

1992

# Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers

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## Recommended Citation

68 N. D. L. Rev. 1 (1992).

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# STANDING AND RIPENESS REVISITED: THE SUPREME COURT'S "HYPOTHETICAL" BARRIERS

BY MARLA E. MANSFIELD\*

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## I. INTRODUCTION

Recently, the Supreme Court decided two cases, namely *Lujan v. National Wildlife Federation*<sup>1</sup> and *Air Courier Conference of America v. Postal Workers Union, AFL-CIO*.<sup>2</sup> Both deal with access to the judiciary for review of agency action. Analysis of the cases might at first bring to mind the childhood chant of "Sticks and stones may break my bones but names will never hurt me," but with the ending transposed to "a hypothetical will never hurt me." In the legal setting, however, the bravado-laden assertion might not be true: when courts discuss "hypotheticals" the *dicta* created can influence the legal process. *Dicta* must be taken into account, especially when the digressing court is the Supreme Court.<sup>3</sup> These recent cases dealing with judicial review exemplify this.

In these two cases, the conservative majority<sup>4</sup> forwarded its vision of the proper role of courts. The majority's view could tighten judicial access, making it harder for parties other than those directly regulated by an agency to challenge the agency's action. Nevertheless, as the justices objecting in *Lujan*<sup>5</sup> and *Air Courier*<sup>6</sup> noted, what the majority did in each was to indulge in hypotheticals. The hypotheticals in these cases may hurt because they inappropriately limit review of agency action.

By contrast, the direct holding of *Lujan v. National Wildlife Federation* does not change traditional standing doctrine, nor does it create too onerous a barrier to judicial access. *Lujan* only directly requires that the plaintiff employ specificity when expressing use of the particular land affected by agency action. This would enable the plaintiff to be counted among those with an "injury in fact" and therefore entitled to standing.<sup>7</sup> The majority

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1. 110 S. Ct. 3177 (1990).

2. 111 S. Ct. 913 (1991).

3. See, e.g., Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 84 (3d Cir. 1990) (Aldiser, 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."), cert. denied, 111 S. Ct. 1018 (1991).

4. Although "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.

5. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3201 (1990) (Blackmun, J., dissenting) (because the majority found no standing at all, this portion of majority opinion is "abstract" and inappropriately concerned with scope of relief).

6. *Air Courier Conference of America v. Postal Workers Union, AFL-CIO*, 111 S. Ct. 913, 922 (1991) (Stevens, J., concurring in result).

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

opinion, however, contains two additional propositions: a general "program" is not an "action" subject to appeal,<sup>8</sup> and court intervention might not be "ripe" until actual earth-moving activity begins on the public lands.<sup>9</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 *Lujan*.

Similarly, *Air Courier Conference of America v. Postal Workers Union, AFL-CIO*<sup>10</sup> could have been a narrow decision with no general impact on standing law. The concurrence noted that the Administrative Procedure Act (APA) does not apply to the statute under which the challenge was brought, and the action was therefore unreviewable.<sup>11</sup> Nevertheless, the majority denied standing under the so-called "zone of interest" test,<sup>12</sup> a prudential limitation on standing. The test demands a particular type of connection between the plaintiff's injury and the "relevant statute."<sup>13</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 by the Court as "not . . . especially demanding."<sup>14</sup> Interestingly, those who merely concurred with the judgment in the opinion containing this easily-met depiction did so because they thought the case could have been resolved by simple use of precedent.<sup>15</sup> Therefore, they labelled the Court's comments on the liberality of the test "a wholly unnecessary exegesis on the 'zone of interest' test."<sup>16</sup> Except for Justice Stevens,<sup>17</sup> the two zone of interest cases reveal reversed fortunes in whether jus-

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8. *Id.*

9. *Id.* at 3190-91.

10. 111 S. Ct. 913 (1991).

11. *Air Courier Conference of America v. Postal Workers Union, AFL-CIO*, 111 S. Ct. 913, 921 (1991) (Stevens, J., concurring in result).

12. *Id.* at 918-20.

13. *Id.* at 921. 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 the relevant statute . . ." 5 U.S.C. 702 (1988). See Appendix, *infra* notes 432-36 and accompanying text.

14. *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. Orgs., Inc. v. Camp*, 397 U.S. 150, 168 (1970) (Brennan, J., and White, J., concurring).

15. *Clarke*, 479 U.S. at 410 (Stevens, J., concurring, joined by Rehnquist, C.J. and O'Connor, J.).

16. *Id.* Two explanations of this urge to provide supplemental guidance may exist. One is systemic: limited opportunities to address problems may force the Supreme Court to respond to requests for clarification from commentators and lower 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 COLUM. L. REV. 1093, 1103

tices are in the majority or dissent, and exemplify the change in the Supreme Court's philosophical orientation.

In the earlier case, the more conservative justices, who desire less court access, bemoaned the expansive "hypothetical" of the more liberal justices.<sup>18</sup> In the more recent *Air Courier*, those who were accused of engaging in hypotheticals before, now accuse the conservative justices of doing the same.<sup>19</sup> One reason for these recurrent digressions is that standing is as important to the current conservative agenda as it was to the more liberal agenda of prior courts.<sup>20</sup> Controlling access to courts has ramifications beyond the esoteric realm of legal theory; standing and ripeness constraints affect which laws are enforced and how.

If nothing else, therefore, *Air Courier* and *Lujan* reflect a "mood" on the part of the Supreme Court to decrease access to the judiciary.<sup>21</sup> The two cases are, however, more than this. They culminate a trend within the Court, one which 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>22</sup> According to these conservative justices, "separation of powers"<sup>23</sup> doctrine requires the judiciary to refrain from usurping either executive or congressional

(1987). The second is more specific to the particular case being decided: ideological disputes may require supplementation through concurrences. See *id.* at 1105 n.51.

17. Justice Stevens concurred in both *Air Courier* and *Clarke*.

18. *Clarke*, 479 U.S. at 410 (Stevens, J., concurring, joined by Rehnquist, C.J. and O'Connor, J.). Justice Scalia participated in the decision as a judge on the D.C. Circuit Court of Appeals. He dissented from that court's treatment of standing. To him, the plaintiffs were beyond the zone of interest of the statute; he criticized the appellate court for collapsing the zone test with the injury in fact test. *Securities Indus. Ass'n v. Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir.), *reh'g denied*, 765 F.2d 1196 (D.C. Cir. 1985) (Scalia, J., dissenting). Thus, three of the *Air Courier* majority are aligned in the *Clarke* dispute.

19. *Air Courier Conference of America v. Postal Workers Union, AFL-CIO*, 111 S. Ct. 913, 921 (1991) (Stevens, J., concurring with Marshall, J. and Blackmun, J.). The same justices dissented in *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3194 (1990). Justice Brennan had joined them in *Lujan*. His replacement, Justice Souter, aligned with the majority in *Air Courier*, making the restrictive majority more solid. The "liberal" trio, however, continued to insist on judicial access in their recent dissent in *West Va. Univ. Hosp. v. Casey*, 111 S. Ct. 1138 (1991) (contrary to majority, § 1988 attorney fee provision covers expert fee reimbursement).

20. One example of its importance is the fact that the Supreme Court granted *certiorari* in a third case dealing with such issues. *Defenders of Wildlife, Friends of Animals v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, *Lujan v. Defenders of Wildlife*, 111 S. Ct. 2008 (1991). See also *Robertson v. Seattle Audubon Soc'y*, 931 F.2d 590 (9th Cir.), *cert. granted*, 111 S. Ct. 2886 (1991) (whether 9th Circuit correctly concluded that separation of powers forbids Congress passing a law that specified factual results in two pending lawsuits by name).

21. Cf. Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1490-91 (1983) ("A standard of judicial review expresses only a 'mood.'") (footnote omitted).

22. See *infra* notes 272-81 and accompanying text.

23. See *infra* notes 242-56 and accompanying text. Restricting standing may enforce not only the idea of separation of powers, but also sovereign immunity. See *infra* notes

prerogatives. Under their influence, the Supreme Court therefore will employ standing and ripeness to prevent what the conservatives would call government by the judiciary.<sup>24</sup> This stance reflects the private rights model of standing<sup>25</sup> and, to a certain extent, uses standing as a surrogate for sovereign immunity.<sup>26</sup>

Closing the door to judicial review, however, leads to an imperious executive.<sup>27</sup> This is especially true when 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>28</sup> 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 member of Congress might believe it is the best or most appropriate interpretation of the law.

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 petition Congress to change the law. While the concept 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 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 put the two recent cases in historical perspective. Section II presents an overview of basic history and criticisms of standing and ripeness jurisprudence. Section III takes a detailed look at *Lujan* and *Air Courier*. Employing the discussion in Section II, Section IV shows that the current tightening is a return to the original individualistic private rights model of standing. The philosophical underpinnings and judicial precursors of this position are examined and critiqued. Section V reviews lower court responses to the two judicial access cases to see if thresholds are truly being raised.

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323-25 and accompanying text. It also may implicate the nondelegation doctrine. See *infra* notes 328-32 and accompanying text.

24. See generally C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862 (1985) (conservative movement generally against government by the judiciary).

25. See *infra* notes 37-46 and accompanying text.

26. See *infra* notes 328-32 and accompanying text.

27. Cf. Arthur S. Miller, *The President and the Faithful Execution of the Law*, 40 VAND. L. REV. 389, 395 (1987) (Presidents follow the "laws of politics" and judiciary is a "sapless and toothless branch in such circumstances").

28. 467 U.S. 837 (1984).

Finally, the Conclusion considers ramifications of the current Supreme Court trend.

## II. THE LAW OF STANDING AND RIPENESS

### A. HISTORY OF STANDING LAW AND GENERAL CRITIQUES

Standing is the metaphor<sup>29</sup> used to designate a proper party to a court action: "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue."<sup>30</sup> Or, as then Judge Scalia put the concept colloquially: "[Standing] is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"<sup>31</sup> This article will concentrate on standing to seek review of an agency action.<sup>32</sup>

The jurisprudence of standing has been criticized so heavily that it may appear to be a camouflage for unprincipled subterfuge rather than a jurisprudence.<sup>33</sup> Even the Supreme Court has pithily trumpeted not only the doctrine's shortcomings, but also the Court's own inability to rationally apply the so-called "black letter" law it announces.<sup>34</sup> Solutions to the problem have been diverse.<sup>35</sup> The purpose of this article is neither to settle this dis-

29. See generally Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) ("metaphors" may trap analysis by forcing a doctrine to fit the metaphor which, in the case of "standing," resonates with images of individual action).

30. *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972).

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

32. See David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 48-49 (standing analysis complicated by confusing standing to challenge violation of statute with that required if Constitution at issue).

33. See, e.g., KENNETH C. DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 24:1 (K.C. Davis Pub. Co. 2d ed., 1983). See also Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 73 (1984) (arguing that the law of standing is so disjointed that Court itself might see standing as a manipulable doctrine valuable only for nonjurisdictional ends).

34. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982). ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it . . .").

