</sup> and *Air Courier Conference of America v. Postal Workers Union, AFL-CIO*.<sup>3</sup> Both deal with access to the judiciary for review of agency action. The *National Wildlife Federation* decision has aroused the greatest furor,<sup>4</sup> and has already borne fruit with the decision in *Lujan v. Defenders of Wildlife (Defenders of Wildlife)*.<sup>5</sup> Nevertheless, the *Air Courier* decision may be a "sleeper" of a case, one which will have more ultimate impact on who may invoke judicial review.

The two cases, together with *Defenders of Wildlife*, tighten access to the judiciary, making it harder for parties other than those directly regulated by an agency to challenge the agency's action. When this constriction is combined with other Supreme Court precedents, a mirror image of the nondelegation doctrine emerges. As with the original doctrine, Congress's ability to legislate through general policy guidance is questioned, but the vehicle of disapproval in this incarnation is withdrawal of judicial review.

In both *National Wildlife Federation* and *Air Courier*, the impact on judicial access came from pronouncements that were not necessary to resolve the controversy.<sup>6</sup> Similarly, four Justices in *Defenders of Wildlife* provided a second rationale to deny standing when one would have sufficed.<sup>7</sup> One reason the Court digresses is because regulating entry to courts is as important to the current conservative agenda as it was to the more liberal agenda of prior courts.<sup>8</sup> Recognizing echoes of earlier

1. Although the labels conservative and liberal have numerous connotations, for the purposes of this article, "liberal" refers to those in favor of wide access to the judiciary, and "conservative" refers to those who would limit such access. To a certain extent, this dichotomy will correlate with those who espouse "liberal" and "conservative" philosophies as popularly delineated. The majority for tightening access began to break ranks in *Defenders of Wildlife*. See *infra* note 76.

2. 110 S. Ct. 3177 (1990).

3. 111 S. Ct. 913 (1991).

4. See, e.g. Karin Sheldon, NWF v. Lujan: *Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENVTL. L. REP. 10557, 10560-61 (1990); Poisner, *Environmental Values and Judicial Review after Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOL. L. Q. 335 (1991); Note John Treangen, *Standing: Closing the Doors of Judicial Review: Lujan v. National Wildlife Federation*, 36 S.D. L. REV. 136, 138-45 (1991); Note Bradley J. Larsen, *Meeting the Requirements of Standing: A Framework for Environmental Interest Groups: Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), 14 HAMLINE L. REV. 277, 284-85 (1990); Bill J. Hays, Comment, *Standing and Environmental Law: Judicial Policy and the Impact of Lujan v. National Wildlife Federation*, 39 U. KAN. L. REV. 997 (1991); Note Michael J. Shinn, *Misusing Procedural Devices to Dismiss an Environmental Lawsuit—Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), 66 WASH. L. REV. 893 (1991); and Tae P. Ho, Note, *Lujan v. National Wildlife Federation: Non-User Plaintiffs and the Standing Requirement of Injury in Fact in Environmental Litigation*, 5 J. ENVTL. L. & LITIG. 99 (1990).

5. 112 S. Ct. 2130 (1992).

6. See generally, Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. REV. 1 (1992).

7. *Defenders of Wildlife*, 112 S. Ct. at 2140-42 (Scalia, J. joined by Rehnquist, C.J., White, and Thomas, JJ.) (lack of redressability forecloses standing).

8. The Supreme Court has discussed standing when not argued by the parties. FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 607-08 (1990). Cf., Michael A. Peroni, Comment, *Justice Scalia: Standing, Environmental, Law and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 157, n.173 (1987) (Scalia wrote 18 opinions on standing in 4 years on the D.C. Court of Appeals).

philosophies, therefore, explicates the cases. Their underpinnings are found not only in a separation of powers analysis, but the cases also raise the specters of sovereign immunity and the nondelegation doctrine.

The direct holding of *Lujan v. National Wildlife Federation*, however, does not immediately reveal these pedigrees. It does not change traditional standing doctrine nor create too onerous a barrier to judicial access. *National Wildlife Federation* only directly requires that the plaintiff be specific when expressing use of the particular land the agency action would affect. This would enable the plaintiff to be counted among those with an "injury in fact" and therefore entitled to standing.<sup>9</sup> The majority opinion, however, contains two additional propositions: a general "program" is not an "action" subject to appeal<sup>10</sup> and court intervention might not be "ripe" until actual earth-moving activity begins on the public lands.<sup>11</sup> These ruminations can hamstring plaintiffs who want early and system-wide relief from illegal agency actions. Congressionally granted protection may be eroded because of Justice Scalia's "abstract" discussion in *National Wildlife Federation*.

Similarly, *Air Courier Conference of America v. Postal Workers Union, AFL-CIO* could have been a narrow decision with no general impact on standing law.<sup>12</sup> Nevertheless, the majority denied standing under the so-called zone-of-interest test,<sup>13</sup> a prudential limitation on standing. The test demands a particular type of connection between the plaintiff's injury and the "relevant statute."<sup>14</sup> Strict application of the zone-of-interest test can limit access to courts, a phenomenon that changes the nature of the test from one previously described as "not . . . especially demanding."<sup>15</sup> It heralds a return to the concept that only direct beneficiaries of a statute may enter the courts.

*Air Courier*, *National Wildlife Federation*, and *Defenders of Wildlife* culminate a trend within the Court that embodies conservative beliefs that a judge should not freely "make law" but should allow the politically accountable legislature and executive to handle majoritarian interests.<sup>16</sup> Closing the door to judicial review, however, can increase the executive's power. This power rearrangement is underscored

9. *National Wildlife Fed'n*, 110 S. Ct. at 3189.

10. *Id.*

11. *Id.* at 3190-91.

12. The dissent noted that the Administrative Procedures Act does not apply to the statute under which the challenge was brought and the action was therefore unreviewable. *Air Courier*, 111 S. Ct. at 921 (Stevens, J., dissenting).

13. *Id.* at 918-20.

14. The test arose as a gloss on the Administrative Procedure Act's grant of standing to those "suffering legal wrong . . . or adversely affected or aggrieved . . . within the meaning of a relevant statute." 5 U.S.C. § 702 (1988). See *infra* text and authorities at note: 227-31.

15. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Justice White wrote this opinion, which aligns it with liberal tendencies. He was among those who merely concurred in the original case imposing the "zone-of-interest test." At that point, Justice White asserted that "injury in fact" should have been sufficient to confer standing and the "zone" test unnecessarily tightened judicial access. *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 167 (1970) (Brennan and White, JJ., concurring in the result). Interestingly, those who merely concurred with the judgment in *Clarke*, which contained this easily met depiction, did so because they thought that the case could have been resolved by simple use of precedents. Therefore, they labelled the Court's comments on the liberality of the test "a wholly unnecessary exegesis on the zone-of-interest test." *Clarke*, 479 U.S. at 410. (Stevens, J., concurring, joined by Rehnquist, C.J., and O'Connor, J.)

16. See text and authorities cited, *infra* notes 201-212.

when access limits are combined with the standard of review of agency action as stated in the 1984 opinion of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>17</sup> *Chevron's* requirement of deference to agency views, when added to limited standing and strict ripeness rules, makes courts less available to ascertain the intended meaning of a statute. The remedy for an agency misinterpretation of the law, therefore, is to go to Congress to change it. Deference and limited standing in combination create a mirror-image of the nondelegation doctrine.

In this version of the nondelegation doctrine, statutes are not invalidated as standardless, but Congress is being forced to be specific in legislating because judges will not be available to ascertain whether agency interpretations comport with generalized intent. Although requiring congressional remedies for agency errors might not be objectionable in the abstract, in reality Congress cannot micro-manage all regulatory programs. The judiciary is as necessary a "check and balance" on the executive as it is on the Congress. To limit access to the judiciary can realign powers between Congress and the Executive as well as change the judicial role.

To fully understand this proposition, this article will first review *National Wildlife Federation* and *Air Courier* in detail. *Defenders of Wildlife* will similarly be reviewed. With the cases explicated, Section III reveals that the current tightening returns to an older private rights model of standing, which concentrates on the individualistic sphere rather than public law. The article then examines and critiques the philosophical underpinnings and judicial precursors of this "new" old law. Section IV concentrates on *National Wildlife Federation* and the separation of powers arguments for decreased access to the judiciary. It identifies Justice Scalia's reliance on the wording of the Administrative Procedures Act as a refinement of separation of powers argument. The article next turns to the *Air Courier* decision and its restructuring of the "zone-of-interest" test to ascertain its impact on whether beneficiaries of statutes will be granted standing or be dismissed as mere "bystanders." Finally, Section VI moves from the traditional realm of standing and ripeness discussions to recognize that the current state of affairs echoes the doctrine of sovereign immunity and creates a new version of the nondelegation doctrine.

## II. The Cases: *National Wildlife Federation*, *Air Courier Conference* and *Defenders of Wildlife*

### A. LUJAN V. NATIONAL WILDLIFE FEDERATION

#### 1. Overview

*National Wildlife Federation* creates two requirements for potential plaintiffs, both designed to limit court intervention to situations that threaten individual rights.

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17. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The so-called *Chevron* doctrine requires that, if a statute is ambiguous, an agency policy should be upheld if it is "reasonable," regardless of whether or not either the judge or a legislator might believe it is the best or most appropriate interpretation of the law.

First, the case insists that an injury be pled with specificity. Second, *National Wildlife Federation* shies away from allowing challenges to general regulatory actions in favor of requiring a plaintiff to await concrete harm before seeking redress. This implicates ripeness doctrine as well as standing.<sup>18</sup> The *National Wildlife Federation* case arose when suit was filed in July of 1985.<sup>19</sup>

During the early 1980s, the Bureau of Land Management (BLM) was actively terminating land classifications and revoking withdrawals when it felt these administrative orders no longer served their original purposes. Before modification of the orders, the lands affected by them were unavailable for the full array of public land laws.<sup>20</sup> The Federation alleged that the program under which the BLM acted had two faults: the BLM did not evaluate the environmental impacts of its actions adequately and did not provide sufficient public participation in the decisionmaking process. The case on the merits has never been completed, but for several years the BLM was under a preliminary injunction.

In late 1985, Judge Pratt found the plaintiffs were likely to prevail on the merits.<sup>21</sup> The preliminary injunction he entered required the lands to be returned to their status as of January 1, 1981.<sup>22</sup> Judge Pratt's action was upheld on appeal,<sup>23</sup> but almost three years later, Judge Pratt found that the plaintiffs lacked standing to bring the lawsuit.<sup>24</sup> The D.C. Circuit Court of Appeals disagreed, both as a new issue and as part of the "law of the case."<sup>25</sup> The Department of Interior sought certiorari.

In its petition, the government framed the question in terms of standing to obtain system-wide relief:

Whether, in a lawsuit challenging a vast array of government decisions affecting the use or disposition of approximately 180,000,000 acres of public land, an environmental organization may establish its standing to sue on an affidavit asserting that one member of the organization makes use of property "in the vicinity of" a particular 2,000,000 acre parcel, only 4,500 acres of which were affected by one of the challenged decisions.<sup>26</sup>

18. "Standing" deals with the "who" of a lawsuit; "ripeness" deals with the "when." Since the 1967 *Abbott Laboratories* decision, determining whether an action is ripe for judicial review generally requires two inquiries: the evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs, Inc. v. Gardner*, 387 U.S. 136, 148-49 (1967). See generally, Mansfield, *supra* note 6 at 19-23, 68-70; Gene R. Nichol Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 155 (1987); and Brian C. Murchison, *On Ripeness and Pragmatism in Administrative Law*, 41 ADMIN. L. REV. 159, 168 (1989).

19. *National Wildlife Fed'n v. Burford*, 676 F. Supp. 271 (D.D.C. 1985).

20. For background on the withdrawal and classification laws, see *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 307-09 (D.C. Cir. 1987) (*National Wildlife Federation I*).

21. For land classification terminations, the plaintiffs were likely to succeed on their claim that the BLM improperly terminated them without Resource Management Plans. *National Wildlife Fed'n*, 676 F. Supp. at 277. For withdrawal revocations, they were likely to succeed because there was no public participation as required by FLPMA for land management activities. *Id.* at 278.

22. *National Wildlife Fed'n v. Burford*, 676 F. Supp. 271 (D.D.C. 1985), explicated, *National Wildlife Fed'n v. Burford*, 676 F. Supp. 280 (D.D.C. 1986) (Feb. 10, 1986).

23. *National Wildlife Federation I*, 835 F.2d 305.

24. *National Wildlife Fed'n v. Burford*, 699 F. Supp. 327 (D.D.C. 1988) (Nov. 4, 1988).

25. *National Wildlife Fed'n v. Burford*, 878 F.2d 422, 430, 432-33 (D.C. Cir. 1989) (*National Wildlife Federation II*). Different judges heard the case in each appeal. The second decision was characterized as being rendered "somewhat testily." Sheldon, *supra* note 4, at 10561.

26. U.S. Dept. of Interior, Petition for Certiorari, *NWF v. Lujan*, No. 89-640 (Oct. 18, 1989).

The challenge was sent. As the Supreme Court phrased the issues, the APA governed the case.<sup>27</sup> Therefore, the question was two-fold: (1) whether there was a "final agency action" subject to review;<sup>28</sup> and (2) whether there was a party "suffering legal wrong or adversely affected or aggrieved within the meaning of the relevant statute."<sup>29</sup> The first issue, with its concern for "finality" and an identifiable "action" corresponds to some degree with ripeness doctrine.<sup>30</sup> The second issue concerns the traditional standing inquiry and will be addressed first.

## 2. The "Injury in Fact" Decision

In order to have standing, a plaintiff must allege an injury in fact and be among the injured.<sup>31</sup> The *National Wildlife Federation* claimed an injury to the environmental and aesthetic interests of its members.<sup>32</sup> Because these types of injuries are cognizable, the primary issue in the case was whether Federation members were "among the injured." A second question involved the scope of the action challenged.

The Federation sought to contest what it referred to as the "Land Withdrawal Review Program,"<sup>33</sup> which was a policy encompassed in several agency directives.<sup>34</sup> By the time of suit, at least 788 classifications had been terminated or withdrawals revoked.<sup>35</sup> Each of these actions was done by a Public Land Order (PLO) or other notice published in the *Federal Register*.<sup>36</sup> The Federation concentrated on two particular localities in order to attack the program. These were the South Pass-Green Mountain area in Wyoming and the Grand Canyon National Park-Arizona Strip area. The Federation filed affidavits of two members that stated that the member used land "in the vicinity" of one of these locales.<sup>37</sup>

27. *National Wildlife Fed'n*, 110 S. Ct. at 3185. (APA rules because neither NEA nor FLPMA provide a private right of action.)

28. *Id.* See also 5 U.S.C. § 704 (1988) (review of final agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court) and discussion of APA, *infra* at notes 167-73.

29. *National Wildlife Fed'n*, 110 S. Ct. at 3185. See also 5 U.S.C. § 702.