35. See, e.g., Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1046-47 (1968) (injury in fact not constitutionally required and ideological plaintiff proper); DAVIS, *supra* note 33, at 24.2 (key to standing is injury in fact); Winter, *supra* note 29, at 1515 (must recognize communitarian as well as individual goals); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222-23 (1988) (depends on claim's merits and not injury in fact; for statutorily based rights, Congress should delineate standing); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1466 (1988) (develop a public law of standing by recognizing Congress' ability to resolve); David R. Dow, *Standing and Rights*, 36 EMORY L.J. 1195, 1217-18 (1987) (need citizen standing rather than injury in fact when societal right violated); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 692 (1973) (for access screening, cost of suit

pute nor to provide an overreaching theory of standing, but to understand where the current cases fit in the philosophical and historical scheme. The history of standing law shows an expansion from its roots and a new retrenchment.<sup>36</sup>

### 1. "Narrow" Standing: Private Rights Model

Initially only plaintiffs suffering wrong to a "legal interest" had standing to seek judicial review.<sup>37</sup> These plaintiffs were of two types, those with complaints analogous to a common law cause of action,<sup>38</sup> and those granted the right of appeal by being among the parties classified as "aggrieved" within a particular statute.<sup>39</sup> The two categories created a dichotomy—statutory and nonstatutory review.<sup>40</sup> In both instances, the emphasis was on the individualistic sphere, limiting judicial access to those vindicating private rights.<sup>41</sup> This mode of thinking allowed the regulated industry access to the courts, but made it more difficult for intended beneficiaries of regulation to proceed in court.<sup>42</sup>

Justices who supported the New Deal and the right of legislatures to experiment with social legislation championed this narrow

should be only barrier; use other doctrines to preclude review based on issues); Nichol, *supra* note 33, at 78-79, 92-93 (particularized injury insufficient gauge and must look to interests created by statute and Constitution); Lee A. Albert, *Standing to Challenge Administrative Action*, 83 YALE L.J. 425, 428-29 (1974) (standing not a preliminary matter, but is actually whether a claim for relief exists); Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1706 (1980) (plaintiff need only have a personal stake in action sufficient to ensure concrete and adversarial presentation).

36. For more complete discussion, see Winter, *supra* note 29, at 1417-58.

37. *Tennessee Elec. Power v. Tennessee Valley Auth.*, 306 U.S. 118, 137 (1939) (stating that no standing exists "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.") (footnote omitted).

38. This type of plaintiff includes those asserting interests created by the Constitution or a statute if the remedy of court review was traditionally provided. See Scott, *supra* note 35, at 649-52.

39. See Albert, *supra* note 35, at 429 (statutory aggrievement also required a "legal interest" to be invaded).

40. Scalia, *supra* note 31, at 889 (initial scheme gave broader rights of review under specific "statutory" grants; nonstatutory 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 n.13 (1970).

41. Thus referred to as a "private law model." Sunstein, *supra* note 35, at 1438 (private law model arose from two ideas: belief that judiciary exists to protect common law interests from government and fear of those sympathetic to regulation that regulation would be hindered without standing barriers). 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 Administrative State, 92 YALE L.J. 1129, 1131 (1983) (citizen participation and official accounting for public decisions are available on demand).

42. Sunstein, *supra* note 35, at 1434-36 (evidenced by fact that no separate law of standing existed; access was based on whether a duty to the plaintiff was violated).



door to the courthouse.<sup>43</sup> They feared that court interference could too easily result in invalidation of statutes under the substantive due process of Lochnerian thinking.<sup>44</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>45</sup> Hence, the heyday of the agency under the New Deal has been referred to as a "technocratic era."<sup>46</sup>

## 2. "Broadened" Access

A period of agency distrust followed the enshrinement of the agency during the New Deal. Concurrently, two important legal changes opened access to the courts by those questioning agencies.<sup>47</sup> The first building block for increased access was a reinterpretation of the types of injuries that could be judicially cognizable.<sup>48</sup> Injuries other than economic harm could suffice.<sup>49</sup> The second impetus was interpreting the APA as an independent source of standing to review agency action when no other remedy was available.<sup>50</sup> This led to the liberally interpreted "zone of

43. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

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.

*Id.* at 152 (Frankfurter, J., concurring) (citations omitted).

44. See Sunstein, *supra* note 35, at 1436-38; Fletcher, *supra* note 35, at 1456-57. See generally *Lochner v. New York*, 198 U.S. 45 (1905) (state law regulating work hours unconstitutional).

45. 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).

46. Shapiro, *supra* note 21, at 1496-97. See also Mashaw, *supra* note 41, at 1129 ("statist" conception of legal rights depends on legislative definitions of public welfare for content); *id.* at 1131 ("statist" rights structure limits participation).

47. 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).

48. Sunstein, *supra* note 35, at 1438-39. Professor Nichol argues that the difference in what could be considered a cognizable "injury" evolved 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, *supra* note 33, at 89-90.

49. The traditional citation is *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). But for arguments that *Sierra Club* did not liberalize standing but imposed restrictions through its injury in fact requirements, see Mashaw, *supra* note 41, at 1141, and Jerry W. Markham, *Standing in the Political Arena*, 45 ALB. L. REV. 932, 935 (1981).

50. Whether this expansion was initially intended by Congress is debatable. Compare DAVIS, *supra* note 33, at § 24.3 (injury in fact was intended test; "within the meaning of the relevant statute" not to modify "adversely affected") with Scalia, *supra* note 31, at 887-88 (Congress only codifying existing law); Sunstein, *supra* note 35, at 1441-42 (APA not intended to extend standing).

interest" test,<sup>51</sup> which could reverse prior holdings affecting who could enter the courthouse.

The strength of the change is obvious from the "competitor" cases. Under the earlier private rights view, a competitor could not challenge actions of the Tennessee Valley Authority, because there was no "legal interest" in being free from competition.<sup>52</sup> 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.<sup>53</sup> The test did not require proof that Congress had intended to grant a private right of action to the protesting parties.<sup>54</sup> Consequently, the zone of interest test resulted in a lessening of the burden of proof for access to court.<sup>55</sup> To a certain extent, it authorized private attorneys general.<sup>56</sup>

The increased access to the judiciary prompted a more public-

51. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156 (1970); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). See Appendix, *infra* notes 433-41 and accompanying text.

52. *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-38 (1939). See also *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1937) (rejecting competitor's objection that loans to another were unauthorized). The *Alabama Power* Court used an analogy to the private sphere, namely, whether the owner of a grocery store could object to a competitor getting a loan because the loan would be *ultra vires* if the grocer had no connection with the lending bank. *Id.* at 481. The Court responded: "Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do." *Id.* While the argument may be strong when only private interests such as bank's profits are involved, regulation is based on public interests and thus requires different analysis.

53. *Clarke*, 479 U.S. at 403 (policy was to prevent ills that could accompany a monopoly). See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1281 (1982) (zone test identifies public values relevant to particular administrative policy). For examples of other cases granting competitor standing, see *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970). See also *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (competitor may be the only one with incentive to uncover violations of law).

54. *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 were enacted." *Id.* (quoting *Cort v. Ash*, 422 U.S. 66 (1975)). See also *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (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 53, at 1289-1316.

55. See Scott, *supra* note 35, at 663 (use of word "arguably" before "within the zone of interest of the statute" reduces burden on plaintiff to show Congress' desire to protect; mere indication that it knew of plaintiff's interest might suffice); Fletcher, *supra* note 35, at 234-35 (test resembles standard to determine if federal claim exists; only denied if wholly frivolous or insubstantial).

56. Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 311-12 (1984) (the authorization occurred because competitive impact was an interest regulators must recognize).

oriented view of judicial review<sup>57</sup> and of administrative law in general.<sup>58</sup> No longer were agencies to be trusted to single-handedly administer the public interest.<sup>59</sup> 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.<sup>60</sup> In addition to the liberal zone of interest test, courts fostered this citizen role by manipulating the "fairly traceable" and "redressability" elements of injury in fact.<sup>61</sup> However, manipulation implies an intellectual exercise that may result in an opposite conclusion.

Several cases illustrate the liberal tendency: a refusal to use the "fairly traceable" and "capable of redress" requirements to restrict standing. The most prominent example is *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.<sup>62</sup> In *SCRAP*, a group of law students objected to railroad rates that were formulated without an Environmental Impact Statement.<sup>63</sup> For injury, *SCRAP* claimed its members "suffered economic, recreational and aesthetic harm"<sup>64</sup> because the freight structure did

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57. Referred to as a part of an independent "public law." Sunstein, *supra* note 35, at 1450. Mashaw's terminology calls it "an individualistic model." Mashaw, *supra* note 41, at 1131. In the dichotomy of Shapiro, this would be a "democratic" tendency. Shapiro, *supra* note 21, at 1497. See also Robert L. Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 YALE L.J. 1174, 1180-88 (1983) (labelled "public interest era"). Cf. Cass R. Sunstein, *Participation, Public Law and Venue Reform*, 49 U. CHI. L. REV. 976, 1001 (1982) (bipolar orientation of private law venue rules inappropriate for increased representation in public law litigation); Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (public law litigation differs from bipolar suit for money damages in numbers of parties affected and type of relief requested).

58. Stewart, *supra* note 47, 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).

59. Sunstein, *supra* note 35, at 1443 (judicial review changed so as to promote as well as check regulatory intervention). Rabin, *supra* note 57, at 1182-83 (judicial review changed because regulators faced issues of indeterminant harm which needed intangible values quantified, and many were skeptical about rational implementation of governmental policy). See generally James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363 (1976) (detailing rationales for skepticism about agency prowess). Professor Shapiro concluded that this period, with its loss of faith in expertise, reflected a distaste for both democracy and technocracy. Judges therefore entered as heroes of the layperson, creating a partnership with agencies through "hard looks" and added procedural protection. Shapiro, *supra* note 21, at 1497-99.

60. Professor Sunstein argues that three premises promoted standing for beneficiaries: 1) Congressional purposes could be defeated not only by overzealous regulation, but by withholding it; 2) capture made it incongruous to allow regulated access to court, but not beneficiaries; and 3) statutory rights of beneficiaries were as important as common law rights. Sunstein, *supra* note 35, at 1443-44.

61. See Appendix, *infra* text at note 419.

62. 412 U.S. 669 (1973).

63. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 679 (1973).

64. *Id.* at 678. More specifically, in its accepted allegations, *SCRAP* claimed each member "[u]ses the forests, rivers, streams, mountains and other natural resources

not encourage recycling and would therefore adversely impact the environment. Despite not only the generalized harm, but also an "attenuated line of causation,"<sup>65</sup> the Court refused to find that the facts alleged, if proven, would not place the students among the injured.<sup>66</sup> Moreover, the Court declined to require that an injury be "significant" and allowed a "trifle" to suffice.<sup>67</sup>

Other cases showed a similar tendency to relax "injury in fact" to allow a broad-based challenge to a general rule. The Supreme Court accepted that the Price-Anderson Act,<sup>68</sup> which limited liability in the event of a nuclear accident, could have "caused" nuclear plants to have been built.<sup>69</sup> Therefore, finding the Act unconstitutional could redress harm caused by the nuclear plant.<sup>70</sup> In *Bryant v. Yellen*,<sup>71</sup> residents were permitted to question whether the 160-acre limitation of Reclamation Law applies to certain private lands in the Imperial Valley. If the limitation applies, the Secretary of Interior must force the sale of excess acreage.<sup>72</sup> Because the Valley residents desired to purchase land and could not do so unless lands were required to be sold below market value, the Supreme Court found a particularized injury rather than a mere generalized desire to enforce the law.<sup>73</sup> Applying the limitation to the lands could "redress" their injury. Despite these liberal cases, the "fairly traceable" causation requirement and the redressability element provided dual-edged swords.