30. It is also, to some degree, reminiscent of the Supreme Court's insistence on a concrete "proposal" to trigger NEPA. Compare *Kleppe v. Sierra Club*, 427 U.S. 390, 401 (1976) with *National Wildlife Fed'n*, 110 S. Ct. at 3190 (desire to "flesh out controversy").

31. *Sierra Club v. Morton*, 405 U.S. 729, 735 (1972). This criterion has been called the core constitutional component of standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Nevertheless, the Supreme Court has enumerated prudential limitations on standing, which Congress may eliminate by legislatively granting standing. *Bread Political Action Comm'n v. Federal Election Comm'n*, 455 U.S. 577, 584 (1981). Standing will be denied prudentially if the injury is a generalized grievance, if the plaintiff is asserting the rights of third parties, or if the injury is not within the "zone of interest" of the "relevant statute." *Valley Forge Christian College v. American United for Separation of Church and State*, 454 U.S. 464, 474-75 (1982). For a fuller discussion, see Mansfield, *supra* note 6.

32. *National Wildlife Federation I*, 835 F.2d at 312-13. It also alleged that it was injured as an organization because the BLM's failure to provide information and public participation interfered with the Federation's purposes, which include participating in decisionmaking. *National Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 330 (D.D.C. 1988) (Nov. 4, 1988).

33. *National Wildlife Federation I*, 835 F.2d at 309.

34. See, e.g., BLM Organic Act Directive No. 81-11, June 18, 1981; for more detail, see Treangen, *supra* note 4, at 157-58 and Larsen, *supra* note 4, at 284-85.

35. *National Wildlife Federation I*, 835 F.2d at 312.

36. *Id.* at 307-09.

37. Referred to as the Erman and Peterson affidavits; see, e.g., *National Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 332 (D.D.C. 1988).



The Court of Appeals in 1987 was the first court to use these affidavits in analyzing whether an injury in fact was shown.<sup>38</sup> The court expressly rejected the idea that standing would be negated by employment of the words "in the vicinity" in reference to the lands covered by the challenged withdrawal revocations.<sup>39</sup> Moreover, the court was unconcerned about the "fairly traceable" and "redressability" requirements of standing.<sup>40</sup> Injury was not dependent on additional actions by third parties because the agency action directly impacted lands.<sup>41</sup>

When Judge Pratt looked at these affidavits in response to a motion for summary judgment, he disagreed with this assessment of the injury and focused on one question: "whether the plaintiff's . . . [use of lands] will occur in the same location as the third party's response to the challenged governmental action."<sup>42</sup> Whether activities no longer forbidden might take place and thus interfere with the members' enjoyment of public lands was of primary concern. He seemingly treated the injury as incomplete without something in addition to the governmental action of opening lands.<sup>43</sup>

Judge Pratt therefore examined the affidavits carefully.<sup>44</sup> He rejected standing based on injury to specific members. To him, the proof was inadequate not only for the individual actions mentioned in the affidavits, but also for the entire program:

Both the Peterson and Erman Affidavits are vague, conclusory and lack factual specificity. They do not and cannot show 'injury in fact' with respect to the two specific areas

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38. *National Wildlife Federation I*, 835 F.2d at 313. Before addressing the affidavits, however, it noted that the allegations of the complaint alone would suffice to deny a motion to dismiss under *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). The complaint referred to specific land by reference to identified actions published in the Federal Register and therefore alleged use of affected lands. *National Wildlife Federation I*, 835 F.2d at 312-13.

39. *National Wildlife Federation I*, 835 F.2d at 313. Compare language in *National Wildlife Fed'n* dealing with use of lands "in the vicinity" with allegations in *SCRAP*, 412 U.S. at 678.

40. Two refinements theoretically clarify the injury in fact requirement. First, the questioned agency action must have caused the injury. Moreover, the relief requested must be capable of redressing the complained of injury. The first of these elements is the "causation" or "fairly traceable" requirement and the second is the "redressability" requirement. *Allen*, 468 U.S. at 753, n.19. See also *infra* note 43 and Mansfield, *supra* note 6 at 11-15.

41. *National Wildlife Federation I*, 835 F.2d at 314. ("Because the [Withdrawal Review] Program acts directly on the land (rather than on third parties), we can be certain that the challenged agency action has affected the land areas that the Federation's members use and that the anticipated response by third parties will concern those lands.")

42. *National Wildlife Fed'n*, 699 F. Supp. at 331 (quoting *Wilderness Soc'y v. Griles*, 824 F.2d 4, 12 (D.C. Cir. 1987)). *Griles* dealt with the difficulty of proving use of submerged lands.

43. He is therefore echoing the times that the Supreme Court applied an extra level of analysis when activities of third parties in response to agency policies would actually be required for a concrete remedy. If no one could predict whether these third party actions would assist the plaintiffs, standing could be denied because a favorable ruling would not redress the harm. *Allen*, 468 U.S. at 758. See generally Richard H. Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 35-39 (1984) (addressing problem in terms of "remedial standing").

44. The Peterson Affidavit claimed that she used land "in the vicinity" of the South Pass-Green Mountain area. The court noted the largeness of the area and relatively localized impacts of opening the lands to mineral activity. The classification termination would allow mining on 4,500 acres, but the relevant area comprised two million acres, the balance of which, except for 2,000 acres, had always been open to mineral leasing and mining. *National Wildlife Fed'n*, 699 F. Supp. at 331. The Erman Affidavit similarly referred to using federal lands in the vicinity of the affected public lands, which in the Grand Canyon-Arizona Strip area comprised more than 5.5 million acres. *Id.* at 332.

in Wyoming and Arizona in the vicinity of which these affiants claim to be located. More important, standing alone, these two affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawal revocations.<sup>45</sup>

No injury in fact existed for the members.<sup>46</sup>

On appeal, the D.C. Circuit found that the affidavits did show "injury in fact." Its decision was partially based on the law of the case.<sup>47</sup> However, the court also insisted that the affidavits be read as sufficiently "specific" because to not do so would make them meaningless.<sup>48</sup> At a minimum, the affidavits should be considered "ambiguous" and doubts resolved in favor of the non-moving party, that is, the Federation.<sup>49</sup>

The Supreme Court looked at the same affidavits to ascertain if "injury in fact" was shown. It easily found that the type of injury alleged, namely environmental and aesthetic harm, could be cognizable, but questioned whether the affidavits demonstrated that such interests of the two members were affected.<sup>50</sup> Under its reading, they did not prove such injury: the "averments . . . state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action."<sup>51</sup> The affidavits did not aver any specific facts and a court could not "presume" facts necessary for standing.<sup>52</sup>

To the Court, the affidavits of individual members proved no injury in fact to challenge anything, be it a single PLO or a complete "Land Withdrawal Review Program."<sup>53</sup> Justice Scalia found the affidavit in support of organizational stand-

45. *Id.* at 332.

46. He also found the affidavit of the vice president of the Federation submitted to support organizational standing to be similarly "conclusory." *Id.* at 330.

47. See *National Wildlife Federation*, 878 F.2d at 432-33, where the second panel discussed the earlier ruling on the sufficiency of the affidavits. The second panel acknowledged that the previous setting involved a motion to dismiss, which has a lower burden for plaintiffs than summary judgment, but recognized the prior judgment also found the injury sufficient for a preliminary injunction, which requires a standard similar to that needed to sustain standing on a summary judgment motion. See also *National Wildlife Federation I*, 835 F.2d at 329-30 (Williams, J., concurring & dissenting) (standing to support preliminary injunction similar to that for summary judgment and "minimally met").

48. The affidavits were only challenged for their specificity, not their truthfulness:

If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious.

*Id.* at 431.

49. *Id.* The Court of Appeals also felt that the District Court should consider the supplemental affidavits submitted by the Sierra Club, which were without question sufficiently specific.

50. *National Wildlife Fed'n*, 110 S. Ct. at 3187. In this portion of the decision, the Supreme Court emphasized the procedural status of the case. This was not a Rule 12(b) motion to dismiss, but a summary judgment proceeding. Although doubts must be resolved in favor of the non-moving party in this setting, Justice Scalia found the Court of Appeals inappropriately relied on this doctrine. The decisional rule is applicable only when there is a conflict between averred facts. *Id.* at 3188 (only applies "where the facts specifically averred by that party contradict facts specifically averred by the movant").

51. *Id.* at 3189.

52. *Id.* at 3189 ("It will not do not to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege.").

53. For an argument that the Court misinterpreted the "in the vicinity language," see Treangen, *supra* note 4, at 153-55 (words used to avoid implication that plaintiffs were at the bottom of a pass or top of a mountain).

ing similarly flawed.<sup>54</sup> To solve these problems, however, would only require more specificity in pleading and recruitment of members who actually used the particularly affected lands.

### 3. *The Nature of an "Action" and the "Ripeness" Decision*

Justice Scalia, however, additionally discussed what constituted agency action and what issues would be "ripe" to challenge.<sup>55</sup> There are two distinct and separate concepts important to this portion of the decision: (1) the Federation attacked the BLM's "Land Withdrawal Review Program," and, to do so, (2) it detailed certain Public Land Orders and classification orders to which it objected. These particular orders had been modified to allow mineral activity on affected lands. According to the Federation, this authorization would injure its members. Justice Scalia questioned whether the operative element of the first concept, the so-called program, was a "final agency action" and whether the actions delineated in the second were "ripe" for review.

The first issue is the scope of the challenged action. To the Court of Appeals, the lawsuit involved the total Land Withdrawal Review Program. It affirmed a preliminary injunction that undid every individual BLM action taken since 1981 under the existent policy. Because the Federation challenged "an alleged pattern of agency action,"<sup>56</sup> the Court did not require it to prove "injury" in regard to each specific tract of land:

If the organization can establish that the Department's actions as to one parcel of land are unlawful because the procedure by which the agency terminates classifications and revokes withdrawals fails to comply with FLPMA, then it has established the illegality as to all the lands at issue which have been affected by the unlawful procedure.<sup>57</sup>

The common theme in each action would justify system-wide relief.

The Court of Appeals also resolved the second issue in favor of the plaintiffs. It recognized an immediate impact from the BLM revocations and terminations. The BLM was not merely authorizing third party activities that may impact the lands. To the Court, the BLM actions revoking withdrawals and terminating classifica-

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54. In fact, it was worse in Justice Scalia's estimation because, unlike the Erman and Peterson affidavits, the affidavit of the Federation's president did not contain geographical descriptions sufficient to even identify a particular classification decision as the source of the problem. *National Wildlife Fed'n*, 110 S. Ct. at 3194.

55. Ostensibly, these issues had to be addressed because other submitted affidavits were more specific than the rejected ones. *See id.* at 3189. In fact, the government admitted these supplemental affidavits were not facially deficient although it reserved the right to attack the truth of their allegations. *Id.* at 3196 n.6 (Blackmun, J., dissenting). Justice Scalia, however, held that the District Court did not abuse its discretion when it refused to admit these affidavits. *Id.* at 3192-93. Justice Blackmun therefore correctly labelled this portion of the majority opinion as "abstract" because the majority removed the predicate of needing to rule on the supplemental affidavits. Additionally, much of the discussion could be described as going to the scope of relief, not the question of standing. *Id.* at 3201 (Brennan, J., dissenting).

56. *National Wildlife Federation I*, 835 F.2d at 314.

57. *Id.* *See also National Wildlife Federation II*, 878 F.2d at 431 n.12

tions directly affected lands.<sup>58</sup> Moreover, these program activities could create irreparable injury for the plaintiffs.<sup>59</sup> Changes in land ownership could occur.<sup>60</sup> Additionally, mineral development might be imminent.<sup>61</sup> To the Court of Appeals, it was immaterial that the BLM retained discretion on whether or not it would allow some future uses; the suit was developed to limit such discretion until the proper procedures had been followed.<sup>62</sup> Therefore, the Court in essence found that both the program and the individual orders were sufficiently "ripe" for review.

Justice Scalia could not characterize the lawsuit in this manner. He refused to acknowledge the "land withdrawal review program" was either an "agency action" or "final agency action" subject to review:

The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which [the BLM has] occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA.<sup>63</sup>

According to Justice Scalia, generic agency activity cannot be reviewed without identifying a particular regulation or order that has across-the-board applicability.<sup>64</sup> If one is identified, then a finding of illegality in one instance may impact the "whole program." To a certain degree, Justice Scalia's argument is a matter of semantics because the same end result is possible as under the Court of Appeals reading.<sup>65</sup>

Nevertheless, there is a substantive difference between the approach of the Court of Appeals and Justice Scalia. Most obviously, the Court of Appeals recognized

58. *National Wildlife Federation I*, 835 F.2d at 314 ("[B]ecause the Program acts directly on the *land* (rather than on third parties), we can be certain that the challenged agency action has affected the land areas that the Federation's members use . . .").

59. *Id.* at 324-26.

60. Either from patenting under the Mining Law of 1872, 30 U.S.C. § 29 (1988), or through land sales and exchanges, 43 U.S.C. §§ 1713, 1716 (1988).

61. 835 F.2d at 324-25. Under the Mining Law of 1872, mining could begin without government approval. The opening of the lands for mineral leasing could also create immediate impacts. Seven thousand mining claims had been located and 1,000 mineral leases issued on lands previously closed to mining or mineral leasing. *Id.*

62. *See id.* at 325. The prior status in most instances ensured the lands withdrawn or classified would remain in federal ownership. *Id.* at 324-25.

63. *National Wildlife Fed'n*, 110 S. Ct. at 3189.

64. The Court explained:

If there is in fact some specific order or regulation, applying some particular measure across-the-board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review in the manner we discuss subsequently in text, it can of course be challenged under the APA by a person adversely affected—and the entire land withdrawal review program,' insofar as the content of that particular action is concerned, would thereby be affected.

*Id.* at 3190 n.2.

65. Justice Scalia, however, insists on the distinction, maintaining that to recognize a lawsuit's general impact differs from "permitting a generic challenge to all aspects of the 'land withdrawal review program,' as though that itself constituted a final agency action." *Id.*

a “pattern of conduct” as being a sufficient “across-the-board” requirement to trigger review.<sup>66</sup> No specifically designated “regulation” or “order” was necessary to comprise an “action” in its view. More importantly, Justice Scalia maintains that even if a regulation is found to exist, which would satisfy the agency action prerequisite, ripeness considerations may defer review unless a statute specifically calls for review of broad regulations.<sup>67</sup> To him, judicial review must await until a concrete action is taken that would apply the regulation in a manner that would harm or threaten harm to the Federation. To Justice Scalia, waiting would reduce the controversy’s scope to manageable proportions and flesh out its factual components.<sup>68</sup>

However, the need for a concrete act, which is essentially a “ripeness” requirement, may create a test that is difficult for beneficiaries of agency action to meet.<sup>69</sup> Justice Scalia looked at the ripeness of what was admittedly a rule, namely an individual Public Land Order.<sup>70</sup> He interprets the PLO as simply announcing how the BLM will manage the land in the future: “It may well be, then, that even those individual actions will not be ripe for challenge until some further agency action or inaction more immediately harming the plaintiff occurs.”<sup>71</sup> Justice Scalia, therefore, ignores the immediacy of harm that the Court of Appeals recognized. Indeed, Justice Scalia emphasized the regulations that require the BLM to approve a mine plan in certain circumstances.<sup>72</sup> Deferring analysis until a plan is submitted might make review more concrete because the extent of any proposed activity will be known,<sup>73</sup> but it overlooks the private rights that the Mining Law of 1872 grants.