### 3. "Causation" Limiting Systemic Relief

There were several cases that were as extreme in denying

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surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes,' and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure . . . ." *Id.*

65. *Id.* at 688.

66. *Id.* at 689-90.

67. *Id.* at 687, 689 n.14.

68. 42 U.S.C. § 2210 (1988).

69. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 74-75 (1978).

70. *Id.* at 78 (rejecting requirement that plaintiff must negate "speculative and hypothetical possibilities . . . to demonstrate the likely effectiveness of judicial relief."). See also *id.* at 75 n.20. The liberality of this holding is evident: the injuries alleged in *Duke Power* included immediate impact to two lakes and a river. *Id.* at 73. This led Justice Stewart to comment, "An interest in the local water temperature does not . . . give . . . standing . . . to challenge the constitutionality of a law limiting liability in an unrelated and as-yet-to-occur major nuclear accident." *Id.* at 95 (Stewart, J., concurring).

71. 447 U.S. 352 (1980).

72. *Bryant v. Yellen*, 447 U.S. 352, 366 (1980). The private lands involved were those with water rights vested in 1929. *Id.*

73. *Id.* at 366-68.

standing as the *SCRAP* case was in granting it. Many of these cases dealt with claims that an agency had violated a law in a manner that injured people in addition to the particular plaintiff. Although explanations for distinctions between grants and denials of standing may abound, causation or redressability were the overt tools used to limit standing.

For example, the Supreme Court presumed that the threat of criminal prosecution would not necessarily make a father pay child support.<sup>74</sup> The Court also refused to believe that Internal Revenue Service (IRS) policies on tax deductibility would have the impact for which they were designed, namely, either promoting or discouraging certain activities.<sup>75</sup>

The IRS cases exemplify the difficulties plaintiffs faced when they sought systemic relief for widely-based problems. In *Allen v. Wright*,<sup>76</sup> for example, the Supreme Court did not permit a group of parents to challenge an IRS policy that the parents claimed allowed private nonprofit schools which discriminated against African-Americans to retain tax-exempt status.<sup>77</sup> According to the Supreme Court, the injury to the plaintiffs' rights to attend desegregated schools was not "fairly traceable" to the challenged action.<sup>78</sup> Moreover, the Court applied an extra level of analysis because the activities of third parties in response to the IRS policies would actually be required for a concrete remedy. No one could predict whether these third party actions would assist the plaintiffs. Standing, therefore, could be denied because a favorable ruling would not redress the harm.<sup>79</sup>

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74. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

75. *Allen v. Wright*, 468 U.S. 737, 757-58 (1984). Allowing a contribution to be tax deductible lowers the cost of the service provided by the organization receiving the contribution. A deduction subsidizes and promotes a desired activity. *Id.* at 785 (Stevens, J., dissenting). See also Fletcher, *supra* note 35, at 262.

76. 468 U.S. 737 (1984).

77. *Allen*, 468 U.S. at 739-40. The parents were not challenging a particular school's status, but were seeking class action status to represent all parents of children in school systems that were desegregating. *Id.* at 743. They sought a change in general IRS policy. *Id.* at 747.

78. *Id.* at 758. "The diminished ability . . . to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public-school integration." *Id.*

79. *Id.* "[I]t is entirely speculative . . . whether withdrawal of a tax exemption from any particular [private] school would lead the school to change its policies. . . . It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status." *Id.* (citations omitted). See generally Richard H. Fallon, Jr., *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").

Similarly, the Supreme Court in *Simon v. Eastern Kentucky Welfare Rights Organization*<sup>80</sup> rejected the argument that IRS requirements describing the amount of indigent care a hospital must provide in order to receive tax-exempt status impacted the plaintiffs' particular injuries, that is, denial of medical services.<sup>81</sup> To the Court, not only was redressability questionable, but the policies might not have caused the plaintiffs' specific harms. The adjective "speculative" tarred the plaintiffs' case.<sup>82</sup> Both the redressability and "fairly traceable" elements of injury in fact precluded relief for particularized injuries caused by general programs.

The unique problems of seeking systemic relief based on individual injury may be solved by careful phrasing of the injury. Characterizing an injury either broadly or narrowly may manipulate the causation and redressability requirements to reach a seemingly sensible result linguistically.<sup>83</sup> If the issue is whether a particular patient will receive medical care or a particular school child will have a more racially diverse classroom, then revision of a broad-based national policy might not directly redress that patient's or child's harm. National policies are, by definition, designed to affect the collective, not the individual.<sup>84</sup> However, if the rights that are denied are more broadly expressed, such as a right to a desegregated school system unsullied by wrongful charitable deductions, then the relationship between the injury and the challenged action is clearer and less speculative.<sup>85</sup>

The technique of manipulating the nature of the injury is illustrated in *Watt v. Energy Action Educational Foundation*.<sup>86</sup> In this

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80. 426 U.S. 26 (1976).

81. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976).

82. *Id.* ("It is purely speculative whether the denials of service specified in the complaint fairly can be traced to . . . [IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."). Sometimes, the Court not only finds that redressability or causation is speculative, but that the happening of the injury itself is speculative. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 105-08 (1983) (speculative whether plaintiff would be subjected to choke-hold in future); *Diamond v. Charles*, 476 U.S. 54, 66 (1986) (speculative whether enforcement of abortion controls would result in increased patients for pediatrician).

83. Sunstein, *supra* note 35, at 1465-66; Nichol, *supra* note 33, at 79-82.

84. Sunstein, *supra* note 35, at 1458 (Because regulation is designed to reduce risks that affect large numbers of people, regulatory beneficiary's injury is not discrete and individual as is typical at common law, but is "systemic, collective, or probabilistic.").

85. Professor Sunstein suggests that the plaintiffs in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), should have claimed their injury was "the impairment of the opportunity to obtain medical services under a regime undistorted by unlawful tax incentives." Sunstein, *supra* note 35, at 1465. Similarly, the plaintiffs in *Allen v. Wright* should have claimed "deprivation of an opportunity to undergo desegregation in school systems unaffected by unlawful tax deductions." *Id.*

86. 454 U.S. 151 (1981).

case, the state of California claimed that the Secretary of the Interior did not follow Congress' command to experiment with bidding systems for oil and gas leases on the Outer Continental Shelf.<sup>87</sup> Because California receives a share of revenue from such leases off its shore, the State had a direct financial stake that created an appropriate "distinct and palpable injury" for standing.<sup>88</sup> The United States argued, however, that the injury was not "redressable" by a court order to experiment with bidding systems, because a court could not compel the use of any specific system for leases off California. The Supreme Court assessed the injury in broader terms:

The essence of California's complaint, however, is that the Secretary of the Interior, by failing to test non-cash-bonus systems, has breached a statutory obligation to determine through experiment which bidding system works best.

....

We . . . [believe] the Secretary would use the most successful bidding system on all suitable OCS lease tracts, including those off the California coast.<sup>89</sup>

Under this more extensive reading, California met standing requirements. The Supreme Court accepted that the injury would be redressed by a favorable decision because the Secretary of the Interior would not refuse to adopt a superior system.<sup>90</sup>

Why the Supreme Court categorizes injuries in divergent ways and therefore reaches different conclusions about causation and redressability can be explained in several ways. One explanation might be that a value judgment on the underlying claims generated denials of standing.<sup>91</sup> A more principled, but *sub rosa*,

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87. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981).

88. *Id.* at 161.

89. *Id.* at 161-62.

90. *Id.* at 162. Occasionally the Court also broadly characterizes injuries in constitutional cases. See *Regents of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the plaintiff did not have to prove that but for the challenged affirmative action program, he would have been admitted to medical school. The injury was "the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race." *Id.* at 280 n.14. Cf. *Gilmore v. Utah*, 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting) (Eighth Amendment protects not only an individual, but societal interest against barbaric punishment so that mother of a condemned man has standing in her own right). *But see Whitmore v. Arkansas*, 110 S. Ct. 1717, 1725-26 (1990) (rejecting Marshall's theory).

91. *Allen v. Wright*, 468 U.S. 737, 782 (1984) (Brennan, J., dissenting) ("More than one commentator has noted that the causation component of the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims. The Court today does nothing to avoid that criticism."). See also *Flast v. Cohen*, 392 U.S. 83, 99 (1968) ("There are at work in the standing doctrine the many subtle pressures which tend

answer would be that the substantive nature of the claims called for different treatment.<sup>92</sup> For example, *SCRAP* dealt with an environmental problem at the dawn of environmental concern, when the nation was under the sway of the first Earth Day.<sup>93</sup> The *Simon and Allen v. Wright*<sup>94</sup> cases, however, involved tax policy, an area in which Congress provides only limited rights of judicial review.<sup>95</sup> Nevertheless, a more important distinction is apparent from another pattern: the restrictive standing cases more often occurred when the plaintiffs were intended beneficiaries of the statutes or policies than when they were the objects of regulation.<sup>96</sup>

#### 4. *The Agency Era*

Beginning in the mid-1970s, there was a return to a respect for agency and congressional prerogatives. This provides another clue to the disparate decisions on standing. 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, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,<sup>97</sup> the Court ultimately upheld a congressional decision to support the development of nuclear power.<sup>98</sup> In another case the same year, the Court declared:

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to cause policy considerations to blend into constitutional limitations.”); *Warth v. Seldin*, 422 U.S. 490, 520 (1975) (Brennan, J., dissenting) (majority exhibited “an indefensible hostility to the claim on the merits”). For commentators noting the imposition of value judgments or distinctions on merits, see, for example, *Nichol*, *supra* note 33, at 80; *Logan*, *supra* note 32, at 70; *DAVIS*, *supra* note 33, at § 24:26.

92. See, e.g., *Floyd*, *supra* note 24, at 920-22 (distinctions caused by value-neutral differences such as similarity of challenged action to prosecutorial discretion and the zone of interests test); *Nichol*, *supra* note 33, at 78 (constitutional issues more likely to run into federalism and separation of powers questions).

93. *SCRAP* was decided in 1973. Cf. *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (“These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment.”). See *Fletcher*, *supra* note 35, at 260 (*SCRAP* only discussed injury, but NEPA perhaps demands liberal standing because of type of statutory right at issue). See Michael A. Perino, Comment, *Justice Scalia: Standing, Environmental Law and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 144 (1987) (environmental cases had relaxed standing criteria).

94. 468 U.S. 737 (1984).

95. *Fletcher*, *supra* note 35, at 262.

96. *Sunstein*, *supra* note 35, at 1454 n.103 (regulated hospital would have had standing for review of the IRS policies at issue in *Simon*). Cf. *Metropolitan Sch. Dist. of Wayne Township v. Davila*, 770 F. Supp. 1331 (S.D. Ind. 1991) (school board that must expend funds has standing).