*National Wildlife Federation*, however, insists on two prerequisites for judicial review of agency action: the plaintiffs must delineate harm that is both specific and immediate. The dual requirements may make it difficult for those seeking

66. See *National Wildlife Federation I*, 835 F.2d at 316. Justice Blackmun was not certain whether a system-wide violation existed: “The real issue is whether the actions and omission that NWF contends are illegal are themselves part of a plan or policy.” *Lujan*, 110 S. Ct. at 3201 (Blackmun, J., dissenting). For an argument that a well-defined policy existed, see Treangen, *supra* note 4, at 157-58.

67. *National Wildlife Fed’n*, 110 S. Ct. at 3190.

68. *Id.*

69. The regulated will have an easier time: “The major exception [to awaiting concrete harm to review a rule] is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately.” *Id.*

70. *Id.* at 3190 (PLO is a “rule” under APA because it has “general or particular applicability and future effect.”).

71. *Id.* This ruling may be the “silver lining” for environmentalists, allowing them to attack the propriety of a withdrawal or its revocation at a much later date than previously allowed. Sheldon, *supra* note 4, at 10565. Other precedent began the statute of limitations at the date of the PLO itself. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1366 (9th Cir. 1990). See also *Mesa Operating Ltd. v. Department of Interior*, 931 F.2d 318, 323 n.30 (5th Cir. 1991) (cannot challenge rule itself if statute of limitations has run despite timely challenge of rule’s application); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (six year statute of limitations applies to irregularity of rule’s promulgation).

72. *National Wildlife Fed’n*, 110 S. Ct. at 3190 n.3 (agency action ripe for review will occur if permit granted).

73. As Justice Scalia notes: “[B]efore the grant of such a permit, or (when it will suffice) the filing of a notice to engage in mining activities, or (when only ‘negligible disturbance’ will occur) actual mining of the land, it is impossible to tell where or whether mining activities will occur.” *Id.* at 3191 n.3.

system-wide relief, namely assuring "across-the-board protection"<sup>74</sup> of wildlife and natural resources. Justice Scalia's discussion, even if "abstract" and not germane to the decision, indicates a further entrenchment of the private right model of standing and ripeness. It reflects his deep-rooted belief in the nature of the judicial role and the requirements of separation of powers.<sup>75</sup>

## B. *LUJAN V. DEFENDERS OF WILDLIFE*

### 1. Overview

In *Defenders of Wildlife*, the Court returns to the "injury in fact" equation. Justice Scalia, writing for a majority of the court, found the plaintiffs did not have a sufficiently "imminent" individualized harm.<sup>76</sup> Moreover, a plurality of the court agreed with Justice Scalia that because the lawsuit could not adequately "redress the harm," there was no injury in fact.<sup>77</sup> On a more general vein, the majority emphasized that a plaintiff's desire to enforce procedures required by law does not expand standing. The context for the decision was a challenge to a revised rule promulgated by Secretary of Interior.

The Secretary of Interior, through the Fish and Wildlife Service, is the lead agency for compliance with the Endangered Species Act (ESA).<sup>78</sup> The ESA provides substantive guidance to all federal agencies, but also requires them to consult with the Fish and Wildlife Service to insure that actions they fund, authorize or carry out are not "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . ."<sup>79</sup> Initially, consultation was required regardless of where the activity would take place.<sup>80</sup> In 1986, the Secretary promulgated a rule that rescinded the need to consult when federal agencies authorized, funded, or carried out projects in foreign lands.<sup>81</sup>

Defenders of Wildlife challenged the rule's validity. It sued only the Department of Interior and did not seek to compel action on any particular project. As injury,

74. *Id.* at 3191.

75. *See id.*; *infra* notes 181-211, sources cited, and accompanying text. *See also* Poisner, *supra* note 4, at 348-50 (separation of powers analysis explains requirement of proof of injury as opposed to Warren Court's acceptance of plausible allegation of injury).

76. The alignment of the Court is surprising. Justice Scalia was joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas. Justice O'Connor, who normally asserts separation of powers arguments for standing, joined Justice Blackmun's dissent. Justice Stevens, who generally finds in favor of access, did so here; he concurred in the result based on his view of the substantive law, not on the standing issue. The access-closing majority is not as firm as it might appear. In addition to Justice O'Connor's defection, Justices Kennedy and Souter sounded a caveat in their concurrence. They would not rule out standing based on relationships to issues or based on congressionally created rights that differ from common law analogues. *Defenders of Wildlife*, 112 S. Ct. at 2146-47 (Kennedy, J., concurring in part and concurring in the judgment).

77. Justices Kennedy and Souter did not join in this portion of the decision. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

78. 16 U.S.C. §§ 1531-44 (1988).

79. 16 U.S.C. § 1536(a)(2) (1988).

80. 50 C.F.R. § 402.04 (1984).

81. 51 Fed. Reg. 19926, 19930 (June 3, 1986) (consultation only needed for activities within the United States or on the high seas).

its complaint alleged an interest in enforcement of the ESA because members of the organization benefit both professionally and personally from observing threatened and endangered species that have a range beyond the borders of the United States.<sup>82</sup> Additionally, they supplemented the record by referring to three ongoing projects, all of which were being carried out or funded by federal agencies and could impact threatened or endangered species. These included the Mahaweli, Picchis-Palcazu, and Aswan Dam projects.<sup>83</sup> The lack of consultation because of the rule allegedly would increase the likelihood of diminished opportunities to observe endangered species in foreign lands.

The district court found no actual or threatened injury traceable to the regulatory reinterpretation for several reasons.<sup>84</sup> First, no one would know when or if the projects would impact the species. Second, consultation may have occurred in the past with nothing to gain from further consultation. Finally, because the agencies contemplating action were not sued, a second suit enjoining them would be required to redress the harm. Therefore, the current case must be dismissed because it sought to determine the law in the abstract.<sup>85</sup>

The Eighth Circuit reversed because standing had been proven sufficiently to withstand a motion to dismiss.<sup>86</sup> First, because the ESA has a "citizen suit" provision,<sup>87</sup> the prudential limitations on standing were immaterial; only the constitutional "injury in fact" was needed.<sup>88</sup> The court found the requirement met because not only did *Defenders* allege an interest in preserving endangered species, but it also alleged that specific projects in foreign countries which had been visited by members, were increasing the likelihood of extinction.<sup>89</sup> This provided the concrete injury from the procedural harm alleged, namely that regulations mandating proper consultation were required.<sup>90</sup>

The Eighth Circuit also considered whether the harm alleged was fairly traceable to the Secretary's action and whether ordering a proper regulation would redress the injury.<sup>91</sup> It found such a connection. Under the new regulation there would be no consultation on ongoing projects that could jeopardize protected species or their habitat. Harm was, therefore, traceable to those regulations. Causation was not too attenuated simply because foreign governments and action agencies also had input into the decisions on whether projects would proceed. Congress declared consultation to be the remedy for prospective danger to protected species. Therefore, the harm is redressable without suing the action agencies. They would consult

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82. See *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43, 46 (D. Minn. 1987).

83. *Id.* at 47-48. Respectively, the activities are in Sri Lanka, Per 1, and Egypt.

84. *Id.*

85. *Id.* at 48.

86. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988).

87. 16 U.S.C. § 1540(g) (1988) ("any person" may commence a suit to enjoin any person alleged to be in violation of the Act).

88. *Defenders of Wildlife*, 851 F.2d at 1039.

89. *Id.* at 1040.

90. The district court had also required proof that the funded or authorized activities would harm endangered or threatened species. This is an inappropriate standard; it would require the plaintiff to perform the study it is attempting to force the Secretary to require. *Id.* at 1042.

91. *Id.* at 1042-43.

if a regulation required it, and consultation would assure that serious harm to the endangered and threatened species would not be overlooked.<sup>92</sup>

On remand, the district court reached the merits and found the new regulation violated the ESA, which requires consultation on foreign projects.<sup>93</sup> The Eighth Circuit affirmed.<sup>94</sup> On the standing issue, it considered affidavits of two members, who detailed actual presence at impacted sites. Amy Skillbred visited Sri Lanka to observe wildlife habitat and intended to return. The Mahaweli project, funded by the Agency for International Development, would harm her through its impact on wildlife.<sup>95</sup> Similarly, Joyce Kelly had visited Egypt and would be injured by the Aswan High Dam. She intended to return.<sup>96</sup> The specificity of the affidavits and subsequent deposition testimony met the requirement of *National Wildlife Federation*.<sup>97</sup> In addition, the Eighth Circuit eschewed the need for any "geographical nexus" when a plaintiff seeks to vindicate a right to insist on specific procedures.<sup>98</sup>

The petition for certiorari did not directly question whether concrete injury was alleged in the sense of *National Wildlife Federation* specificity. It appeared to raise questions of redressability and "program wide" attacks:

Do respondents have standing to challenge regulation . . . that merely interprets statutory obligations of federal agencies under Section 7(a)(2) of Endangered Species Act, . . . when respondents have not challenged any specific action by agency upon which statutory obligations actually fall?<sup>99</sup>

Nevertheless, the Supreme Court hit additional facets of the "injury in fact" definition. As Justice Scalia would phrase it, an injury in fact requires invasion of a legally protected interest that is concrete, particularized and also "actual or imminent." Moreover, the injury must be fairly traceable to the challenged action and it must be " 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " <sup>100</sup> The majority of the Court addressed the issues of imminence of harm and how to treat procedural injuries; a plurality also found the injury was not likely to be redressed. The imminence of harm and redressability discussions have the most generalized import for standing law.<sup>101</sup>

92. *Id.* at 1043.

93. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989). Although standing was again challenged, the court found that nothing materially differed from the situation apprised by the Eighth Circuit. *Id.* at 1083-84.

94. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990).

95. *Id.* at 120.

96. *Id.*

97. *See supra* notes 50-52. A third affidavit, which dealt with the Picchis-Palcazu project in Peru, was not sufficiently specific because the member making it only came within several hundred miles of the project. *Defenders of Wildlife*, 911 F.2d at 121 n.2.

98. 911 F.2d at 121.

99. U.S. Dept. of Interior, Petition for Certiorari, *Defenders of Wildlife v. Lujan*, No. 90-1424.

100. *Defenders of Wildlife*, 112 S. Ct. at 2136.

101. The procedural discussion acknowledged that an agency's failure to follow prescribed procedure can create an injury in fact without proof that harm would necessarily occur if the agency decision was implemented or that following the procedures would change the agency's decision. Nevertheless, in order to proceed, the plaintiff must show a concrete, particularized injury beyond the generalized desire to see compliance with the law. A statute allowing "any person" to sue for "any alleged violation" may not eliminate this requirement. *Id.* at 2142-46. Justice Kennedy, who concurred in an opinion joined by Justice



## 2. *The Imminent Harm Decision*

Justice Scalia prefaced his discussion with a summation of the result of his standing theories: namely that “when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily ‘substantially more difficult’ to establish.”<sup>102</sup> As in *National Wildlife Federation*, there was no question that the environmental interests were cognizable injuries.<sup>103</sup> Nevertheless, Justice Scalia, writing for a six-person majority, found that the injury alleged did not rise to the level of an injury in fact because it was not sufficiently “imminent.”

Factually, the problem arose because the affidavits and depositional testimony of Skillbred and Kelly showed that while they had used lands impacted by the foreign projects in the past, they merely alleged that they intended to return in the future.<sup>104</sup> Therefore, to Justice Scalia, this meant it was uncertain whether they would be imminently harmed: “Such ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”<sup>105</sup> Harm to a cognizable interest was immaterial unless the particular plaintiff would return to the impacted site. Mere destruction of habitat or animals once observed was insufficient.

The plaintiffs proposed three additional theories to connect themselves to the threatened injury to the animals: the “ecosystem nexus,” the “animal nexus,” and the “occupational nexus.” Justice Scalia rejected all three. The theory that would have allowed anyone who used any portion of an interconnected ecosystem to have standing would allow those not perceptibly affected into court and violate the *National Wildlife Federation* disapproval of allegations of use “in the vicinity” of the threatened action.<sup>106</sup> Finally, neither those connected by an interest in animals nor those having a professional connection to the threatened and endangered animals could have standing on these bases alone. To Justice Scalia, a geographical connection to the specific area impacted by the proposed actions is a prerequisite or the injury in fact requirement would be meaningless.<sup>107</sup>

The injury in fact discussion commanded a majority of the Court, but Justices Souter and Kennedy expressed some concerns in their concurrence.<sup>108</sup> First, they

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Souter, cautioned that common law models may not suffice for the complex relationships of modern society; Congress could “define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.* at 2146-47 (Kennedy, J., concurring).

102. *Id.* at 2137 (citations omitted).

103. *Id.* (desire to use or observe animal “even for purely aesthetic purposes” is cognizable).

104. *Id.* at 2138.

105. *Id.* (emphasis added).

106. *Id.* at 2139.

107. *Id.* at 2139-40.

108. Justices Stevens, Blackmun, and O'Connor totally rejected the analysis. Stevens noted that the important question was the imminence of the environmental harm, not the return visit. *Id.* at 2148 (Stevens, J., concurring in judgment). Blackmun, joined by Justice O'Connor, opined that the majority was requiring a return to code pleading and the formulaic purchase of an airplane ticket. The seriousness of concern and the professional interests of Skillbred and Kelly would have allowed a finder of fact to conclude that they would return to the areas. *Id.* at 2152-53 (Blackmun, J., dissenting).

recognized that requiring concrete plans for a return trip may seem petty, but thought it appropriate when dealing with land that the plaintiff did not regularly use.<sup>109</sup> On the three "nexus" theories, they agreed they did not confer standing on these facts, but would not rule out their propriety in other settings.<sup>110</sup> Justice Scalia's tightening of the "directly affected" and imminent harm requirements may drive some members of the Court to reconsider whether a "special interest" in the subject matter would be sufficient to confer standing. This was, of course, the theory rejected in *Sierra Club v. Morton*.<sup>111</sup>

### 3. The Redressability Decision

Justice Scalia also faulted standing because the injury may not have been redressed solely by a decision directed to the parties sued. He only commanded a plurality for this portion of the opinion.<sup>112</sup> Nevertheless, it provides insight into the philosophy of tightened access. The problem here differed from that in *National Wildlife Federation*; a regulation existed embodying the Secretary of Interior's view of the scope of required ESA consultation and hence there was agency action by the Fish and Wildlife Service.<sup>113</sup> According to Justice Scalia, the plaintiff's error in *Defenders of Wildlife* was its failure to seek to remedy individual instances of agency action or inaction dealing with proposed projects. Attacking the rule was a programmatic approach, one which leads to causation and redressability problems.<sup>114</sup>

To challenge the regulation, the plaintiffs sued only the Department of Interior, not the agencies authorizing or funding activities in foreign lands. Therefore, Justice Scalia found no assurance that the action agencies would acquiesce in a judgment directed toward the Department of Interior; they had at various times questioned whether Interior's regulations were binding on them.<sup>115</sup> To be guaranteed that specific harm would be averted, individual projects of individual agencies must be challenged and those agencies joined in the suit.

The project-by-project approach would be difficult and not necessarily productive. In *National Wildlife Federation*, Justice Scalia stated that a decision on one action taken pursuant to an "agency program" could of necessity impact the entire program.<sup>116</sup> Many agencies, however, are involved in ESA consultations. A change in procedure by the Department of Interior and the joined agency would not create any precedent for other action agencies under Judge Scalia's thinking.<sup>117</sup>

109. *Id.* at 2146 (Kennedy, J., concurring in part and concurring in judgment).

110. *Id.*

111. 405 U.S. 727 (1972).

112. Justices Kennedy and Souter would not address the issue.

113. Compare *National Wildlife Fed'n*, 110 S. Ct. 3180-90. Quoted *supra* in text accompanying note 63.

114. *Defenders of Wildlife*, 112 S. Ct. at 2140.

115. *Id.* at 2141-42.

116. *National Wildlife Fed'n*, 110 S. Ct. at 3190-92, see *supra* notes 64-65.

117. Cf. *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2788 (1992) (Scalia, J. concurring in part and concurring in judgment) (cannot presume that non-parties would abide by pronouncements of law in a suit or redressability meaningless: "Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power.") For practical difficulties in pursuing a case-by-case approach, see *Mansfield*, *supra* note 6, at 63.

If the plaintiff sought a definitive ruling on the scope of the ESA, it would have to join all agencies that could conceivably fund or authorize extraterritorial activity and find members impacted by a proposed project of each agency.

If a plaintiff adopted either the single project or multi-project litigation strategy, however, Justice Scalia could assert an additional barrier: because foreign nations were involved in the decision making, there was no assurance that the projects would be modified or abandoned based on the results of consultation.<sup>118</sup> Therefore, no way may exist to ascertain the scope of Congress's command to agencies of the United States. Domestic responsibilities would remain unclear if they implicate foreign nations. This shield could not have been intended by Congress nor should it be required by the Constitution. Justice Scalia, however, did not speak for a majority and three Justices affirmatively rejected both of Justice Scalia's barriers to standing based on the completeness of any possible remedy.<sup>119</sup>

### C. AIR COURIER CONFERENCE OF AMERICA V. POSTAL WORKERS UNION, AFL-CIO

#### 1. Overview

In *National Wildlife Federation*, the Court briefly explained that the APA requires a plaintiff to have "suffered legal wrong" because of the challenged action or to have been "adversely affected or aggrieved" by the action "within the meaning of the relevant statute."<sup>120</sup> In *National Wildlife Federation*, the Supreme Court found the "zone-of-interest" test posed no barrier; the environmental interests claimed were exactly the type of interests both NEPA and FLPMA were to protect.<sup>121</sup> Nevertheless, it offered an example of when the test would not be met:

[T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.<sup>122</sup>

118. *Defenders of Wildlife*, 112 S. Ct. at 2142. This ignores Justice Scalia's own discussion of procedural injuries. See *supra* discussion accompanying note 101.

119. Justice Stevens argued that courts should presume that if the Supreme Court decides that the ESA requires consultation, executive agencies would abide by the ruling. Moreover, because Congress ordered consultation, an impact on projects through that consultation should be implied. *Id.* at 2149 (Stevens, J., concurring in judgment). Justices Blackmun and O'Connor emphasized that the action agencies were active participants in the suit and could be collaterally bound by a judgment. Additionally, the funding levels were significant in amounts so as to get the attention of foreign governments if changes in the projects were indicated after consultation. *Id.* at 2154-57 (Blackmun, J., dissenting).

120. *National Wildlife Fed'n*, 110 S. Ct. at 3186 (quoting § 702 of the APA).

121. *Id.* at 3187. *Defenders of Wildlife* also had no problem on this theory.

122. *Id.* at 3186. Compare Judge Williams's example of a party not entitled to standing: "If Congress authorized bank regulators to mandate physical security measures for banks . . . a shoal of security services firms might enjoy a profit potential. . . . But in the absence of either some explicit evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress's ultimate goals, no one would suppose them to have standing to attack regulatory laxity." *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

In *Air Courier*, the Supreme Court found an opportunity to give flesh to this hypothetical.<sup>123</sup> Its overt restriction of the "zone-of-interest" test will have lasting impact.

The plaintiff in *Air Courier* was a union representing postal workers. It objected when the Postal Service approved an exception to the Private Express Statutes (PES)<sup>124</sup> for "international remailing."<sup>125</sup> Exceptions to the Postal Service monopoly are only available where the "public interest requires the suspension."<sup>126</sup> The union claimed the rulemaking did not support such a finding. The District Court disagreed, granting a summary judgment in favor of the Postal Service.<sup>127</sup> The Fifth Circuit reversed.<sup>128</sup>

To reverse the district court and reach the merits, the Court of Appeals found the postal unions had standing. To it, their interests fell within the zone of interest of the relevant statute, namely the PES, for two reasons. First, the PES had been reenacted as part of larger Postal Reorganization Act (PRA), which includes provisions dealing with labor. Because the PES is the "linchpin" of a financially viable postal service, it was related to the interests of the unions expressed in other sections of the Postal Reorganization Act.<sup>129</sup> Additionally, without looking beyond the PES to the larger act, the PES and the unions' concerns were connected: "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities."<sup>130</sup> Quite logically, the Court of Appeals concluded "postal workers benefit from the PES's function in ensuring [the Postal Service with] a sufficient revenue base."<sup>131</sup> The Supreme Court would not agree that this interest would grant standing to challenge a purported violation of the PES.

## 2. Zone-of-Interest Test

For the first time, the Supreme Court found a plaintiff beyond the zone of interest of a relevant statute.<sup>132</sup> It characterized the postal workers' unions as

123. For further explication of the "zone" test, see *infra* text and authorities cited accompanying notes 176-83.

124. 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606 (1988).

125. The history of the controversy is as follows: Air Couriers Conference of America relied on the exception for "urgent letters" to provide "international remailing," that is, taking letters abroad to be mailed in another country's system. The Postal Service thought this was an inappropriate use of the "urgent letter" exception. It therefore promulgated a rule for a separate PES suspension for "international remailing." *Air Courier*, 111 S. Ct. at 915-16.

126. 39 U.S.C. § 601(b) (1988).

127. American Postal Workers Union, AFL-CIO v. United States Postal Service, 701 F. Supp. 880 (D.D. C. 1988); *vacated*, 891 F.2d 304 (D.C. Cir. 1989); *cert. granted sub. nom.*, Air Courier Conference of America v. American Postal Workers Union, AFL-CIO, 496 U.S. 904 (1990); *dismissal denied*, 111 S. Ct. 32 (1990); *rev'd*, 111 S. Ct. 913 (1991). Air Courier Conference, an entity that used the exception, had joined the lawsuit aligned with the Postal Service.

128. American Postal Workers Union, AFL-CIO v. United States Postal Service, 891 F.2d 304, 306 (D.C. Cir. 1989) (regulation arbitrary and capricious because it only considered costs to users); *cert. granted sub. nom.*, Air Courier Conference of America v. American Postal Workers Union, AFL-CIO, 496 U.S. 904 (1990); *dismissal denied*, 111 S. Ct. 32 (1990); *rev'd*, 111 S. Ct. 913 (1991).

129. *Id.* at 310.

130. *Id.*

131. *Id.*

132. In *Block v. Community Nutrition Institute*, 467 U.S. 340, 346-48 (1984), milk consumers were "within the zone" of the relevant statute. Judicial review at their behest, however, was precluded by detailed statutory provisions granting named parties specific remedies.

analogous to the court reporters discussed in *National Wildlife Federation*.<sup>133</sup> Both groups would have the injury in fact required by § 702 of the APA,<sup>134</sup> but the harm they suffered was not within “the meaning of the relevant statute.” Justice Rehnquist, writing for the majority, rejected both rationales the Court of Appeals used to justify including the unions within the act’s “zone of interest.”

First, Justice Rehnquist criticized the Court of Appeals for holding that the revenue protection purposes of PES relate to interests the unions have in preserving job opportunities. He found that their analysis “conflates the zone-of-interests test with injury in fact.”<sup>135</sup> The loss of economic opportunity may injure the unions’ members, as the court reporters in the hypothetical were injured, but Justice Rehnquist insisted on examining the statute involved to see if Congress intended to protect jobs. As stated in *National Wildlife Federation*, the relevant statute is “the statute whose violation is the gravamen of the complaint.”<sup>136</sup> According to Justice Rehnquist, neither the basic wording of the PES nor its legislative history reveal a congressional intent to protect job security:<sup>137</sup> “The postal monopoly . . . exists to ensure that postal services will be provided to the citizenry at-large, and not to secure employment for postal workers.”<sup>138</sup>

Second, the Supreme Court disagreed about whether a court should go beyond the PES and examine the intent of the Postal Reorganization Act in its entirety. Justice Rehnquist acknowledged that previous cases considered other sections of a larger act of which the statute under which the case was brought was a part, but those cases were distinguished.<sup>139</sup> In *Clarke*, the specific provision at issue was an exception to the main rule embodied in the remainder of the act. Hence, the policies behind the other portions of the act were relevant to understanding the provision allegedly violated.<sup>140</sup> The challenged statute and larger act did not have this relationship in *Air Courier*:

The only relationship between the PES, upon which the Unions rely for their claim on the merits, and the labor-management provisions of the PRA, upon which the Unions rely for their standing, is that both were included in the general codification of postal statutes embraced in the PRA. . . . [T]o accept this level of generality on defining the “relevant statute” could deprive the zone-of-interests test of virtually all meaning.<sup>141</sup>

The Supreme Court found no connection between the two parts of the code.<sup>142</sup>

133. See *supra* text accompanying note 121.

134. *Air Courier*, 111 S. Ct. at 917-18. (District Court found injury in fact and finding not appealed).

135. *Id.* at 918.

136. *National Wildlife Fed’n*, 110 S. Ct. at 3187.

137. *Air Courier*, 111 S. Ct. at 918-19.

138. *Id.* at 920.

139. *Id.*, referring to *Clarke v. Securities Industry Ass’n*, 479 U.S. 388 (1987), *Association of Data Processing Service Organizations Inc. v. Camp*, 397 U.S. 150 (1970), and *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971).

140. *Air Courier*, 111 S. Ct. at 920.

141. *Id.* at 921. Compare *Securities Industry Association*, 765 F.2d at 1196 (Scalia, J., dissenting) (standing under one act not sufficient to raise questions about another statute).

142. Compare *Securities Industrial Association*, 765 F.2d at 1197 (Scalia, J., dissenting) (competitors bringing suit no more within zone protected by statute than are “businesses competing for the parking spaces that an unlawful [banking] branch may occupy.”)

The Supreme Court did not have to read the statutes as narrowly as it did. The postal workers, being a part of the Postal Service, have a greater relationship to it than court reporters have to the general public who are granted rights under a statute for a hearing on the record. The workers are, in the words of *Clarke*,<sup>143</sup> more than "marginally related" to the purposes of the statute because an economically viable Post Office is a prerequisite for their employment.

If postal workers could not sue, under the Court's view, no one may be able to challenge the Postal Service determination at issue. The reading of the zone test being forwarded requires a clear indication from Congress that a particular party is to be allowed to bring suit.<sup>144</sup> The public definitely is not envisioned as a check on executive action.

### III. Past is Prologue: Consolidation of the Private Law Model

The current conservative majority of the Supreme Court is completing a re-institution of the private law model of standing. Those suffering "legal wrong" will easily obtain standing.<sup>145</sup> Property and contract rights, which are most easily embraced within this model, will be protected.<sup>146</sup> Within limits, standing will also be available for those especially noted by Congress.<sup>147</sup>

This tendency reflects an earlier era.<sup>148</sup> Initially only plaintiffs suffering wrong to a "legal interest" had standing to seek judicial review.<sup>149</sup> Plaintiffs meeting the test could proceed either through statutory or non-statutory review.<sup>150</sup> In both

143. *Clarke*, 479 U.S. at 396-97.

144. Cf. Mary Christine Hutton, *The Unique Perspective of Justice White: Separation of Powers, Standing and Section 1983 Cases*, 40 ADMIN. L. REV. 377, 404 (1988).

145. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885-86 (1983), where he argues against bifurcating standing into constitutional and prudential concerns: "As I would prefer to view the matter, the Court must always hear the case of a litigant who asserts the violation of a legal right."

146. Cf. *Payne v. Tennessee*, 111 S. Ct. 2597, 2610, *reh'g denied*, 112 S. Ct. 28 (1991) (stare decisis more important for property and contracts where people rely on precedents than for procedural and evidentiary rules).

147. Congress, however, cannot exceed the Constitution in granting standing. See Scalia, *supra* note 145, at 886 (case and controversy requirement limits Congress) and *id.* at 894 (broad grants of standing would resemble two branches ganging up on the third, the executive). See also *Defenders of Wildlife*, 112 S. Ct. at 2145.

148. For more complete discussion, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1417-58 (1988).

149. *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 137 (1939) (no standing "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a Statute which confers a privilege.'). Eligible plaintiffs were of two types, those with complaints analogous to a common law cause of action, and those granted the right of appeal by being among the parties classified as "aggrieved" within a particular statute. See generally Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 649-52 (1973) and Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim of Relief*, 83 YALE L.J. 425 (1974).

150. Scalia, *supra* note 145, at 889 (initial scheme gave broader rights of review under specific "statutory" grants; non-statutory review was the generalized right to protect a "legal interest" by way of mandamus and injunction.) See also Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-lands Cases*, 68 MICH. L. REV. 867, 870-71 n.13 (1970).

instances, the emphasis was on the individualistic sphere, limiting judicial access to those vindicating private rights.<sup>151</sup> Under this view, the regulated industry had access to the courts, but it was difficult for intended beneficiaries of regulation to proceed in court.

This narrow door to the courthouse was championed by Justices who supported the New Deal and the right of legislatures to experiment with social legislation.<sup>152</sup> They feared that court interference could too easily result in invalidation of statutes under the substantive due process of Lochnerian thinking.<sup>153</sup> Therefore, the New Deal model of an agency included deference to agency expertise and sought to insulate the agency from central policy control, isolate it from the executive, and limit judicial oversight of its activities.<sup>154</sup> Hence, the heyday of the agency under the New Deal has been referred to as a “technocratic era.”<sup>155</sup>

A period of agency distrust followed the enshrinement of the agency during the New Deal. Two important legal changes opened access to the courts by those questioning agencies after the initial New Deal era.<sup>156</sup> The first building block for increased access was re-interpreting the types of injuries that could be judicially cognizable.<sup>157</sup> Injuries more varied than economic harm could suffice. The second impetus was interpreting the APA as an independent source of standing to review agency action when no other remedy was available.<sup>158</sup>

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151. Thus referred to as a “private law model,” Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1438 (1988) (arose from two ideas: belief that judiciary exists to protect common law interests from government and fear of those sympathetic to regulation that without standing barriers regulation would be hindered). This is not to be confused with what Professor Mashaw refers to as “an individualist model,” which has expansive judicial access. Jerry L. Mashaw, “Rights” in the Federal Administrative State, 92 YALE L.J. 1129, 1131 (1983) (citizen participation and official accounting for public decisions are available on demand).