97. 438 U.S. 59 (1978).

98. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59 (1978). See also 42 U.S.C. § 2210(e) (1988) (Price-Anderson Act limitation on liability).



Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to re-examination in the federal courts under the guise of judicial review of agency action.<sup>99</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>100</sup> Standing allowed a congressional policy choice to be affirmed.

The other more generous grants of standing similarly aided agency policy choices because the grants upheld agency decisions that had been invalidated below. The history of agency policy in *Bryant v. Yellen*<sup>101</sup> is somewhat convoluted. The Department of Interior had reversed a long-standing position prior to the litigation.<sup>102</sup> The district court found the new Interior policy to be incorrect, thus confirming the original departmental interpretation.<sup>103</sup> The Department of Interior and the Solicitor General decided not to appeal and re-implemented prior administrative practice.<sup>104</sup> The intervenors then sought standing to appeal on their own right and prevailed in the court of appeals.<sup>105</sup> Therefore, the only way to return to the position the Department of Interior now advocated, without the cloud of the Ninth Circuit decision, was to grant standing to the intervenors.<sup>106</sup> Standing

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99. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978). See also *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (fundamental policy choice for nuclear energy lies with Congress, agencies, and total populace); *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1294 (D.C. Cir. 1984), *aff'd on reh'g sub nom.*, *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986) (en banc) (noting Supreme Court's disapproval of D.C. Circuit's interference with nuclear decision making).

100. See *Duke Power*, 438 U.S. at 102 (Stevens, J., concurring); DAVIS, *supra* note 33, § 24:33 (justified in *Duke* because constitutional uncertainties defeated congressional purpose).

101. 447 U.S. 352 (1980).

102. *Bryant v. Yellen*, 447 U.S. 352, 355 (1980). The Department of Interior had maintained that the 160-acre limitation for irrigation did not apply to pre-existing water rights in the Imperial Valley. *Id.*

103. *Id.*

104. *Id.* at 365-66.

105. *Id.* at 366. The court of appeals held that the Reclamation Act limitation was applicable to the Imperial Valley lands. *Id.*

106. *But see* DAVIS, *supra* note 33, at § 24:33 (unlike *Duke*, no practical reason mandating standing in *Bryant*).

would allow a ruling on the merits that would confirm the agency interpretation.<sup>107</sup>

Examined from the perspective of impact on agency choices, the post-Warren Court decisions that restrict standing and those that grant it can be explained as part of a single phenomenon: a trend away from active review of agency actions.<sup>108</sup> Courts are less apt to second-guess an agency or even force it to respond more fully, because more and more agency decisions are based not only on scientific evidence that requires complex predictions,<sup>109</sup> but also involve statutes in which Congress failed to give direct guidance on how or even what it wanted implemented.<sup>110</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>111</sup> In the early 1990s, the Court's response to an unclear statute is to allow the agency to fill in the blank.<sup>112</sup>

The so-called *Chevron* Doctrine<sup>113</sup> cemented this change. This 1984 case has two important facets. First, the agency is entitled to balance interests when Congress has not.<sup>114</sup> The second

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107. A similar rationale may explain the Court's desire to grant standing to the State of California in *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981). Again, the Supreme Court reversed a decision of the court of appeals, which had invalidated an agency interpretation of a statute. *Id.* at 169.

108. *Cf.* Fallon, *supra* note 79, at 45 (standing analysis overprotects defendants because it prevents adjudication as a threshold doctrine rather than deciding a case on the merits).

109. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."). *See also* Antonin Scalia, *Responsibilities of Regulatory Agencies under Environmental Laws*, 24 *HOUS. L. REV.* 97, 98 (1987) (substantial evidence test used to review factual determinations, but in complex situations a "court feels less competent to 'second guess' than it would the factual judgments of a jury."). *Cf.* *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (Bazelon, J., concurring) (unreliable to have technically illiterate judges substantively review math and science evidence).

110. Justice Scalia argues that the need for agencies to apply expertise to complex facts is no longer the main reason for deference to agencies. Deference is appropriate not because agencies are "experts," but because many decisions do not have one "correct" answer. They involve policy choices. 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. ENVTL. L. REV.* 465, 490-99 (1988).

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

112. *See Mobil Oil Exploration and Producing Southeast, Inc. v. United Distribution Cos.*, 111 S. Ct. 615 (1991) (upholding discretion of FERC).

113. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See generally* Cass R. Sunstein, *Law and Administration After Chevron*, 90 *COLUM. L. REV.* 2075, 2075 (1990) ("*Chevron* has altered the distribution of national powers among courts, Congress, and administrative agencies."). *But see* Scalia, *supra* note 110, at 517 (not necessarily new law but simply provides a background rule giving agencies the primary interpretive role unless Congress designates differently).

114. The Court explained how indeterminate statutes come about:

facet is its dogma on judicial review. 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>115</sup>

The *Chevron* Doctrine therefore helps to erode judicial review. It goes beyond mere deference to an agency. Deference implies the possibility of disagreement, but *Chevron* gives legislative effect to agency interpretations.<sup>116</sup> 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.<sup>117</sup> Consequently, courts are not actively reviewing agency interpretations of the statutes they administer.<sup>118</sup>

In addition to *Chevron's* impact on the scope of judicial review, a tendency to retreat from even implementing judicial

Congress intended to accommodate both interests [economic and environmental], but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance . . . , thinking that those with great expertise . . . would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and . . . each side decided to take their chances with the scheme devised by the agency.

*Chevron*, 467 U.S. at 865. Justice Scalia more pragmatically asserts that in most cases Congress probably did not consider either legislating a single result or conferring discretion. Scalia, *supra* note 110, at 517.

115. *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. For further discussion, see *infra* notes 334-40.

116. 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 rule making 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 110, at 512.

117. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 432-33 (D.C. Cir. 1986) (letter threatening enforcement action without the need for a precancellation hearing). Justice Scalia maintains *Chevron* should apply to agency determinations made in the ordinary course of business, but not to litigation positions. Scalia, *supra* note 110, at 519-20.

118. 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); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520-25 (1985) (presidential control is sufficient political accountability); Scalia, *supra* note 110, 517-18 (Doctrine's strength is that it allows law to change in light of changed circumstances). For more tempered defenses, see Sidney Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 869 (if it requires more complex inquiry into clarity of congressional intent, doctrine not necessarily bad); Sunstein, *supra* note 113, at 2076 (Doctrine is plausible reconstruction of Congress' desires and role of agencies if appropriately limited).

review is illustrated by *Heckler v. Chaney*.<sup>119</sup> This case involved a challenge to an agency's failure to act and partially reversed *Overton Park*'s<sup>120</sup> presumption that agency action is reviewable.<sup>121</sup> At least in the case of agency inaction, *Heckler* demands that courts operate from the presumption that review is not available.<sup>122</sup>

The insulation of agency determinations from judicial review mirrors the New Deal attitude. In fact, there has been a technocratic resurgence, a desire for agencies to rationally solve problems.<sup>123</sup> In such situations, 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>124</sup>

## B. HISTORY OF RIPENESS LAW AND GENERAL CRITIQUES

As with standing, ripeness law has changed through the years. The *Abbot* cases<sup>125</sup> completed a transformation of a doctrine that had initially restricted the regulated from obtaining pre-enforcement review. Ripeness jurisprudence, however, differs from standing law in the sense that it has not been subject to extensive criticism. Most legal scholars approve of how the doctrine currently operates,<sup>126</sup> although some question whether the doctrine,

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119. 470 U.S. 821 (1985) (no review of FDA decision not to take enforcement action against use of lethal drugs for capital punishment). Professor Sunstein identified an earlier cutback in judicial review; the Court moved from requiring "clear and convincing" evidence of a congressional intent to preclude review to a requirement that the intent be "fairly discernible" in *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984). See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 660 (1985).

120. 401 U.S. 402 (1971).

121. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410-11 (1971). For a general discussion of the limited place of unbridled and numinous discretion, see Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 498-501, 509-10 (1986).

122. *Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985). For effect of case on lower courts, see Shapiro & Glicksman, *supra* note 118, at 854-56.

123. Shapiro, *supra* note 21, at 1499-1500. Professor Shapiro argues that high productivity fueled a contempt for technocracy during the '60s and '70s. *Id.* Productivity was not as high in the 1980s. *Id.* Therefore, people examining Japanese models and desiring efficiency demanded that agencies not listen to all parties, but learn all facts. *Id.* Additionally, Professor Shapiro argues that an intuitive distrust of legislative vetoes could be traced to the fact that agencies, having been "judicialized" earlier, began to command more respect. Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 462-64 (1988). Congress was viewed as political and arbitrary. *Id.*

124. Sunstein, *supra* note 35, at 1432-33 (return to private law model); Mashaw, *supra* note 41, at 1129-30 (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. Shapiro & Glicksman, *supra* note 118, at 846-63.

125. *Abbot Lab., Inc. v. Gardner*, 387 U.S. 136 (1967); *Gardner v. Toilett Goods Ass'n*, 387 U.S. 167 (1967); *Toilett Goods Ass'n v. Gardner*, 387 U.S. 158 (1967). See *infra* notes 450-65 and accompanying text.

126. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 155 (1987). Cf. Brian C. Murchison, *On Ripeness and 'Pragmatism' in Administrative Law*, 41

as articulated in the *Abbot* cases, truly elucidates what is occurring.<sup>127</sup> Before appraising the present status of the doctrine, however, some history is in order.

Early cases insisted that review was appropriate only when private parties were directly impacted. For example, no review was allowed of an Interstate Commerce Commission ruling that determined how to value railroad property, thus affecting a railroad's credit:

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation.<sup>128</sup>

Unless an agency directly violated a legal duty owed to a plaintiff, a court would not intervene.<sup>129</sup>

This approach paralleled a restricted view of standing and was employed by the justices committed to the New Deal social experiment. These justices only sporadically let courts provide remedies at early stages. Some of the most restrictive opinions occurred under the tutelage of Justice Frankfurter.<sup>130</sup> In one egregious example, the Immigration Service construed a statute so as to make entry from Alaska equivalent to an alien's first entry into the United States.<sup>131</sup> Aliens who seasonally worked in Alaska, and therefore would have had to choose between employment and possible exclusion on return, challenged the interpretation.

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ADMIN. L. REV. 159, 168 (1989) (since 1967, scholars either simply restate the ripeness doctrine or call it bad doctrine and seek its demise).

127. Murchison, *supra* note 126, at 160 ("more of a riddle than a guide, a vocabulary [rather than] a charter"). For Professor Murchison's elucidation of the riddle, see *infra* note 139.

128. *United States v. Los Angeles & Salt Lake R.R.*, 273 U.S. 299, 309-10 (1927).

129. Professor Davis argued that the pre-1934 cases resulted from "the longterm lack of comprehension that severe injury to a plaintiff may be susceptible of remedy by a mere judicial declaration, and the longterm lack of comprehension that resolving a debilitating legal uncertainty is a legitimate function of a court." DAVIS, *supra* note 33, at § 25:2. The Declaratory Judgments Act, enacted in 1934, changed understandings. *Id.*

130. *See, e.g., Eccles v. Peoples Bank*, 333 U.S. 426 (1948); *International Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954); *CBS v. United States*, 316 U.S. 407, 433 (1942) (Frankfurter, J., dissenting); *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting). *See generally* DAVIS, *supra* note 33, at § 25:4 (discussing Frankfurter philosophy).