152. See, e.g., *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) (“A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. Or standing may be based on an interest created by the Constitution or a statute. But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially.”) (citations omitted).

153. *Lochner v. New York*, 198 U.S. 45 (1905) (state law regulating working hours unconstitutional). See Sunstein, *supra* note 151, at 1436-38 and 1456-57.

154. See Bruce A. Ackerman & William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1471-78 (1980).

155. Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1496-97 (1983). See also Mashaw, *supra* note 151, 1129 (“statist” conception of legal rights depends on legislative definitions of public welfare for content), and *id.* at 1131 (statist rights structure limits participation).

156. See Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1669, 1676-78 (1975), arguing that a disavowal of an objective “public interest” and unguided agency expertise transformed administrative law.

157. Sunstein, *supra* note 151, at 1438-39. Professor Nichol argues that the difference in what could be a cognizable “injury” occurred because legal interests change to reflect society’s values. Today, environmental harms may create judicially recognized private injuries. To a large extent, such recognition requires empathy by judges. Nichol, *Rethinking Standing*, 72 CAL. L. REV. 68, 73, 89-90 (1984).

158. Whether this expansion was initially intended by Congress is debatable. Compare 4 Kenneth C. Davis, ADMINISTRATIVE LAW TREATISE, at § 24:3, at 214-15 (1983) (injury in fact was intended test; “within the meaning of the relevant statute” not to modify “adversely affected”); with Scalia, *supra* note 145, at 887-88 (Congress only codifying existing law), and Sunstein, *supra* note 151, at 1441-42 (APA not intended to extend standing).

The increased access to the judiciary prompted a more public oriented view both of judicial review<sup>159</sup> and administrative law in general.<sup>160</sup> No longer would agencies be trusted to single-handedly administer the public interest. Congress, in legislating in complex fields that impacted on many, could rationally expect that the intended beneficiaries of regulation would have a role in enforcing the law.

Beginning in the mid-1970s, there was a return to a respect for agency and congressional prerogatives. This provides another clue to disparate decisions on standing.<sup>161</sup> Standing is used to defer to the other branches of government by avoiding judicial review or by reinforcing the ability of these other branches to make policy choices. For example, *Duke Power Co.* ultimately upheld a congressional decision to support the development of nuclear power.<sup>162</sup> Therefore, an opinion on the validity of the Price-Anderson Act was necessary, even if it could be termed an advisory opinion rather than one generated from a traditional case or controversy.<sup>163</sup> Standing allowed a congressional policy choice to be affirmed. In *Bryant v. Yellen*<sup>164</sup> and *Watt v. Energy Action Educational Foundation*,<sup>165</sup> the more generous grants of standing similarly aided agency policy choices because they upheld agency decisions that had been invalidated below.

Examined from the perspective of impact on agency choices, both the opinions restricting standing and the unusually liberal ones that grant it after the Warren court era can be explained as part of a single phenomenon: a trend away from active review of agency actions.<sup>166</sup> Courts are less apt to second-guess an agency or even force it to respond more fully because more and more agency decisions

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159. Referred to as a part of an independent "public law," Sunstein, *supra* note 151, at 1450. Mashaw's terminology calls it "an individualistic model." Mashaw, *supra* note 151, at 1131. In the dichotomy of Shapiro, this would be a "democratic" tendency. Shapiro, *supra* note 155, at 1497.

160. Stewart, *supra* note 156, at 1670, 1760-62 ("interest representation" model of administrative law is one in which agencies provide forums to fine tune legislative actions rather than merely implementing predetermined statutory goals or being viewed as uniquely qualified to protect the public interest).

161. Compare *Duke Power Co.*, 438 U.S. at 78 (plaintiff has standing because damage limitation statute could have caused plant to be built); *Bryant v. Yellen*, 447 U.S. 352 (1980) (residents desiring to purchase lands could challenge whether acreage restrictions should force below market price sales of property); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981) (state could seek review of general Department of Interior program); *with Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (no standing to seek review of constitutionality of decision to not prosecute fathers of illegitimate children because threat of criminal prosecution would not compel child support); *Allen*, 468 U.S. 737 (1984) (parents cannot challenge IRS policy that allowed private non-profit schools which discriminated against African-Americans to retain tax-exempt status); and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) (no standing because no proof requirements on indigent care needed for tax exempt status caused plaintiffs' denial of medical services).

162. 438 U.S. at 78. Compare *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978) (Congress and agency decides whether to develop nuclear energy).

163. See conclusion of Justice Stevens, *Duke Power Co.*, 438 U.S. at 102 (concurring) and Davis, *supra* note 158, § 24:33, 328-29 (justified in *Duke* because constitutional uncertainties defeated congressional purpose).

164. 447 U.S. 352 (1980).

165. 454 U.S. 151 (1981).

166. Cf. Fallon, *supra* note 43, at 45 (standing analysis overprotects defendants because it prevents adjudication as a threshold doctrine rather than deciding a case on the merits).



not only are based on scientific evidence that requires complex predictions,<sup>167</sup> but also involve statutes in which Congress failed to give direct guidance on how or even what it wanted implemented.<sup>168</sup> In the early 1970s, the Supreme Court responded to the latter dilemma by reading a statute in order to locate the policy choice and thus create “law to apply,” which would enable judicial review.<sup>169</sup> In the early 1990s, the Court’s response to an unclear statute is to allow the agency to fill in the blank.<sup>170</sup>

The standing aspects of *National Wildlife Federation*, *Air Courier* and, *Defenders of Wildlife* are part of a new insulation of agency determinations from judicial review, which in turn mirrors the New Deal attitude. The trend of decisions that found standing in order to re-assert agency determinations did not continue with *Defenders of Wildlife* and *National Wildlife Federation*: The denial of standing in both cases left open questions about the propriety of the regulation on the ESA’s scope and the BLM’s withdrawal review procedures. Curbing access may be more important than upholding individual agency decisions because in the long-term closing the door will insulate numerous decisions.

As in the days of the New Deal, there has been a technocratic resurgence, a desire for agencies to rationally solve problems.<sup>171</sup> In such a situation, judges are not necessarily adept at review. Therefore, it is not surprising that there has been a similar return to earlier models of standing.<sup>172</sup>

In addition to implications for standing doctrine, there is a second facet to the *National Wildlife Federation* decision— that dealing with ripeness. As interpreted by Justice Scalia, ripeness doctrine may limit review to individual actions rather than allowing lawsuits to seek system-wide relief. Linking standing and ripeness in this manner furthers the majority’s view that under a government of distinct branches, the judiciary must avoid even appearing to invade prerogatives of the other branches. This reflects the philosophical underpinnings of the cases.

167. *Baltimore Gas & Electric Co.*, 462 U.S. at 102. See also The Honorable Antonin Scalia, *Responsibilities of Regulatory Agencies under Environmental Laws*, 24 HOUSTON L. REV. 97, 98 (1987) (substantial evidence test used to review factual determinations but in complex situations “court feels less competent to ‘second guess’ than it would the factual judgments of a jury.”)

168. Justice Scalia argues that deference to agencies is no longer driven primarily by the need for agencies to apply expertise to complex facts. Deference is appropriate not because agencies are “experts,” but because many decisions do not have one “correct” answer. They involve policy choices. The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517-21. For an examination of this phenomenon as applied to the Bureau of Land Management, see Marla E. Mansfield, *The “Public” in Public Land Appeals: A Case Study in “Reformed” Administrative Law and Proposal for Orderly Participation*, 12 HARV. ENV. L. REV. 465, 490-99 (1988).

169. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (statute requires park uses to be given priority).

170. *Mobil Oil Exploration and Producing Southeast, Inc. v. United Distribution Companies*, 111 S. Ct. 615 (1991) (upholding discretion of the Federal Energy Regulatory Commission).

171. Shapiro, *supra* note 155, at 1499-1500.

172. Sunstein, *supra* note 151, at 1432-33 (return to private law model); Mashaw, *supra* note 151, at 1138 (return to the statist model). Professors Shapiro and Glicksman identify this as part of a general trend towards executive implementation and away from a system of checks and balances. Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution*, 1988 DUKE L.J. 819, 846-63.

#### IV. Separation of Powers: Standing and the APA

The recent Supreme Court decisions exemplify several strains of thought. One, made explicit in *National Wildlife Federation* and echoed in *Defenders of Wildlife*, is that standing and ripeness doctrine can promote a formal, compartmentalized separation of powers analysis.<sup>173</sup> The relationship between Justice Scalia's academic writings and this doctrine has been noted often.<sup>174</sup> His concentration on the APA's provisions in *National Wildlife Federation*, however, contracts ripeness and standing into one analysis. More importantly, it also attempts to cement theory into practice.

##### A. THEORIES OF SEPARATION OF POWERS

Although it is clear that some conservative standing decisions draw upon the idea of separation of powers, this concept itself is not a model of clarity as a doctrine.<sup>175</sup> One of its primary purposes is to prevent any one branch of government from exercising power to the extent that it could threaten freedom.<sup>176</sup> To describe its purpose, however, is not necessarily a description of how separation of powers should operate.

There are two models of separation of powers analysis: the formal and the functional.<sup>177</sup> With the growth of administrative agencies, the functional theory may be more appropriate than the traditional formal theory of three compartmentalized branches.<sup>178</sup> Nevertheless, the formal theory appears to be the philosophy

173. See, e.g., response to allegations of "rampant" violations of law in program: "Perhaps [it is] so. But respondent cannot seek *wholesale* improvement of the program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made" (emphasis in original). *National Wildlife Fed'n*, 110 S. Ct. at 3190. In *Defenders of Wildlife*, Justice Scalia declared: "Vindicating the *public* interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive." 112 S. Ct. at 2145.

174. For a comparison of Justice Scalia's scholarly work and his judicial output as an appellate judge, see Comment (Perino), *supra* note 8, at 156-72. See also Sheldon, *supra* note 4 and Poisner, *supra* note 4, at 353-57.

175. To begin with, the United States Constitution does not even mention "separation of powers," but merely delineates three separate federal branches of government that share ultimate power. The doctrine may not be a doctrine but merely a theory, one which provides only a "framework" for analysis rather than strict rules. Arthur S. Miller, *Separation of Powers: An Ancient Doctrine under Modern Challenge*, 28 ADMIN. L. REV. 299 (1976).

176. See *United States v. Brown*, 381 U.S. 437, 443 (1965) (a "bulwark against tyranny"). See, e.g., Ralph F. Fuchs, *An Approach to Administrative Law*, 18 N.C.L. REV. 183, 194 (1940) and Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUMBIA L. REV. 371 (1976). But see Miller, *supra* note 175 at 302 (separation also promotes efficiency).

177. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987). The formal views each branch as tightly confined to its enumerated powers. The functional approach stresses core functions—relationships between the branches may be flexible if these core functions are not threatened. *Id.* Under the functional view, the branches may overlap and create checks and balances. Hutton, *supra* note 144, at 389-95 (creating a flexible government that may respond to change).

178. Peter L. Strauss, *The Place of Agencies in Government, Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578-79 (1984) (formal three branch theory as traditionally expressed cannot describe our government; model should look to separation of functions and checks and balances with agencies as inferior parts of government controlled by the other three).

forwarded in these cases.<sup>179</sup> It begins with the Court's constitutional role. The judiciary is empowered to decide various enumerated "cases" and "controversies."<sup>180</sup> Standing and ripeness are designed to keep courts in their appointed realm. Justice Scalia in *National Wildlife Federation and Defenders of Wildlife* aligns with this belief and uses the doctrines to prevent what he would term governance by the judiciary.<sup>181</sup>

Despite the current views of Justice Scalia, which are not unique to him, the Supreme Court has not uniformly viewed standing as linked inexorably to separation of powers.<sup>182</sup> Some Justices have believed that members of the public are given standing because they are proper "checks" on the executive within the constitutional framework.<sup>183</sup> In general terms, Chief Justice Warren wrote for the Court in *Flast v. Cohen* of the need to distinguish standing from other issues of justiciability. Because standing concentrates on the "who," it would not implicate separation of powers.<sup>184</sup> Other doctrines of justiciability, such as the political question doctrine,<sup>185</sup> address substantive issues that implicate separation of powers analysis. In 1984, most of the Justices who would later dissent in *National Wildlife Federation* endorsed this view.<sup>186</sup>

179. Cf., Strauss, *supra* note 178, at 626-28 (siren call of certainty influenced cases decided in 1982-83) and Frederick R. Anderson, *Revisiting The Constitutional Status of Administrative Agencies*, 36 AMER. U. L. REV. 277, 291-92 (1987) (noting formalism in separation of powers decisions).

180. U.S. CONST. art. III, § 2. Some argue this means that standing and other justiciability doctrines should preclude a court decision that did not arise in what would have been a "judicial" setting at the time of the Constitution. *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 150 (Frankfurter, J.) This historically phrased limitation is read by some as forcing courts to eschew advisory opinions and only act at the behest of a person concretely injured. The historical evidence, however, does not support this view. Informer and relator suits and mandamus actions allowed courts to intervene in other situations. See Winter, *supra* note 148, at 1394-1417. See also Davis, *supra* note 158, at § 24:5 (advisory opinions at time of constitution).

181. Justice Scalia had espoused this view previously in his scholarly writing. See, e.g., Scalia, *supra* note 145.

182. In an issue-dependent plea, Justice Douglas objected to the Solicitor General's attempt to raise the specter of "government by the judiciary" when examining standing. *Sierra Club v. Morton*, 405 U.S. at 745 (Douglas, J., dissenting). To Justice Douglas, natural resources could too easily be trammelled because of agency "capture" and broad authority to act in the "public interest." *Id.* at 745-51. Therefore, the problem was not one of judicial interference, but of assuring that nature not be destroyed before being considered. Allowing standing furthers this end. *Id.* at 750.

183. Hutton, *supra* note 144, at 387 (view identified as being that of Justice White).

184. He cautioned:

Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

*Flast v. Cohen*, 392 U.S. 83, 101 (1968). Justice Scalia rephrased this holding as follows: "Standing . . . is only meant to assure that the courts can do their work well, and not to assure that they keep out of affairs better left to other branches." Scalia, *supra* note 145, at 891.

185. This doctrine precludes judicial review of controversies "which revolve around policy choices and value determinations" that the Constitution commits to either the Congress or Executive. *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986). See Louis Henkin, *Is there a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (exists when there are no legally cognizable standards).

186. *Allen*, 468 U.S. at 767 (Brennan, J. dissenting); *Id.* at 790-91 (Stevens, J., dissenting, joined by Blackmun, J.). Justice Marshall, who dissented in *National Wildlife Fed'n*, took no part in *Allen*.

Their reaffirmations of *Flast v. Cohen*, however, appeared in dissenting opinions when the Warren Court's era ended.<sup>187</sup> Justice O'Connor wrote for the majority in *Allen v. Wright*<sup>188</sup> and succinctly disagreed: "the law of Art. III standing is built on a single basic idea—the idea of separation of powers."<sup>189</sup> Therefore, the doctrine would provide an independent tool to determine whether standing exists.<sup>190</sup> In direct opposition to Justice Warren's statement, this view recognizes that standing can exclude issues as well as persons. If every person who would raise an issue is denied the right to litigate it, the issue is effectively excluded.<sup>191</sup> Therefore, separation of powers arguments are made to invalidate suits seeking system-wide relief from an agency's action or inaction.

## B. RATIONALES FOR SEPARATION OF POWERS LIMITATIONS

A lawsuit seeking system-wide relief is one that claims that a general policy or pattern of action is not in accord with the law. Because such illegality injures numerous parties, it could, to a certain extent, resemble a generalized complaint that the government is not acting in accord with the law.<sup>192</sup> Two main arguments are made that separation of powers mandates that the courts refuse such cases: (1) the executive is to "take care" that the laws are executed; and (2) the courts are to protect individuals.<sup>193</sup> Both can be taken to extremes.

187. *Id.* See also C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 863-69 (1985) (contrasting *Flast* with Burger court decisions that elevate separation of powers and federalism to primary roles in justiciability decisions). For other Burger court expressions of separation of powers concerns, see *Warth*, 422 U.S. at 499 (Powell, J.); *U.S. v. Richardson*, 418 U.S. 166, 179 (1974) (Burger, C.J.); *Id.* at 188 (Powell, J., concurring); *Schlessinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-22 (Burger, C.J.). See also *Valley Forge*, 454 U.S. at 471 (Rehnquist, C.J.).

188. 468 U.S. 737 (1984). Justice O'Connor was joined by Justices Burger, White, Powell and Rehnquist.

189. *Allen*, 468 U.S. at 752. See also *City of Los Angeles v. Lyons*, which implicates the corollary doctrine of federalism: the Court stated the proper forum was with "local authorities." 461 U.S. at 111.

190. *Allen*, 468 U.S. at 761 n.26. ("We disagree with Justice Stevens's suggestion that separation of powers [principles] merely underlie standing requirements, have no role to play in giving meaning to those requirements, and should be considered only under a distinct justiciability analysis.") Justice O'Connor insisted, however, that the decision in *Allen* rested on the causation and redressability requirements of injury in fact. *Id.*

191. Scalia, *supra* note 145, at 892. The example he gives is the denial of taxpayer standing, which makes the legislative and executive branches solely responsible for compliance with the constitutional requirement that "a regular Statement and Account of the Receipt and Expenditures of all public Money . . . be published from time to time." *Id.* See *United States v. Richardson*, 418 U.S. 166 (1974) (taxpayer seeking information on CIA expenditures in order to better fulfill duties of informed voter denied standing).

192. A generalized complaint is repeatedly declared to be insufficient to grant standing. See, e.g., *Allen*, 468 U.S. at 754; *Defenders of Wildlife*, 112 S. Ct. at 2144-45 (noting that it had previously been applied primarily to allegations of constitutional violations). See generally, Floyd, *supra* note 187, at 871-75. The generalized harm barrier is particularly intractable for several reasons. Even with generalized harm, some are more injured or offended than others. Additionally, many cases in which "private" injury was found also have widely shared injuries and diffuse impacts, such as the right to an abortion or to be free from segregation or poll taxes. See Albert, *supra* note 149, at 483 and *Id.* at 488 (shared injury not equivalent to mere interest in matter). It is not, therefore, a particularly helpful criterion.

193. For arguments against the traditional rationales for imbuing standing with separation of powers concerns, see Sunstein, *supra* note 151, at 1469-74 (noting a third supposed justification, namely that the president exerts sufficient political control).

The *Allen v. Wright* majority reflects the first argument. To allow standing when injuries are generalized would improperly embroil the judiciary in the affairs of the executive:

[Standing] would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication. "Carried to its logical end, [respondents'] approach would have the federal courts virtually continuing monitors of the wisdom and soundness of Executive action."<sup>194</sup>

Rather simplistically, this position maintains that only the President has the power "to take Care that the Laws be faithfully executed."<sup>195</sup> This hands-off attitude ignores the fact that acting illegally outside of the law is not proper "execution of the laws."<sup>196</sup> Taken to its extreme, this rigid view of separation of powers would preclude all judicial review.<sup>197</sup> But to accept that would be to destroy the concept of a limited government<sup>198</sup> and eschew the benefits that can derive from judicial review.<sup>199</sup>

Justice Scalia has explained his view of the judiciary in a slightly different manner. He bases his analysis in separation of powers,<sup>200</sup> but discovers the key not in the "take care" clause of the Constitution, but in what he views to be the core role of courts, namely that they are uniquely suited to protecting rights of individuals and minorities.<sup>201</sup> Therefore, courts should require a plaintiff to show a particularized injury, one which, in Justice Scalia's words, "sets him apart from the citizenry at large."<sup>202</sup> Such a standing requirement helps courts maintain their proper role:

[It] roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against the impositions of the majority, and excludes them from the even

194. *Allen*, 468 U.S. at 759, quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972). In *Laird*, the plaintiff claimed army surveillance of civilian political activity chilled his First Amendment rights. The Supreme Court referred the plaintiff to Congress, which could control matters through its committees and the power of the purse.

195. *Allen*, 468 U.S. at 761, quoting U.S. CONST. art II., § 3, cl. 4. *But see* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985) ("take care" clause is a duty, not a license).

196. *See, e.g., Allen*, 468 U.S. at 794 (Stevens, J. dissenting):

It has been clear since *Marbury v. Madison*, 1 Cranch 137 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177. Deciding whether the Treasury has violated a specific legal limitation on its enforcement discretion does not intrude upon the prerogatives of the Executive, for in so deciding we are merely saying "what the law is."

197. Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 12 (1984-85).

198. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COL. L. REV. 1 (1983).

199. On the merits of judicial review, *see generally*, Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 537 (1989) and Shapiro & Glicksman, *supra* note 172, at 863-72.

200. Scalia, *supra* note 145, at 891. (*Flast v. Cohen* incorrectly severed standing from separation of powers analysis).

201. Scalia, *supra* note 145, at 894 (emphasis in original). *But see* differing view of the role of judges, Owen M. Fiss, *The Supreme Court 1978 Term-Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 29-30 (1979) (function of judge is to "give proper meaning to our public values").

202. Scalia, *supra* note 145, at 881-82.

more undemocratic role of prescribing how the other branches would function in order to serve the interest *of the majority itself*.<sup>203</sup>

If a plaintiff only shows a generalized injury, one shared by the majority of the public, then relief should be sought in other locales. Again, if taken to an extreme, this position would create a constitutional paradox: it would require submittal to a vote of the majority issues that the constitution intentionally removed from majority control.<sup>204</sup>

Nevertheless, to Justice Scalia, majoritarian grievances are to be redressed in administrative or legislative venues: "Governmental mischief whose effects are widely distributed is more readily remedied through the political process, and does not call into play the distinctive function of the courts as guardians against oppression of the few by the many."<sup>205</sup> Justice Scalia maintains that courts should not protect the majority because they are unsuited to that task. He fears that if courts act when elected officials did not, the judiciary would likely assert the particular values of individual judges.<sup>206</sup> Judges, being politically unaccountable, are inappropriate arbiters of values.<sup>207</sup> Justice Scalia assigns majoritarian interests to the political branches.<sup>208</sup> According to Justice Scalia, courts should not intervene.

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203. *Id.* at 894.

204. David R. Dow, *Standing and Rights*, 36 EMORY L.J. 1195, 1213-14 (1987). Additionally, political solutions may be unavailable, especially when agency non-action is at issue. Peter Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 639 (1983) (Congress believes it already did its job by passing statute).

205. *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1256 (D.C. Cir. 1983) (Scalia, J., concurring in part and dissenting in part), reversed *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). See also *National Wildlife Fed'n*, 110 S. Ct. at 3190. Cf., *United States v. Richardson*, 418 U.S. at 179 (under representative government, lack of judicial remedy does not mean no remedy exists; although slow, electoral process is remedy). Once again, Justice Frankfurter is echoed: "In a democratic society . . . , relief must come through an aroused popular conscience that sears the conscience of the people's representatives." *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting) (how to select representatives is a non-justiciable political question).

206. Justice Scalia explained his view:

Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class. Scalia, *supra* note 145, at 896. *But see* Shapiro & Glicksman, *supra* note 172, at 864-65 (if courts insist on Congress's will, judicial review is democratic) and Poisner, *supra* note 4, at 374-78 (judicial review increases agency ability to accurately aggregate preferences by making agencies more politically accountable).

207. Scalia, *supra* note 167, at 107, arguing that judges should not decide levels of environmental enforcement not because of any "unsuitability" to decide the issue but because judges are not politically accountable.

208. Moreover, legislative initiatives can be lost in the halls of an executive agency within our system. If Congress does not respond, then it is what the majority desired. Scalia, *supra* note 145, at 897. Cf. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2088-89 (1990) (giving agencies interpretive authority may allow changed circumstances to affect legislation in manner similar to common law growth). *But see* Arthur S. Miller, *The President and Faithful Execution of the Law?*, 40 VANDERBILT L. REV. 389 (1987) (executive should not pick and choose laws but does do so); Peter Lehner, *supra* note 204, at 690 (judges, not legislators, are traditional interpreters of past laws).

One barrier to court action is standing. It thus serves a separation of powers agenda by limiting lawsuits to those with concrete, individualized harm.<sup>209</sup> Justice Scalia has at least twice favorably quoted the following from a 1944 case:

When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies *only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers . . .* (emphasis added by Justice Scalia).<sup>210</sup>

Viewed in this manner, separation of powers prevents the courts from second-guessing generally applicable executive action. It is up to the legislative branch to insist that agencies comply with the intent of the laws it passes.<sup>211</sup>

### C. THE APA AND SEPARATION OF POWERS

*National Wildlife Federation* forwards Justice Scalia's separation of powers agenda in two ways. First, he insisted on a clear and unequivocal "injury in fact" that would distinguish the plaintiffs and thus prove that judicial intervention on their behalf was justified. To Justice Scalia, this requires a showing that the plaintiffs were "harmed *more* than the rest of us, . . . [thus establishing a] basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection."<sup>212</sup> Second, he elevated the APA reference to "an agency action" as a precursor to judicial review into an overriding requirement of particularity that must be met before a court can intervene.<sup>213</sup> The APA does not necessarily require this interpretation.

The APA defines "agency action" broadly. It includes "the whole or a part of an agency rule, order, license, sanction, relief, or *the equivalent* or denial thereof, or failure to act."<sup>214</sup> Each of these enumerated components of an "action" are defined. For example, a "rule" is a wide category of activity: agency acts of "general or particular applicability and future effect."<sup>215</sup> Because the definition

209. Cf., Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1271 (1982) (noting separation of powers arguments against private rights of action).

210. Scalia, *supra* note 145, at 883, quoting *Stark v. Wickard*, 321 U.S. 288, 309 (1944). Justice Scalia quotes the same passage in *Defenders of Wildlife*, 112 S. Ct. at 2145. *Stark* upheld the right of dairy producers to challenge administrator of the milk settlement fund despite the fact that the act did not expressly provide for judicial review at their behest. The administrative act affected their payments directly, giving rise to personal rights "not possessed by the people generally." *Stark*, 321 U.S. at 309. This is in contrast to the consumers that Scalia would deny had standing. *Community Nutrition Institute*, 698 F.2d at 1297 (Scalia, J., dissenting).

211. But, according to Justice Scalia, this insistence cannot be through legislative vetoes. Antonin Scalia, *Oversight and Review of Agency Decisionmaking*, 28 ADMIN. L. REV. 661, 684-95 (1976).

212. Scalia, *supra* note 145, at 894.

213. This tendency is related to some cases that deny standing to challenge police practices because of a lack of concrete injury. *Rizzo v. Goode*, 423 U.S. 362 (1976). Justice Rehnquist refused to see a connection between past individual rights violations and disciplinary policies of the police department that arguably could influence an unnamed policeman to violate plaintiffs' rights again in the future. *Id.* at 367-72.

214. 5 U.S.C. § 551(13) (1988) (emphasis added).

215. 5 U.S.C. § 551(4) (1988).

of "action" quoted above includes within its scope "the equivalent" of each of the enumerated components, an agency-sanctioned pattern of activity could be an "agency action."<sup>216</sup> If the pattern is designed to control future activities, it would be the equivalent of a "rule."

Justice Scalia, however, seemingly requires specifically designated "orders" or "rules" in order to dignify agency activity with the title "action."<sup>217</sup> Moreover, in his ripeness analysis, when faced with what undoubtedly was an agency "rule,"<sup>218</sup> he apparently wanted an adjudicated decision on land use—an order in APA terms<sup>219</sup>—before he would proceed. This precludes early and system-wide relief.

What Justice Scalia did in *National Wildlife Federation* is akin to what Justice Rehnquist did in *Air Courier*. Both restrict the universe of potential challengers to agency action. The strict interpretation of the "zone-of-interest" test is related to separation of powers because it insists on concrete, individual cases as the crux of the judicial realm. Nevertheless, *Air Courier* deserves further explication.

## V. "Bystander" Status Resurgent

A second major theme present in the cases is the philosophy that "bystanders" generally should not have standing. This concept imbues *National Wildlife Federation* and *Defenders of Wildlife*<sup>220</sup> to a certain extent, but is even more important in *Air Courier*. Close examination of congressional intent under a revitalized "zone-of-interest" test will limit standing to those who are either the regulated or the primary beneficiaries of a regulatory statute. Although not making those with standing coterminous with those "especially benefitted" by a statute, as required for a private cause of action, standing requirements have tightened.

### A. THE "ZONE" TEST: OPENED AND CLOSED

Initial standing doctrine limited challenges of agency action to those who suffered legal wrong or who would come within the meaning of the word "aggrieved"

216. Cf., Sunstein, *supra* note 195, at 678-79 (*Heckler* exception making "pattern" of non-enforcement more reviewable than isolated refusal to act is because pattern equals an assessment of congressional intent).

217. *National Wildlife Fed'n*, 110 S. Ct. at 3189. (Land Withdrawal Review Program "does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations"). Justice Scalia also adamantly rejects judicially requiring the BLM to establish rules for public participation or information dissemination when system-wide or general failures are alleged. To Justice Scalia, any response to such an allegation would interfere with executive prerogatives: "With regard to alleged deficiencies in providing information and permitting public participation, as with regard to the other illegalities alleged in the complaint, respondent cannot demand a general judicial review of the BLM's day-to-day operations." *Id.* at 3194.