131. *Boyd*, 347 U.S. at 222.

Justice Frankfurter, speaking for the Court, simply stated that there was no case or controversy:

*This is not a lawsuit to enforce a right*; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determinations of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.<sup>132</sup>

Until an agency has actually acted against a party, the potential plaintiff would, unfortunately, have to choose between changing behavior or risking sanctions. Limiting judicial action to enforcement of "rights" echoed the New Deal standing criterion.

Nevertheless, in certain circumstances, the Court recognized that something less than a direct order to an individual could cause sufficient harm to allow redress. For example, groups could protest inclusion on a list of "Communist" organizations when an executive order banned federal employees from joining such organizations:

It is unrealistic to contend that because the respondents gave no orders directly to the petitioners to change their course of conduct, relief cannot be granted against what the respondents actually did. We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them.<sup>133</sup>

The groups received no hearing before the Attorney General listed them. They lost money and the ability to solicit money, as well as being subjected to approbation. According to Justice Frankfurter, these injuries were unusual but similar to others found justiciable. There was final, immediate harm to reputation.<sup>134</sup>

Justice Frankfurter's concurrence is telling. Despite his many opinions closing the courthouse door, he emphasized that

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132. *Id.* at 233 (emphasis added).

133. *Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 141 (1951).

134. *Id.* at 160 (Frankfurter, J., concurring). Although every action by the government that is defamatory may not be redressable, here the groups were objecting to the validity of the regulation authorizing the listing, not the specific application of the rule to them. This issue would be justiciable to Justice Frankfurter. *Id.* at 159-60.

“‘[f]inality’ is not . . . a principle inflexibly applied.”<sup>135</sup> Crucial elements to consider include the probability that the plaintiff will be impacted and the burden created by procedures that exist for challenging the ultimate action.<sup>136</sup> He concluded as follows: “Whether ‘justiciability’ exists, therefore, has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardships of denying judicial relief.”<sup>137</sup> These words will resonate later.

In the 1967 *Abbot* decision,<sup>138</sup> which is heralded as beginning the modern era of ripeness, Justice Harlan’s formula echoed the same concerns: “The problem [of ripeness] is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”<sup>139</sup> Pragmatism plainly frames ripeness.<sup>140</sup> Ripeness doctrine can allow other branches of government the opportunity to work<sup>141</sup> plus assist the courts in gaining a firmer factual footing.<sup>142</sup>

Because ripeness analysis is sensitive to the substance of any

135. *Id.* at 156.

136. *Id.*

137. *Id.* Frankfurter continued: “This explains . . . [why] ‘standing’ to challenge official action is more apt to exist when that action is not within the scope of official authority than when the objections to the administrative action goes only to its correctness. The objection to judicial restraint of an unauthorized exercise of powers is not weighty.” *Id.* at 156-57 (citations omitted). Justice Frankfurter’s concern about administrative independence, therefore, remained intact despite the opening of the courthouse door.

138. *Abbot Lab., Inc. v. Gardner*, 387 U.S. 136 (1967).

139. *Id.* at 149. Professor Murchison traces Harlan’s pronouncement further, to the work of Professors Jaffe and Davis. Murchison, *supra* note 126, at 168-72. The two professors had fundamental differences:

Davis saw an administrative process whose legitimacy depended in large part on judicial review. Legitimacy was founded on fairness; judicial doctrine, based on injury would promote that necessary value. Jaffe . . . saw a process whose legitimacy depended on the appropriate participation of a cast of players. For Jaffe, . . . judicial involvement depended on the court’s sense of both its own competence and the agency’s need to complete negotiation with all the various players. In ripeness analysis, these considerations went to the appropriateness of the issues. Fairness remained a concern for Jaffe, but it was not to govern the matter.

*Id.* at 171. Therefore, the distinctions made in the three *Abbot* cases reflected Professor Jaffe’s concerns. They reveal an approach rather than a doctrine and were “system-sensitive;” the distinctions sought to examine ripeness for judicial intervention from the perspective of the entire system rather than only considering the Court’s own perspective. *Id.* at 175.

140. Nichol, *supra* note 126, at 176 (“a malleable tool of judicial decision making” serving interrelated purposes); DAVIS, *supra* note 33, at § 25:16 (proper balance between need to conserve judicial resources and to relieve “debilitating uncertainties”).

141. Nichol, *supra* note 126, at 178.

142. Floyd, *supra* note 24, at 933 (ripeness resembles causation analysis; “plaintiff seeking future relief against an alleged illegal statute, regulation or policy must differentiate” self from general citizenry by showing he or she will likely be impacted). The controversy must be real and immediate. *Id.* at 922-34.

complaint, it could either assist participation by those impacted by agency action or insulate the agency from such participation. The *Abbot* Doctrine, however, has been most helpful to the regulated, who must alter behavior when new regulations are passed. Judges have rejected arguments that ripeness concerns would preclude judicial review of environmental claims, but the analysis in the environmental setting differs from recognizing the direct "hardship" to the plaintiffs which was evident for the drug companies involved in the *Abbot* cases.<sup>143</sup> The analysis in the environmental setting has more in common with an equitable irreparable injury inquiry.

### III. THE CASES IN DETAIL: *LUJAN* AND *AIR COURIER CONFERENCE*

#### A. *LUJAN V. NATIONAL WILDLIFE FEDERATION*

##### 1. *Factual and Procedural Background*

During the early 1980s, the Bureau of Land Management (BLM) was actively revoking withdrawals and terminating land classifications when it felt these administrative orders no longer served their original purposes. The BLM-modified orders had previously rendered the lands affected by them unavailable for the full array of public land laws.<sup>144</sup> In July of 1985, the National Wildlife Federation (Federation) filed suit,<sup>145</sup> claiming that the BLM violated the APA, the National Environmental Policy Act (NEPA)<sup>146</sup> and the Federal Land Policy and Management Act (FLPMA).<sup>147</sup> More specifically, the Federation alleged that the program under which the BLM acted led the agency to evaluate the environmental impacts of its actions inadequately and to provide insufficient public participation in the decisionmaking process. The case on the merits has never been completed, although for several years the BLM could not act freely.

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143. See *infra* notes 451-68 and accompanying text.

144. 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). See also K. Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENVTL. L. REP. 10557, 10560-61 (1990); John Treangen, Note, *Standing: Closing the Doors of Judicial Review: Lujan v. National Wildlife Federation*, 36 S.D. L. REV. 136, 138-45 (1991) [hereinafter Treangen Note]; Bradley James Larsen, Note, *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) [hereinafter Larsen Note].

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

146. 42 U.S.C. § 4321-4370 (1988).

147. 43 U.S.C. § 1701-1784 (1988).



In late 1985, Judge Pratt found the plaintiffs were likely to prevail on the merits<sup>148</sup> and entered a preliminary injunction which required the lands to be returned to their status as of January 1, 1981.<sup>149</sup> To a certain extent, this injunction transformed the district judge into "a *de facto* Secretary of the Interior" over more than half of the public lands managed by the BLM.<sup>150</sup> Before many management activities could take place, the BLM had to turn to the judge for an exception to the injunction.<sup>151</sup>

Judge Pratt's preliminary injunction was upheld on appeal,<sup>152</sup> but almost three years after he issued it, Judge Pratt found that the plaintiffs lacked standing to bring the lawsuit.<sup>153</sup> The D.C. Circuit Court of Appeals disagreed, both as a new issue and as part of the "law of the case."<sup>154</sup> It ordered the district court to promptly consider the merits.<sup>155</sup>

Instead of proceeding in district court, the Department of Interior sought *certiorari*. The Department 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 by relying 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 4500 acres

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148. 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.

149. *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).

150. *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 327 (D.C. Cir. 1987) (as Amended Dec. 15, 1987) (Williams, J., concurring & dissenting) ("*National Wildlife Fed'n I*") (identifying affected lands at 280 million acres or almost one-fourth of all federal lands).

151. *Id.* at 325-26. Even if an exception was not needed, the injunction impacted managerial operations. During some of this time period, the author was an attorney for the Department of Interior in the Office of the Regional Solicitor for the Rocky Mountain Region. Often, before an exchange, lease, or sale could proceed, the BLM required an opinion from counsel on whether the reinstated classification or withdrawal order precluded or allowed the proposed activity. See *National Wildlife Fed'n v. Burford*, 676 F. Supp. at 284 (activities permitted on affected public lands under withdrawals or classifications prior to revocation or termination could take place).

152. *National Wildlife Fed'n I*, 835 F.2d at 307.

153. *National Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 329 (D.D.C. 1988).

154. *National Wildlife Fed'n v. Burford*, 878 F.2d 422, 430, 432-33 (D.C. Cir. 1989) ("*National Wildlife Fed'n II*"). Different judges heard the case in each appeal. The second decision was characterized as being rendered "somewhat testily." Sheldon, *supra* note 144, at 10561.

155. *National Wildlife Fed'n II*, 878 F.2d at 433.

of which were affected by one of the challenged decisions.<sup>156</sup>

The gauntlet was thrown down. As the Supreme Court phrased the issues, the APA governed the case.<sup>157</sup> Therefore, the question was two-fold: 1) whether there was a "final agency action" subject to review;<sup>158</sup> and 2) whether there was a party "suffering legal wrong . . . or adversely affected or aggrieved within the meaning of a relevant statute . . ." <sup>159</sup> The first issue, with its concern for "finality" and an identifiable "action," corresponds to some degree with ripeness doctrine.<sup>160</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>161</sup> The National Wildlife Federation claimed an injury to the environmental and aesthetic interests of its members.<sup>162</sup> 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.<sup>163</sup> These types of injuries are cognizable.<sup>164</sup> 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 challenge what it referred to as the "Land Withdrawal Review Program,"<sup>165</sup> which was a policy encompassed in several agency directives.<sup>166</sup> By the time of suit,

156. Petition for cert., *Lujan v. National Wildlife Fed'n*, 878 F.2d 422 (D.C. Cir. 1989) (No. 88-5397, 88-5291), referred to as presenting "a tantalizing question" to the conservative Court. Sheldon, *supra* note 144, at 10562.

157. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3185 (1990) (APA rules because neither NEPA nor FLPMA provide a private right of action).

158. *Id.* See also 5 U.S.C. § 704 (1988) (final agency action made reviewable by statute; there is no other adequate remedy in court for final agency action) and discussion of APA, *infra* notes 435-44.

159. 5 U.S.C. § 702 (1988). See also *Lujan*, 110 S. Ct. at 3186.

160. 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) (need actual proposal or there is nothing for analysis) with *Lujan*, 110 S. Ct. at 3190 (desire to "flesh out" controversy).

161. *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). See *infra* notes 414-22 and accompanying text.

162. *National Wildlife Fed'n I*, 835 F.2d at 312-13.

163. *National Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 330 (D.D.C. 1988).

164. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (general requirements of organizational standing).

165. *National Wildlife Fed'n I*, 835 F.2d at 309.