218. A Public Land Order or PLO. *Id.* at 3140. See discussion in text, *supra* notes 68-69.

219. 5 U.S.C. § 551(6) (1988).

220. It is most clear in the discussion of procedural injury, in which Justice Scalia maintains that Congress could not imbue "any person" with the right to remedy the failure to follow statutory procedures. *Defenders of Wildlife*, 112 S. Ct. at 2144-46. Article III injury in fact requirements overrule such wide grants.



as specifically used in a particular statute.<sup>221</sup> This tended to allow the regulated to enter the courts, but many of the beneficiaries of statutes were denied standing as mere “bystanders.”<sup>222</sup> *Association of Data Processing Service Organizations, Inc. v. Camp*<sup>223</sup> interpreted the APA as enlarging the universe of potential plaintiffs; “adversely affected or aggrieved . . . within the meaning of [the] relevant statute”<sup>224</sup> meant those “arguably within the zone of interests” of the relevant statute.<sup>225</sup>

The re-interpretation of the APA led to the liberally interpreted “zone-of-interest” test,<sup>226</sup> which could reverse prior holdings on who could enter the courthouse.<sup>227</sup> The test did not require proof that Congress had intended to grant a private right of action to the protesting parties.<sup>228</sup> Consequently, the “zone-of-interest” test lowered the burden of proof for access to court.<sup>229</sup> Beneficiaries of statutes need not be mere bystanders, but actually those intended by Congress to enforce a statutory scheme.<sup>230</sup> Nevertheless, all three recent Supreme Court cases make it harder for someone other than the directly regulated to enter a court. They narrow the largesse of these precedents.

The first mechanism for restricting review occurred through Justice Scalia’s

221. As then Judge Scalia phrased the pre-*Data Processing* view: “Quite evidently, one cannot be ‘adversely affected or aggrieved within the meaning of [a] statute’ that does not contain those—or at least substantially similar—words.” Scalia, *supra* note 145, at 887-88.

222. This was, of course, a tautology: if one was a “bystander” one would not have standing. See Sunstein, *supra* note 151, at 1435, n.18.

223. 397 U.S. 150 (1970).

224. 5 U.S.C. § 702 (1988).

225. *Association of Data Processing Service Organizations, Inc.*, 397 U.S. at 156. As Judge Scalia put it, “the wording of the APA was interpreted to mean no more than ‘adversely affected or aggrieved in a respect which the statute sought to prevent.’” Scalia, *supra* note 145, at 889.

226. *Association of Data Processing Service Organizations, Inc.*, 397 U.S. at 156; *Clarke*, 479 U.S. at 399.

227. The strength of the change is obvious from the “competitor” cases. Under the earlier private rights view, a competitor could not object because there was no “legal interest” in being free from competition. *Tennessee Power*, 306 U.S. at 137-38. By contrast, the Supreme Court later found that competitors of a regulated entity could be proper parties to protest the activities of the regulating agency if they show a “plausible relationship” to the underlying policies of the regulating act. *Clarke*, 479 U.S. at 403 (policy was to prevent ills that could accompany a monopoly). See Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 311-312 (1984) (test authorized private attorneys general because competitive impact was an interest regulators must recognize).

228. *Clarke*, 479 U.S. at 400, n.16 (private causes of action, require greater threshold burden, namely showing plaintiff was “one of the class for whose *especial* benefit the statute was enacted,” citing *Cort v. Ash*, 422 U.S. 66 (1975)). See also *Japan Whaling Association*, 478 U.S. 230-31 n.4. (Blackmun, J.) (private right of action not needed for judicial review; APA grants that right and zone-of-interest test provides a different threshold). For further information on private rights of action, see Stewart & Sunstein, *supra* note 209, at 1289-1316.

229. See Scott, *supra* note 149, at 663 (word “arguably” before “within the zone of interest of the statute” reduces clarity with which plaintiff must show Congress desired to protect; mere indication that it knew of plaintiff’s interest might suffice) and William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 234-35 (1988) (test resembles standard to determine if federal claim exists; only denied if wholly frivolous or insubstantial).

230. The “zone-of-interest” test so-interpreted is broader than acknowledging situations where an act actually directly creates rights and hence “injuries.” See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (“[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing . . .”) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975), quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

insistence in *National Wildlife Federation* on strict "ripeness." Unless Congress specifically provides for earlier review, a regulation cannot be judicially reviewed until "concrete effects" are felt.<sup>231</sup> The directly regulated will not feel the brunt of this as deeply as the purported beneficiaries of a regulation because of the acknowledged exception to his ripeness requirement: review will be appropriate when a substantive rule requires a plaintiff to immediately modify behavior.<sup>232</sup> Obviously, it is the regulated who must modify behavior, not the beneficiary of regulation.

The regulated will have quicker access to courts, but perhaps more importantly, they also will always have standing. Justice Scalia has stated that one who is "the very *object* of a law's requirement or prohibition" will always be able to show an "individual" grievance.<sup>233</sup> The timing preference and assured standing will tilt agency action away from vigorous enforcement of statutes as agencies seek to avoid lawsuits from those who can challenge them. This defensive action may harm beneficiaries.<sup>234</sup>

Beneficiaries are further frustrated because standing is more problematic for persons other than the regulated. Some injuries could be deemed fortuitous, in the sense that the law was not designed to prevent that harm, but was designed for another purpose.<sup>235</sup> Justice Scalia's hypothetical in *National Wildlife Federation* would amount to such an example.<sup>236</sup> A requirement that hearings be held on the record is to ensure due process for parties, not full employment for court reporters. Most cases are not as clear-cut as this.

To address this problem, the "zone-of-interest" test was designed to look at the relationship between the alleged harm and the statute's purposes. For a judge who views the public's ability to sue as a necessary "check" on the other branches of government, broad relationships would suffice.<sup>237</sup> For a judge that contends that

231. *National Wildlife Fed'n*, 110 S. Ct. at 3190.

232. *Id.*

233. Scalia, *supra* note 145, at 894 (emphasis in original). This contrasts with what Justice Scalia described as a "plaintiff . . . complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*." *Id.* (emphasis in original). In the latter situation, unless some individual harm distinguishes the plaintiff, Justice Scalia views the plaintiff as simply claiming that acts required by law or the Constitution are being withheld. *Id.* This view was echoed in *Defenders of Wildlife*, 112 S. Ct. at 2137. *Cf.*, Justice Rehnquist's rationale in *Heckler v. Chaney* against review of a decision to not enforce an act: "[W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." 470 U.S. 821, 832 (1985) (emphasis in original).

234. Richard J. Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1283-84 (1989) (agencies respond to arguments of those who can challenge in court, not to others) and Poinsner, *supra* note 4, at 374-75 (unequal standing rights leads to unequal bargaining power before agencies). *Cf.* Note (Peter Lehner), *supra* note 204, at 643-44 (failure to review non-implementation skews administrative law in favor of regulated).

235. Scalia, *supra* note 145, at 895.

236. *National Wildlife Fed'n*, 110 S. Ct. at 3186, quoted, *supra* text at note 122.

237. *See, e.g.*, Justice White in *Clarke*: "Competitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings. There is sound reason to infer that Congress intended [this] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." *Clarke*, 479 U.S. 388, 399 quoting *Community Nutrition Institute*, 467 U.S. at 347. *See* Hutton, *supra* note 144, at 411-12, discussing Justice White's view of separation of powers.

courts do not entertain suits to rectify majoritarian complaints, a philosophical quandary results if a statute has a very broad zone of interest.

### B. *AIR COURIER* UNCLOAKED

Justice Scalia, while a Judge on the D.C. Circuit Court of Appeals, identified two types of statutes that could have broad spheres: statutes that seek to protect nothing but “generalized interests” and ones that “benefit[] generalized interests through the protection of more particularized interests to which it is immediately directed.”<sup>238</sup> Classifying a statute ascertains who would have standing under Justice Scalia’s view. This philosophy may have influenced the *Air Courier* decision.<sup>239</sup>

For the first type of statute, which is concerned only with generalized interests, Congress may have intended to give standing to everyone impacted.<sup>240</sup> Justice Scalia doubted, however, that Congress always would have meant to make other large universes of persons “private attorneys general” simply because of their concern with a statute’s generalized benefits. Therefore, if the statute is of the second type, so that there are direct and immediate beneficiaries, these persons and not the more generalized indirect beneficiaries would have standing. Even if the indirect beneficiaries have interests within the disputed act’s purposes, they should rely on those through which their claims derive for judicial enforcement.<sup>241</sup>

These categorizations of types of beneficiaries and potential plaintiffs are not new. In fact, Justice Scalia’s arguments mirror those of Justice Frankfurter:

Frequently governmental action directly affects the legal interest of some person, and causes only a consequential detriment to another. Whether the consequentially harmed can challenge the action is said to depend on the “directness” of the impact of the action on him. . . . [It is not true that only directly affected can sue.] The likelihood that the interests of the petitioner will be adequately protected by the person directly affected is a relevant consideration . . . as is, probably, the nature of the relationship involved.<sup>242</sup>

Current conservative views on standing and justiciability again reflect a prior era.

238. *Community Nutrition Institute*, 698 F.2d at 1257. (Scalia, J., dissenting) (emphasis in original) He explains why the situation is likely to occur: “Almost any statute has generalized indirect benefits; ultimate improvement of the society at large is the whole theoretical justification for heeding the requests of special interests.” *Id.*

239. Compare then-Judge Scalia’s complaint that the D.C. Circuit was collapsing the zone-of-interest test into the injury in fact determination, *Securities Industries Association v. Comptroller of the Currency*, 765 F.2d 1196 (1985) (dissenting from denial of rehearing), *aff’d sub nom. Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) with Justice Rehnquist’s objection to “conflat [-ing] the zone-of-interests test with injury in fact.” *Air Courier*, 111 S. Ct. at 918. For other comparisons between Justice Rehnquist and earlier Scalia opinions, see notes 140-141, *supra*.

240. *Community Nutrition Institute*, 698 F.2d at 1257. (Scalia, J., dissenting). NEPA and its environmental concerns are cited as an example.

241. *Id.* The zone-of-interest test is ultimately a way of apprising Congress’s intent as to who it anticipated would enforce the statute. See also Scalia, *supra* note 145, at 896 (courts should not presume Congress designated a “minority group broad enough to include the entire population”).

242. *Anti-Fascist Refugee Committee*, 341 U.S. at 153-54 (Frankfurter, J.). Ironically, Professor Scott identified this case as one in which only those secondarily impacted were allowed standing. The organizations listed as subversive used their own injuries to receive standing, but the more directly impacted parties were the government employees who were told they could not join the organizations. Scott, *supra* note 149, at 679-80.

It was not, however, until the *Air Courier* decision that the Supreme Court re-adopted these thoughts. Justice Scalia had adopted this position when he praised an earlier case, *Stark v. Wickard*.<sup>243</sup> In *Stark*, milk handlers would not be interested in administration of the settlement fund, the issue in the case. Hence, producer claims could not be protected "derivatively" by the handlers, who had express rights to judicial review. Producers, therefore, had standing.<sup>244</sup> In *Community Nutrition Institute*,<sup>245</sup> then Judge Scalia attempted to use the same rationale to deny standing for milk consumers.

The claims of consumers of milk to Judge Scalia were derived from interests of both the producers and the milk handlers. Standing for them therefore would be inappropriate. Consumer interest in a high-enough price to ensure a sufficient supply would be protected by the producers, and the milk handlers would protect consumer interest in avoiding artificially high prices.<sup>246</sup> Although superficially correct, if milk has inelastic demand, which for some portions of the population is or should be true, then the milk handlers have no incentive to sue because they could pass on the price they pay even if too high. When this question was before the Supreme Court, whether or not the handlers would pass on savings they received from appealing was deemed irrelevant.<sup>247</sup> This conclusion undercuts Justice Scalia's derivative protection analysis. In fact, the Supreme Court did not adopt his view at this point, but based its decision on the statutory scheme precluding additional remedies.<sup>248</sup>

The distinction between indirect or consequential beneficiaries and immediate beneficiaries, however, might answer the question of who could have standing in *Air Courier*. Perhaps patrons of a rural post office scheduled to close for lack of revenue or a domestic mailer whose rates are being raised might be able to object. These parties might be called the immediate and direct beneficiaries of the act if one views the postal monopoly as attempting to provide universal service at reasonable rates.<sup>249</sup> These plaintiffs, however, might encounter difficulties with the "fairly traceable" and "likely to be redressed" hurdles. A competitor of a person using the exemption could object to the grant of the exemption under earlier precedents, but perhaps not now.<sup>250</sup> Liberal precedents have been modified.

In *Air Courier*, the court directly looked at the "zone-of-interest" test and read the statute narrowly. Moreover, at no time in the opinion did the court use the terminology "arguably within the zone of interest."<sup>251</sup> Citing *National Wildlife*

243. Scalia, *supra* note 145, at 883, discussed *supra* note 164.

244. 321 U.S. at 308.

245. 698 F.2d at 1257 (Scalia, J., dissenting).

246. *Id.*

247. 467 U.S. at 352 n.3.

248. *Community Nutrition Institute*, 467 U.S. at 347.

249. *See Air Courier*, 111 S. Ct. at 920.

250. Justice Scalia, as a judge on the D.C. Circuit, objected to grants of competitor standing. *Securities Industry Association*, 758 F.2d at 740 and 765 F.2d at 1197 (Scalia, J., dissenting).

251. This terminology should have been used in the APA arena. *Community Nutrition Institute*, 698 F.2d at 1256. (Scalia, J., dissenting). ("zone-of-interest" test developed for APA review with word "arguably;" also used as prudential limitation in non-APA setting and Supreme Court dropped "arguably" only there).

*Federation*, it formulated the test to require the unions to “show that they *are* within the zone of interests sought to be protected through the PES.”<sup>252</sup> The “arguable” language apparently was designed to lower the test’s threshold.<sup>253</sup> This linguistic change is significant: by removing “arguable,” the zone test merges with the private right of action cases. Only direct beneficiaries will be able to meet the test.

Analyzing a statute to discover direct beneficiaries reflects general concerns about judicial interference with the executive at the behest of those with broad-based interests. It explains the Supreme Court’s attempt to put teeth in the previously tame “zone-of-interest” test.<sup>254</sup> The discussion in *Defenders of Wildlife* of the meaning of a citizen’s suit provision serves a complementary purpose. Congress may not confer standing on a party who was not injured with particularity: “Individual rights . . . [the vindication of which is the judicial function] do not mean public rights that have been legislatively pronounced to belong to each individual who forms a part of the public.”<sup>255</sup> Strict injury in fact and zone-of-interest tests limit those who may seek conformity with congressional demands.

## VI. Further Trends: Sovereign Immunity and The “New” Nondelegation

### A. STANDING AS SURROGATE FOR SOVEREIGN IMMUNITY

Strict standing and ripeness analysis also may mark a resurgence of sovereign immunity in the guise of standing.<sup>256</sup> In an early article, Justice Scalia praised an opinion by Justice Brandeis that seemingly limited sovereign immunity claims to arguments against legislative action and delegated protection of the executive to two doctrines: standing and the ministerial-discretionary dichotomy.<sup>257</sup> Use of standing in this manner would insulate the agency from judicial review.<sup>258</sup>

Relating sovereign immunity to standing would begin with a presumption against review. Nevertheless, on a superficial level, Justice Scalia’s refusal to allow standing in *National Wildlife Federation* could seem ironic in light of his earlier

252. *Air Courier*, 111 S. Ct. at 917 (emphasis added), citing *National Wildlife Fed’n*, 110 S. Ct. at 3177. See also *Air Courier*, 111 S. Ct. at 918: “Specifically, ‘the plaintiff must establish that the injury he complains of (*his* grievement, or the adverse effect *upon him*) falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis of his complaint.’ ” (quoting, *National Wildlife Fed’n*, 110 S. Ct. at 3186) (emphasis in original).

253. Fletcher, *supra* note 229, at 263-64 (“arguably” means presume standing, not that one should make a tentative decision on whether plaintiff is entitled to sue).

254. Therefore, it might signal a change in another of the prudential limitations on standing, namely, the inability to champion the rights of third-parties. *Cf.*, the zone test and its underlying justifications of concern for immediacy and individual harm. The Court characterized the PES as a “competition statute that regulates the conduct of competitors of the Postal Service.” *Air Courier*, 111 S. Ct. at 920 n.5. Therefore, it could rely on other cases denying employees standing to enforce competition laws “because they lack competitive and direct injury.” *Id.*

255. *Defenders of Wildlife*, 112 S. Ct. at 2145.

256. Scalia, *supra* note 150, at 904-5 (standing can do the work of sovereign immunity).

257. *Id.* at 903-07, discussing *Morrison v. Work*, 266 U.S. 481 (1925).

258. Compare Fallon, *supra* note 43, at 24-30 (standing analysis displacing more flexible doctrine of mootness in federal litigation predicated on past injuries).

writings. *National Wildlife Federation* involved a challenge to actions of the Department of Interior. Justice Scalia's article noted that sovereign immunity was almost never raised as a defense to such suits.<sup>259</sup> Looking closer, however, there is consistency. The cases allowing review of Interior decisions cited by Justice Scalia involved individuals claiming that they were denied specific resources.<sup>260</sup> The *National Wildlife Federation* plaintiffs, of course, were not developers but preservers and raised issues of general concern rather than individual rights. Therefore, standing as a substitute for sovereign immunity would reflect the private rights model of standing.

### B. THE "NEW" NONDELEGATION

In addition to providing echoes of sovereign immunity, restricting judicial access may, in a roundabout manner, be forwarding the nondelegation doctrine. The nondelegation doctrine insists that Congress cannot delegate legislative authority and must confine administrative action by relatively precise standards.<sup>261</sup> No statute has been invalidated on the theory since 1935.<sup>262</sup> The doctrine has, however, garnered some recent express support.<sup>263</sup> More importantly, the doctrine's aims are underscored by the Supreme Court's standing and ripeness cases and other developments.

Denying judicial review will force Congress's hand.<sup>264</sup> It will be required to legislate with specificity because if it speaks in generalities, the judiciary will not constrain an agency and force it to comply with underlying policy goals. In a seeming contradiction, by a court allowing too much agency discretion through approving too much delegated authority, the desired end of the nondelegation doctrine may be met. Restricted standing and ripeness rules play a role in this resurgence of an old doctrine.

If no review may be had of a general agency program, Congress will be forced to act if it is displeased with agency performance. Congress may act

259. Scalia, *supra* note 150, at 917-18.

260. *See, e.g., id.* at 875-82, citing *Udall v. Tallman*, 380 U.S. 1 (1965).

261. *See Stewart & Sunstein, supra* note 209, at 1260-61 (doctrine promotes political accountability and predictability for those benefitted or regulated).

262. *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

263. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting) and *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring.) For the pros and cons of reinstating the doctrine, *see generally*, Symposium, *The Uneasy Constitutional Status of the Administrative Agencies, Part I*, 36 *AMER. U. L. REV.* 295-492 (1987). For criticisms, *see, e.g.,* Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 *YALE L.J.* 341, 366-67 (1988) (judicial review should mandate internal and budgetary consistency to interpret statute); Richard J. Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 *TEX. L. REV.* 469, 489-502 (1985) (reinvigorating doctrine appealing in abstract but impractical); and Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 *TEX. L. REV.* 1175, 1205 (1981) (if reinstate and refuse to allow generalities, Congress would pass less regulatory law).

264. *Cf.,* Murchison, *supra* note 18, at 173 (ripeness forces Congress's hand). Kevin W. Saunders, *Agency Interpretations and Judicial Review: A Search for Limits On the Controlling Effect Given Agency Constructions*, 30 *ARIZ. L. REV.* 769, 796-98 (1988) (doctrine could apply to whether agency construction can have controlling weight on judicial review).

directly against the agency by restricting an agency's budget. To remove judicially created ripeness barriers, it may authorize courts to review specific regulations immediately upon promulgation.<sup>265</sup> Restraints on standing and ripeness may require more congressional action, but other Supreme Court pronouncements about the relationship between the courts and agencies also could result in more specificity from Congress. No law need be formally invalidated under the nondelegation doctrine for a parallel result to occur under this mirror-image nondelegation doctrine.

Congress's ability to legislate is further challenged because the *Chevron*<sup>266</sup> doctrine also insulates agencies from judicial interference. *Chevron's* role in the new nondelegation doctrine is peculiar to the point of being perverse because it implicitly rejects the argument that Congress cannot delegate resolution of policies to other branches. The Court in *Chevron* recognized that the policy at issue originated in the White House and therefore confirmed the President's power to control agencies and make policy choices.<sup>267</sup> Nevertheless, under *Chevron*, if Congress has not clearly spoken on a matter, and has either explicitly or implicitly granted the agency authority to regulate, the role of a court is limited: "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."<sup>268</sup> This helps erode judicial review.<sup>269</sup>

The doctrine goes beyond mere deference to an agency. Deference implies the possibility of disagreement, but *Chevron* gives legislative effect to agency interpretations.<sup>270</sup> Consequently, courts are not actively reviewing agency interpretations of

265. See Justice Scalia's point that early intervention is only allowed when congressionally authorized. *National Wildlife Fed'n*, 110 S. Ct. at 3190.

266. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See generally, Sunstein, *supra* note 195, at 675 (1990) (*Chevron* altered the distribution of national powers among the courts, Congress, and administrative agencies). *But see* Scalia, *supra* note 168, at 517 (not necessarily new law but simply provides a background rule giving agencies the primary interpretive role unless Congress designates differently).

267. *Chevron*, 467 U.S. at 865. *See also* Pierce, *supra* note 263, at 503.

268. *Chevron*, 467 U.S. at 844. Conversely, if Congress has clearly spoken, both the agency and Court are bound; "[they] must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

269. The retreat from judicial review is further illustrated by *Heckler v. Chaney*, 470 U.S. 821 (1985) (no review of FDA decision to not take enforcement action against users of lethal drugs from capital punishment). At least in the case of agency inaction, *Heckler* demands that courts operate from the presumption that review is not available. 470 U.S. at 834-35.

270. Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis And a Proposal for Public Participation*, 1986 DUKE L.J. 346, 357 (expands agency rules receiving legislative effect from those for which explicit delegation of rulemaking exists to include ones promulgated under implicit authority). Although some question whether the doctrine should apply to questions of "pure" statutory construction, Justice Scalia maintains it should. Scalia, *supra* note 168, at 512. For defenses of such deference, see Michael Asimow, *Non-Legislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 414-15 (avoids challenges without persuasive arguments); Pierce, *supra* note 263, at 520-25 (presidential control is sufficient political accountability) and Scalia, *supra* note 168, at 517-18 (doctrine's strength is it allows law to change in light of changed circumstances). For more tempered defenses, see Shapiro & Glicksman, *supra* note 172, at 869 (if require more complex inquiry into clarity of congressional intent, doctrine not necessarily bad) and Sunstein, *supra* note 208, at 2076 (doctrine is plausible reconstruction of Congress's desires and role of agencies if appropriately limited).

the statutes they administer.<sup>271</sup> A court may not substitute its view of a statute's meaning for that of the agency if the statute interpreted was ambiguous.<sup>272</sup>

More and more, almost all statutes are found to have ambiguity of some degree.<sup>273</sup> This increases reliance on agency interpretation.<sup>274</sup> Because the courts must compel an agency to implement what Congress has clearly stated,<sup>275</sup> Congress will have to authorize both actions and priorities explicitly and cease granting agencies policy discretion<sup>276</sup> and execution discretion.<sup>277</sup> To do so will be difficult.<sup>278</sup> Nevertheless, if Congress does not act with greater specificity, it risks having its proposals misinterpreted.

The Supreme Court has modified not only judicial roles, but also those of Congress through its cases delineating judicial review of agency action. *Chevron* removes courts from active policing of agency compliance with less than specific congressional intent. Standing and ripeness decisions reflect the conservative Court's concern with the role of the judiciary and seek to limit it to protecting individual rights that might be trammelled by agency action. They limit use of the courts to seek general agency compliance with the will of Congress. In sum, the executive branch is strengthened and the other branches weakened.<sup>279</sup>

271. Although *Chevron* dealt with rules promulgated after notice and comment, courts cite it as precedent for the view that even informal agency pronouncements are binding unless arbitrary or capricious. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986) (letter threatening enforcement action without the need for a pre-cancellation hearing). Justice Scalia maintains it should apply to agency determinations made in the ordinary course of business, but not to litigation positions. Scalia, *supra* note 168, at 519-20.

272. *Chevron U.S.A. Inc.*, 467 U.S. at 843 ("question for the court is whether the agency's answer is based on a permissible construction of the statute"). Justice Scalia explains the case as informing Congress of who would resolve ambiguity so that it could accept or modify the roles. Scalia, *supra* note 168, at 517.

273. Shapiro & Glicksman, *supra* note 172, at 859 (presumption of ambiguity) and Saunders, *supra* note 264, at 778-83 (final erosion of judicial review comes from ease with which courts find ambiguity). *But see* Scalia, *supra* note 168, at 515 (finding ambiguity requires court to compare competing interpretations "only when the court concludes that the policy furthered by *neither* interpretation will be clearly 'better' (in the sense of achieving what Congress apparently wished it to achieve).") and Sunstein, *supra* note 208, at 2091-92 (mere fact another plausible interpretation exists will not be sufficient ambiguity).

274. Explained by Professor Strauss as a tendency by the Supreme Court to manage its case load by relying on agencies that not only have "specialist" expertise, but have national scope and thus can rein in disparate Circuit Courts. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUMBIA L. REV. 1093, 1114-22, 1126 (1987).

275. *Chevron U.S.A. Inc.*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") *See also* *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978).

276. Koch, *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 483-84 (1986) (power to take action to forward societal goals).

277. *Id.* at 479. (power to fill in details from vague, general or incomplete statutes).

278. Strauss, *supra* note 274, at 1116 (unrealistic to think Congress can correlate all aspects of legal order). Professors Shapiro and Glicksman, however, argue that to a certain extent Congress has already begun to legislate more specifically. Shapiro & Glicksman, *supra* note 172, at 820 (primarily spurred by congressional displeasure with Reagan appointees, not the Supreme Court).

279. *Cf.*, Justice Blackmun's argument that courts should enforce procedural duties: "[T]he principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates." *Defenders of Wildlife*, 112 S. Ct. 2158 (Blackmun, J., dissenting).



## VII. Conclusion

The lower courts have not rushed to deny standing dramatically because of *National Wildlife Federation* and *Air Courier*.<sup>280</sup> There is, however, a sense in the lower courts that they must tread carefully because a signal has been sent: environmental cases may no longer have a relaxed standing threshold.<sup>281</sup> Recent Supreme Court decisions have aggressively continued the trend of restricting access to the courts for parties complaining of agency action but who are not directly regulated by the agency. One reason for this is that strictly interpreting standing and ripeness doctrines is fundamental to the more general conservative agenda. It reflects not only the current majority's belief in the limited role of the judiciary, but also signals a resurgence in respect for agency decisionmaking when Congress fails to make clear-cut policy choices.

The result of these changes is to cement the private rights model of judicial access more definitely. The courts would not be involved in public value determinations, which is not necessarily an objectionable result.<sup>282</sup> However, congressional value determinations may be lost if beneficiaries of programs are unable to seek judicial review at the threshold level of standing. Courts will not even be able to ascertain whether an agency is clearly violating statutes rather than making a delegated policy choice.

In a government that has never had static relations between the branches,<sup>283</sup> the pendulum has swung toward the executive. By limiting access to courts, in conjunction with demanding judicial deference to agency interpretations, the Supreme Court has removed an important "check and balance" on the executive and also threatened congressional prerogatives. In so doing, the Court first denigrates an important judicial function, namely that of telling what the law is, in favor of limiting the judicial role to protection of individual rights. Judicial review, however, is a necessary component of the checks and balances of our system. Congress cannot micro-manage every agency. The political process is also an inadequate control. People voting for the executive branch merely vote for a President, and such vote cannot reflect either approval or disapproval of the myriad of decisions agencies have or will make in a four-year term.

Restricted judicial access and restricted judicial review, therefore, enfeeble not only the judiciary, but weaken Congress. Its voice may be lost unless Congress

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280. Mansfield, *supra* note 6, at 54-62.

281. See, e.g., *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 84 (3d Cir. 1990) (Aldisert, J., concurring) ("I am quick to recognize that *Lujan v. National Wildlife Fed'n* is not precise precedential authority, but it does nevertheless constitute a direction that the Court desires us to travel in environmental law cases."). For the argument that the Supreme Court previously allowed a relatively slight showing to suffice for standing, see Perino, *supra* note 8, at 144.

282. Actual factual allocations of limited resources, which require value judgments, should be made by either Congress or the agency because they can best balance competing interests over a wide spectrum. Courts are limited by both lack of expertise and the scope of the controversy before it. See Marla E. Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law*, 18 *ECOL. L.Q.* 43, 91 (1991).

283. Strauss, *supra* note 178, at 604 (continual flex, growth and competition between branches).

reasserts its priority in policymaking.<sup>284</sup> The "new" nondelegation doctrine, which is a mirror-image of the old, makes broad delegations of power to agencies ineffectual because the courts will not restrain agencies to paths that would conform with generalized congressional intent. Rather than directly invalidating statutes, the new version simply allows frustration of congressional intent if Congress cannot clearly express its views.

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284. As an alternative to specific substantive guidelines, Justice Kennedy suggests Congress could preserve judicial review by defining injuries and explicating chains of causation when it legislates in a setting of complex relationships. *Defenders of Wildlife*, 112 S. Ct. at 2146-49 (Kennedy, J. concurring).