166. See, e.g., BLM Organic Act Directive No. 81-11, June 18, 1981. For more detail, see Treangen Note, *supra* note 144, at 157-58 and Larsen Note, *supra* note 144, at 284-85.

at least 788 classifications had been terminated or withdrawals revoked.<sup>167</sup> Each of these actions was done by a Public Land Order (PLO) or other notice published in the Federal Register.<sup>168</sup> In addition to alleging injuries to the organization, 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 which stated that the member used land "in the vicinity" of one of these locales.<sup>169</sup>

The court of appeals in 1987 was the first court to use these affidavits in analyzing whether an injury in fact was shown.<sup>170</sup> Before addressing the affidavits, however, it noted that the allegations of the complaint alone would suffice to survive a motion to dismiss under *SCRAP*.<sup>171</sup> The complaint referred to specific land by reference to identified actions published in the Federal Register and therefore alleged use of affected lands.<sup>172</sup> Furthermore, the affidavits would have cured any problem created by lack of specificity in the complaint about what lands were used. The court expressly rejected the idea that standing would be negated by using the words "in the vicinity" when referring to the lands covered by the challenged withdrawal revocations.<sup>173</sup> Moreover, the court was unconcerned about the "fairly traceable" and "redressability" requirements. Injury was not dependent on additional actions by third parties, because the agency action directly impacted lands.<sup>174</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 "whether the *plaintiff's* [use of lands] will occur in the same location as the third party's response to the

167. *National Wildlife Fed'n I*, 835 F.2d at 312.

168. *Id.* at 307-09, 313.

169. 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).

170. *National Wildlife Fed'n I*, 835 F.2d at 313.

171. 412 U.S. 669 (1973).

172. *National Wildlife Fed'n I*, 835 F.2d at 312-13 ("It alleges that its 4.5 million members and supporters across the country use and wish to continue to use previously withdrawn or classified lands for recreational or aesthetic purposes, and that these persons are injured in fact when withdrawals are revoked and classifications terminated, thereby threatening continued use of the property and its resources for such purposes.").

173. *Id.* at 313. Compare language in *Lujan* dealing with use of lands "in the vicinity" with allegations in *SCRAP*, quoted *supra* note 64.

174. *Id.* at 314 ("[B]ecause 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.").

challenged governmental action.”<sup>175</sup> Judge Pratt seemingly treated the injury as requiring something in addition to the governmental action of opening lands to be complete. Whether activities no longer forbidden might take place and thus interfere with the members’ enjoyment of public lands was of primary concern.

Judge Pratt therefore examined the affidavits carefully. The Peterson Affidavit claimed that she used land “in the vicinity”<sup>176</sup> of the South Pass-Green Mountain area. The court noted the area was large, and the impacts of opening the lands to mineral activity would be relatively localized.<sup>177</sup> The classification termination would allow mining on 4,500 acres, but the relevant area comprised two million acres, the balance of which, except for two thousand acres, had always been open to mineral leasing and mining.<sup>178</sup> 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.<sup>179</sup>

Because of these facts, Judge Pratt 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 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. It should be noted that plaintiff’s claims of injury reach hundreds of decisions affecting 180 million acres spread over seventeen states.<sup>180</sup>

No injury in fact existed for the members. Judge Pratt also found the affidavit of the president of the Federation, submitted to sup-

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175. *National Wildlife Fed’n v. Burford*, 699 F. Supp. 327, 331 (D.D.C. 1988) (quoting *The 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.

176. *Id.* at 331.

177. *Id.*

178. *Id.*

179. *Id.* at 332.

180. *National Wildlife Fed’n*, 699 F. Supp. at 332.

port organizational standing, to be similarly "conclusory."<sup>181</sup>

On appeal, the District of Columbia Circuit found that the affidavits did show "injury in fact." Its decision was partially based on the law of the case.<sup>182</sup> However, the court also insisted that the affidavits be read as sufficiently "specific" because to not do so would make them meaningless.<sup>183</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>184</sup>

The Supreme Court reviewed 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>185</sup> Under the Court's reading, the affidavits 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>186</sup>

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 nonmoving party in this setting, the court of appeals inappropriately relied on this doctrine. The decisional rule is applicable only when there is a conflict between

181. *Id.* at 330.

182. See *National Wildlife Fed'n II*, 878 F.2d at 432-33. In *National Wildlife Fed'n II*, the second panel discussed the earlier ruling on the sufficiency of the affidavits and acknowledged that the previous setting involved a motion to dismiss, which has a lower burden for plaintiffs than summary judgment. *Id.* But the court recognized that the prior judgment also found the injury sufficient for a preliminary injunction, which requires a standard similar to that sustaining standing on a summary judgment. *Id.* See also *National Wildlife Fed'n 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").

183. 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. The District Court in no way questions the *veracity* or *clarity* of the affidavit, only its *specificity* . . . [U]nless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.

*National Wildlife Fed'n II*, 878 F.2d at 431 (citation omitted).

184. *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.

185. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3187 (1990).

186. *Id.* at 3189.

averred facts.<sup>187</sup> In the current case, the affidavits did not aver any specific facts, and a court could not “presume” facts necessary for standing.<sup>188</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>189</sup> Justice Scalia found the affidavit in support of organizational standing similarly flawed.<sup>190</sup> To solve these problems, however, would only require more specificity in pleading or better searching out of members who actually used the particularly affected lands. If the decision stopped at this point, there would be little reason to write this article.

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

Justice Scalia, however, additionally discussed what constituted agency action and what issue would be “ripe” to challenge.<sup>191</sup> Two concepts are important to this portion of the decision and should be recognized as separate points: 1) the Federation attacked the BLM’s “Land Withdrawal Review Program” and, to do so, 2) the Federation detailed certain Public Land Orders and classification decisions to which it objected. These particular actions had modified earlier decisions and would allow mineral activity on affected lands. According to the Federation, the

187. *Id.* at 3188 (only applicable “where the facts specifically averred by that party contradict facts specifically averred by the movant”).

188. *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.”). When faced with a motion for summary judgment, a plaintiff must do more than is required to survive a Rule 12(b) motion to dismiss for failure to state a claim. *Id.* *SCRAP* was therefore inapposite. Justice Scalia also noted that the *SCRAP* decision has “never since been emulated by this Court.” *Id.* While not overruling *SCRAP*, he is trying to undercut its importance. See also *Whitmore v. Arkansas*, 110 S. Ct. 1717, 1725 (1990) (*SCRAP* at outer limits of standing).

189. For an argument that the Court misinterpreted the “in the vicinity” language, see Treangen Note, *supra* note 144, at 153-55 (words used to avoid implication that plaintiffs were at the bottom of a pass or top of a mountain).

190. 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. *Lujan*, 110 S. Ct. at 3194.

191. Ostensibly, these issues had to be addressed because other submitted affidavits were more specific than the rejected ones. *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 3193. 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).

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.

On the first issue—the scope of the challenged action—the court of appeals viewed the lawsuit as involving the total Land Withdrawal Review Program. The court 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 conduct,"<sup>192</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>193</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 because the BLM was not merely authorizing third party activities that could impact the lands. To the court, the BLM actions revoking withdrawals and terminating classifications directly affected lands.<sup>194</sup> Moreover, these program activities could create irreparable injury for the plaintiffs.<sup>195</sup> Changes in land ownership could occur.<sup>196</sup> Mineral development also might be imminent.<sup>197</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 thrust of the suit was to limit such dis-

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192. *National Wildlife Fed'n I*, 835 F.2d at 314.

193. *Id.* See also *National Wildlife Fed'n II*, 878 F.2d at 431 n.12.

194. *National Wildlife Fed'n 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 . . .").

195. *Id.* at 324-26.

196. These changes could occur either from patenting under the Mining Law of 1872, 30 U.S.C. § 21 (1988), or through land sales and exchanges. 43 U.S.C. §§ 1713, 1716 (1988).

197. *National Wildlife Fed'n I*, 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.

cretion until the proper procedures had been followed.<sup>198</sup> Therefore, the court's conclusions were tantamount to a finding that the propriety of both the program and the individual orders were sufficiently "ripe" for review.

Justice Scalia had more difficulty characterizing the lawsuit in this manner. He refused to acknowledge that 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 in the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing the land use plans as required by the FLPMA.<sup>199</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>200</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>201</sup>

On another level, however, there is a substantive difference between the approach of the court of appeals and Justice Scalia.

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198. *Id.* at 325. The prior status in most instances ensured the lands withdrawn or classified would remain in federal ownership.

199. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3189 (1990). Other language was as follows: "no more an identifiable 'agency action'—much less a 'final agency action'—than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." *Id.*

200. 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 the 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.

201. 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.*



Most obviously, the court of appeals recognized a "pattern of conduct" as being a sufficient "across-the-board" requirement to trigger review.<sup>202</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 satisfying the agency action prerequisite is found to exist, review will be dependent on ripeness considerations unless a statute specifically calls for review of broad regulations.<sup>203</sup> To Scalia, judicial review must be deferred until a concrete action is taken which would apply the regulation in a manner that would harm or threaten harm to the Federation. He justified waiting as a method of reducing the controversy's scope to manageable proportions and fleshing out its factual components.<sup>204</sup>

The need for a concrete act, which is essentially a "ripeness" requirement, may not be an easy test for beneficiaries of agency action to meet.<sup>205</sup> Justice Scalia looked at the ripeness of what was admittedly a rule, namely, an individual Public Land Order.<sup>206</sup> The Supreme Court seems to say that a PLO simply announces 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>207</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 circum-

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202. 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 Note, *supra* note 144, at 157-58.

203. *Lujan*, 100 S. Ct. at 3190.

204. *Id.*

205. 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.*

206. *Id.* (PLO is a "rule" under APA because it has "'general or particular applicability and future effect' . . .").

207. *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 144, 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. United States*, 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 applies to regularity of rule's promulgation). But see *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715-16 (9th Cir. 1991) (substantive challenge to agency decision alleging lack of agency authority may be brought within six years of application of decision).

stances.<sup>208</sup> Deferring analysis until this stage might make review more concrete because the extent of any proposed activity will be known,<sup>209</sup> but it ignores the private rights that the Mining Law of 1872 grants.<sup>210</sup>

*Lujan*, however, requires plaintiffs to delineate harm that is both specific and immediate. The dual requirements may make it difficult for those seeking system-wide relief, namely, assuring "across-the-board protection"<sup>211</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 rights 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>212</sup>

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

### 1. Factual and Procedural Background

In *Lujan*, 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>213</sup> In *Lujan*, 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>214</sup> Nevertheless, the Court offered an example of when the test would not be met:

208. *Lujan*, 110 S. Ct. at 3190-91 n.3 (agency action ripe for review will occur if permit granted).

209. 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 whether mining activities will occur." *Id.*

210. Under current understanding, an irretrievable commitment occurs when a mining claim is initiated. As Ms. Sheldon notes, Justice Scalia certainly "knows better" than his footnote implying that the BLM could stop development later because he was involved in *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) (oil and gas lease authorizes development). See Sheldon, *supra* note 144, at 10564. Additionally, postponing a suit pending future action may subject a plaintiff to a laches defense, a tactic tried in *Lujan*. See *Lujan*, 110 S. Ct. at 3202 n.16 (Blackmun, J., dissenting).

211. *Lujan*, 110 S. Ct. at 3191.

212. *Id.* See *infra* notes 263-76 and accompanying text. See also Jonathon Poisner, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 *ECOLOGY L.Q.* 335, 348-50 (1991) (separation of powers analysis explains requirement of proof of injury as opposed to Warren Court's acceptance of plausible allegation of injury).

213. *Lujan*, 110 S. Ct. at 3186 (quoting § 702 of the APA).

214. *Id.* at 3187.

[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 the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.<sup>215</sup>

In *Air Courier*, the Supreme Court found an opportunity to give flesh to this hypothetical.<sup>216</sup>

The plaintiff in *Air Courier* was a union representing postal workers. The union objected when the Postal Service approved an exception to the Private Express Statutes (PES)<sup>217</sup> for "international remailing."<sup>218</sup> Under the PES, exceptions to the Postal Service monopoly are only available where the "public interest requires the suspension."<sup>219</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>220</sup> The Fifth Circuit reversed.<sup>221</sup>

To reverse the district court and reach the merits, the court of appeals found the postal unions had standing. To the court, the unions' interests fell within the zone of interest of the PES for two reasons. First, the PES had been reenacted as part of the larger Postal Reorganization Act (PRA), which includes provisions dealing with labor. Because the PES is the "linchpin" of a financially

215. *Id.* at 3186. For a comparison to the Court's example, see *Hazardous Waste Treatment Council v. Environmental Protection Agency*, 861 F.2d 277, 283 (D.C. Cir. 1988), in which Judge Williams offers an example of a party not entitled to standing: "If Congress authorized bank regulators to mandate physical security measures for banks . . . a shoal of security service 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 should be unusually suitable champions of Congress's ultimate goals, no one would suppose them to have standing to attack regulatory laxity."

216. Hence, compounding a hypothetical by using a hypothetical to resolve the question.

217. 18 U.S.C. 1693-1699 (1988); 39 U.S.C. §§ 601-606 (1988).

218. 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 Conference of America v. Postal Workers Union, AFL-CIO*, 111 S. Ct. 913, 915-16 (1991).

219. 39 U.S.C. § 601(b) (1988).

220. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 701 F. Supp. 880 (D.D.C. 1988). *Air Courier Conference*, an entity that used the exception, had joined the lawsuit aligned with the Postal Service.

221. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 891 F.2d 304 (D.C. Cir. 1989) (regulation arbitrary and capricious because it only considered costs to users).

viable postal service, it was related to the interests of the unions expressed in other sections of the Postal Reorganization Act.<sup>222</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>223</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>224</sup> The Supreme Court would not agree that this interest would grant standing to challenge a purported violation of the PES.

## 2. *The "Zone of Interest" Test*

For the first time, the Supreme Court found a plaintiff beyond the zone of interest of a relevant statute.<sup>225</sup> It characterized the postal workers' unions as analogous to the court reporters imagined in *Lujan*.<sup>226</sup> They had the injury in fact required by section 702 of the APA,<sup>227</sup> but the harm 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."<sup>228</sup>

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 the circuit's analysis "conflates the zone-of-interests test with injury in fact."<sup>229</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 *Lujan*, the relevant statute is "the statute whose violation

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222. *Id.* at 310.

223. *Id.*

224. *Id.*

225. In *Community Nutrition Institute*, 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. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346-48 (1984).

226. *See supra* text at note 215.

227. *Air Courier Conference of America v. Postal Workers Union*, 111 S. Ct. 913, 918 (1991) (district court found injury in fact and finding not appealed).

228. *Id.* at 918, 921.

229. *Id.* at 918. *Cf. Securities Indus. Ass'n v. Comptroller of the Currency*, 765 F.2d 1196 (D.C. Cir. 1985) (Scalia, J., dissenting) (then-Judge Scalia's complaint that the D.C. Circuit was collapsing the zone of interest test into the injury in fact determination), *aff'd sub nom. Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987).

is the gravamen of the complaint."<sup>230</sup> According to Justice Rehnquist, neither the basic wording of the PES nor its legislative history reveals a Congressional intent to protect this interest: "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>231</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>232</sup> In *Clarke*,<sup>233</sup> 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>234</sup> The challenged statute and larger act did not have this relationship in *Air Courier*:

The only relationship between the PES, upon which the Union 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. . . . To adopt petitioners' contention would require us to hold that the 'relevant statute' in this case is the PRA, with all of its various provisions united only by the fact that they deal with the Postal Service. But to accept this level of generality in defining the 'relevant statute' could deprive the zone-of-interests test of virtually all meaning.<sup>235</sup>

The Supreme Court found no connection between the two parts of the code.<sup>236</sup>

The Supreme Court did not have to read the statutes as nar-

230. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3187 (1990).

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

232. *Id.* (distinguishing *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970); and *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971)).

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

234. *Id.* at 920.

235. *Id.* at 921. *Cf.* *Securities Indus. Ass'n v. Comptroller of the Currency*, 765 F.2d 1196, 1196 (Scalia, J., dissenting) (standing under one act not sufficient to raise questions about another statute), *aff'd sub nom. Clark v. Securities Indus. Ass'n*, 479 U.S. 388 (1987).

236. *Cf. Securities Indus. Ass'n*, 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.").

rowly 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 requiring a hearing on the record. The workers are, in the words of *Clarke*, 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, it is questionable whether anyone could challenge the Postal Service determination at issue under the Court's view. The public is not envisioned as a check on executive action. The zone of interest test in *Air Courier* requires a clear indication from Congress that a particular party is to be allowed to bring suit.<sup>237</sup>

#### IV. PHILOSOPHICAL PEDIGREES OF THE DECISIONS

Several strains of thought are evident in the two decisions. One, made explicit in *Lujan*, is that standing and ripeness doctrine can promote a formal, compartmentalized separation of powers agenda.<sup>238</sup> Although this is not a new position, Justice Scalia's concentration on the APA's provisions has contracted ripeness and standing into one analysis. Moreover, the concerns expressed may implicate sovereign immunity and nondelegation theories as well as separation of powers.

A second major theme present is the philosophy that generally "bystanders" should not have standing. Close examination of congressional intent under a revitalized "zone of interest" test will restrict 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 benefited" by a statute, as required for a private cause of action, standing requirements have tightened.

##### A. SEPARATION OF POWERS AS A DECISIONAL GUIDE

Although the standing decisions analyzed draw upon the idea of separation of powers, this concept itself is not a model of clarity

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237. 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).

238. See *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3190 (1990). In response to allegations of "rampant" violations of law in the program, the Court stated: "Perhaps [it is] so. But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id.*

as a doctrine.<sup>239</sup> 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. Many identify the concept as a "bulwark against tyranny,"<sup>240</sup> which prevents any one branch of government from exercising power to the extent that it could threaten freedom.<sup>241</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>242</sup> 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.<sup>243</sup> Under the functional view, the branches may overlap and create checks and balances.<sup>244</sup> With the growth of administrative agencies, the functional theory may be more appropriate than the traditional formal theory of three compartmentalized branches.<sup>245</sup> Nevertheless, the formal theory appears to be the philosophy forwarded in these cases.<sup>246</sup>

The formal approach begins with the Court's constitutional role. The judiciary is empowered to decide various enumerated "cases" and "controversies."<sup>247</sup> To some, 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

239. In fact, it 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).

240. *United States v. Brown*, 381 U.S. 437, 443 (1965).

241. See, e.g., Ralph F. Fuchs, *An Approach to Administrative Law*, 18 N.C. L. REV. 183, 194 (1940); Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371 (1976). The Massachusetts constitution expressly states that the purpose of separation of powers is to avoid despotism. Scalia, *supra* note 31, at 881. But see Miller, *supra* note 239, at 302 (separation also promotes efficiency).

242. Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency*, 72 CORNELL L. REV. 488, 489 (1987).

243. *Id.*

244. Hutton, *supra* note 237, at 389-95 (creating a flexible government that may respond to change).

245. 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).

246. Cf. Strauss, *supra* note 242, at 626-28 (siren call of certainty influenced cases decided in 1982-83); Frederick R. Anderson, *Revisiting The Constitutional Status of Administrative Agencies*, 36 AM. U. L. REV. 277, 291-92 (1987) (noting formalism in separation of powers decisions).

247. U.S. CONST. art. III, 2. The cases enumerated include those arising under the Constitution or federal laws and maritime issues. "Controversies" listed include those in which the United States is a party or between citizens of different states.

the time of the Constitution.<sup>248</sup> From a slightly different perspective, the formal approach identifies the assigned function of courts to be deciding individual rights in particularized settings. Standing and ripeness are designed to keep courts in this assigned realm. Justice Scalia, in *Lujan*, aligns with this belief and uses the doctrines to prevent what he would term governance by the judiciary.<sup>249</sup> This position is not unique to Scalia, but is opposed by a different view in which members of the public are given standing because they are proper "checks" on the executive.<sup>250</sup>

Despite the current views of Justice Scalia, the Supreme Court has not uniformly viewed standing as linked inexorably to separation of powers. Justice Douglas, in his dissent in *Sierra Club v. Morton*,<sup>251</sup> objected to the Solicitor General's attempt to raise the specter of "government by the Judiciary" when examining standing.<sup>252</sup> To Justice Douglas, natural resources could too easily be trampled because agencies tend to be captured and have such broad authority to act in the "public interest."<sup>253</sup> Therefore, the problem was not one of judicial interference, but one of assuring that nature not be destroyed before being considered. Allowing standing furthers this end: "existing beneficiaries of these environmental wonders should be heard."<sup>254</sup>

On a less emotional and issue-sensitive level, Chief Justice Warren wrote for the Court in *Flast v. Cohen*<sup>255</sup> of the need to distinguish standing from other issues of justiciability. Because standing concentrates on the "who," it would not implicate separation of powers:

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248. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) (no standing "unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed."). To some, this historically-phrased limitation would force 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. Courts could intervene in other situations through informer and relator suits and mandamus actions. See Winter, *supra* note 28, at 1394-1417. See also DAVIS, *supra* note 33, at § 24.5 (advisory opinions given at time of Constitution).

249. Justice Scalia had espoused this view previously in his scholarly writing. See, e.g., Scalia, *supra* note 31. For a comparison of Justice Scalia's scholarly work and his judicial output as an appellate judge, see Perino, *supra* note 93, at 156-72.

250. Hutton, *supra* note 237, at 387 (view identified as being that of Justice White).

251. *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

252. *Id.* at 745. See *id.* at 753 (Appendix to Opinion of Douglas, J., Dissenting, Extract from Oral Argument of the Solicitor General (Griswold)) (arguing that courts cannot simply answer legal questions at behest of the interested, because each branch of government has specified powers and balances); *id.* at 755 (plaintiff's solution lies with Congress because it could stop the development).

253. *Id.* at 745-51.

254. *Id.* at 750.

255. 392 U.S. 83 (1968).



Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitation of 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.<sup>256</sup>

Other doctrines of justiciability, such as the political question doctrine,<sup>257</sup> address substantive issues that could broach the separation of powers problem. In 1984, most of the Justices who would later dissent in *Lujan* endorsed this view.<sup>258</sup>

These reaffirmations of *Flast v. Cohen*, however, came in dissenting opinions after the Warren Court era ended.<sup>259</sup> Justice O'Connor wrote for the majority in the *Allen v. Wright*<sup>260</sup> decision and succinctly disagreed: "the law of Art. III standing is built on a single basic idea—the idea of separation of powers."<sup>261</sup> Therefore, the doctrine would provide an independent tool to determine whether standing exists.<sup>262</sup> Contrary to Justice Warren's statement, under this view standing does work to exclude

256. *Flast v. Cohen*, 392 U.S. 83, 100-01 (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 31, at 891.

257. 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 Soc'y*, 478 U.S. 221, 230 (1986). See Louis Henkin, *Is there a "Political Question" Doctrine?*, 85 YALE L.J. 597, 598-99 (1976) (exists when there are no legally cognizable standards).

258. *Allen v. Wright*, 468 U.S. 737, 767 (1984) (Brennan, J., dissenting); *Id.* at 790-91 (Stevens, J., dissenting, joined by Blackmun, J.). Justice Marshall, who dissented in *Lujan*, took no part in *Allen*.

259. *Id.* See also Floyd, *supra* note 24, at 863-69 (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 v. Seldin*, 422 U.S. 490, 499 (1975) (Powell, J.); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (Burger, C.J.); *id.* at 188 (Powell, J., concurring); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (Burger, C.J.); *Valley Forge College v. Americans United*, 454 U.S. 464, 471 (1981) (Rehnquist, C.J.).

260. 468 U.S. 737 (1984). Justice O'Connor was joined by Justices Burger, White, Powell and Rehnquist. Comparing this conservative alignment to later cases shows that Justices Scalia and Kennedy substituted for Justices Powell and Burger as part of *Lujan's* conservative majority. By the time *Air Courier* was decided, Justice Brennan had retired. His replacement, Justice Souter, was in the *Air Courier* majority. The conservative fold thus increased and, with the retirement of Justice Marshall, is likely to increase further.

261. *Allen v. Wright*, 468 U.S. 737, 752 (1984). See also *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (implicates the corollary doctrine of federalism: the Court stated the proper forum was with "local authorities.").

262. *Allen*, 468 U.S. at 761 n.26 ("We disagree with Justice Stevens' suggestions 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.*

issues as well as persons. If every person who could raise an issue is denied the right to litigate it, the issue is effectively excluded.<sup>263</sup> As such, separation of powers arguments can be raised to invalidate an attempt to seek systemic relief from an agency's action or inaction.<sup>264</sup>

A lawsuit seeking systemic 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>265</sup> To the *Allen v. Wright* majority, allowing standing in such a situation 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 as virtually continuing monitors of the wisdom and soundness of Executive action.'<sup>266</sup>

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263. Scalia, *supra* note 31, 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 Receipts 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).

264. Professor Sunstein identifies, and argues against, three rationales for imbuing standing with separation of powers concerns: courts should protect individual rights, courts should not interfere with the executive who is to "take care" that laws are executed, and the political process provides appropriate redress. Sunstein, *supra* note 35, at 1469-74.

265. A generalized complaint is repeatedly declared to be insufficient to grant standing. See, e.g., *Allen*, 468 U.S. at 754. See generally Logan, *supra* note 32 at 47-48; Floyd, *supra* note 24, 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 35, at 483, 488 (shared injury not equivalent to mere interest in matter). Moreover, the Supreme Court had stated that standing should not be defeated simply because many are injured. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973). Professor Tushnet argues that the difficulties of litigation may discourage the individually impacted plaintiff, such as an African-American who desired admittance to a particular school. Delays may make the question moot as different career paths are taken. Additionally, others similarly impacted naturally "free-ride" on a successful suit. Therefore, the ideological plaintiff may be best because it may solicit support from the "free-riders" and others benefitted. Tushnet, *supra* note 35, at 1709-12.

266. *Allen*, 468 U.S. at 759-60 (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

Rather simplistically, this position maintains that only the President has the power to "take Care that the Laws be faithfully executed."<sup>267</sup> This hands-off attitude ignores the fact that acting illegally outside of the law is not proper "execution of the laws."<sup>268</sup> Taken to its extreme, this rigid view of separation of powers would preclude all judicial review.<sup>269</sup> But to accept that would be to destroy the concept of a limited government<sup>270</sup> and eschew the benefits that can derive from judicial review.<sup>271</sup>

Justice Scalia has explained his view of the judiciary in a slightly different manner. He bases his analysis in separation of powers,<sup>272</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. To him, courts are uniquely suited to protecting rights of individuals and minorities.<sup>273</sup> Therefore, a plaintiff must show a particularized injury, one which, in Justice Scalia's words, "sets him apart from the citizenry at large."<sup>274</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 more undemocratic role of prescribing how the

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control matters through its committees and the power of the purse. Professor Nichol argues that this aspect of standing analysis is misplaced: it deals with the justiciability of the claim, not the propriety of the party. Nichol, *supra* note 33, at 99.

267. *Allen*, 468 U.S. at 761 (quoting U.S. CONST. art II, § 3). *But see* Sunstein, *supra* note 113, at 670 ("take care" clause is a duty, not a license); Peter H. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 631 (1983) (review of inaction is not court policymaking but merely insuring implementation of statute).

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

It has been clear since *Marbury v. Madison*, that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' 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.'

*Id.* (citations omitted).

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

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

271. For a discussion concerning the merits of judicial review, see Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 537; Shapiro & Glicksman, *supra* note 118, at 863-72.

272. Scalia, *supra* note 31, at 891 (*Flast v. Cohen* incorrectly severed standing from separation of powers analysis). For a synthesis of Justice Scalia's decisions and scholarly writing, see Poisner, *supra* note 212, at 353-57.

273. *See* Scalia, *supra* note 31, at 894. For a differing view of the role of judges, see Chayes, *supra* note 57, at 1297 (new model of litigation for public law controversies); 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 the proper meaning to our public values").

274. Scalia, *supra* note 31, at 881-82.

other branches would function in order to serve the interest of the majority itself.<sup>275</sup>

If a plaintiff shows only 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>276</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>277</sup> Justice Scalia maintains that courts should not protect the majority, because they are unsuited to that task.

Justice Scalia, therefore, assigns majoritarian interests to the political branches. He fears that if courts act when elected officials did not, the judiciary would likely assert the particular values of individual judges.<sup>278</sup> Judges, being politically unaccountable, are inappropriate arbiters of values.<sup>279</sup> Moreover, legislative initiatives can be lost in the halls of an executive agency within our sys-

275. *Id.* at 894.

276. *Dow, supra* note 35, at 1213-14. Additionally, political solutions may be unavailable, especially when agency nonaction is at issue. *See Note, supra* note 267, at 639 (Congress, in public's view, already did its job by passing statute creating the agency).

277. *Community Nutrition Inst. v. Block*, 698 F.2d 1239, 1256 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 467 U.S. 340 (1984). *See also Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3190 (1990). *Cf. United States v. Richardson*, 418 U.S. 166, 179 (1974) (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 (1961) (Frankfurter, J., dissenting) (how to select representatives is a non-justiciable political question).

278. 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 31, at 896. *But see Shapiro & Glicksman, supra* note 118, at 864-65 (if courts insist on Congress' will, judicial review is democratic); *Poisner, supra* note 212, at 374-78 (judicial review increases agency ability to accurately aggregate preferences by making agencies more politically accountable).

279. Scalia, *supra* note 110, 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: "[T]he decisions are supposed to be political ones—made by institutions whose managers change with each presidential election and which are under the constant political pressure of the congressional authorization and appropriations processes.").

tem. If Congress does not respond, then it is what the majority desired.<sup>280</sup> According to Justice Scalia, courts should not intervene.

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>281</sup> Justice Scalia once 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.*<sup>282</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>283</sup>

*Lujan* forwards Justice Scalia's separation of powers agenda in two ways. First, Scalia 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

280. Scalia, *supra* note 31, at 897. Scalia stated:

The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.

*Id.* Cf. Sunstein, *supra* note 113, at 2088-89 (giving agencies interpretive authority may allow changed circumstances to affect legislation in manner similar to common law growth). *But see* Miller, *supra* note 27 at 398-99 (executive should not pick and choose laws but does do so); Note, *supra* note 267, at 640 (judges, not legislators, are traditional interpreters of past laws).

281. Cf. Stewart & Sunstein, *supra* note 53, at 1321 (noting separation of powers arguments against private rights of action).

282. Scalia, *supra* note 31, at 883 (quoting *Stark v. Wickard*, 321 U.S. 288 (1944)). The *Stark* Court allowed dairy producers to challenge milk settlement fund administration despite the fact that the act did not expressly provide for judicial review at their behest. The administrative action affected their payments directly, giving rise to personal rights "not possessed by the people generally." *Stark v. Wickard*, 321 U.S. 288, 309 (1944). This is in contrast to the consumers that Scalia would deny had standing. *Community Nutrition Inst. v. Block*, 698 F.2d 1239, 1257 (D.C. Cir. 1983) (Scalia, J., dissenting).

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

that the majority is suppressing or ignoring the rights of a minority that wants protection . . . ."<sup>284</sup> Second, Scalia took the APA reference to "an agency action" as a precursor to judicial review and elevated it to the point that "agency action" now presents an overriding requirement of particularity that must be met before a court can intervene.<sup>285</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>286</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>287</sup> Because the definition 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>288</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>289</sup> Moreover, in his ripeness analysis, when faced with what undoubtedly was an agency "rule,"<sup>290</sup> Scalia apparently wanted an adjudicated decision on land use—an "order" in APA terms<sup>291</sup>—before he would proceed. This precludes early and systemic relief.

What Justice Scalia did in *Lujan* is akin to what Justice Rehn-

284. Scalia, *supra* note 31, at 894-95.

285. 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 violations of individual rights 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.

286. 5 U.S.C. § 551(13) (1988) (emphasis added).

287. 5 U.S.C. § 551(4) (1988).

288. *Cf.* Sunstein, *supra* note 119, at 678-79 (*Heckler* exception making "pattern" of nonenforcement more reviewable than isolated refusal to act is because pattern equals an assessment of Congressional intent).

289. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3189 (1990) (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 the 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.

290. *Id.* at 3190. The agency rule was a Public Land Order or PLO. See *supra* notes 206-07 and accompanying text.

291. 5 U.S.C. § 551(6) (1988).

quist did in *Air Courier*. Both ratchet down 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.

## B. "BYSTANDER" STATUS RESURGENT

Initial standing doctrine limited challenges of agency action to those who suffered legal wrong or who fell within the meaning of the word "aggrieved" as specifically used in a particular statute.<sup>292</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>293</sup> As previously noted, *Association of Data Processing Service Organizations*<sup>294</sup> interpreted the APA as enlarging the universe of potential plaintiffs; "adversely affected or aggrieved by agency action within the meaning of the relevant statute"<sup>295</sup> meant those "arguably within the zone of interests of the relevant statute."<sup>296</sup> Beneficiaries of statutes need not be mere bystanders but those actually intended by Congress to enforce a statutory scheme.<sup>297</sup> Nevertheless, both recent Supreme Court cases make it more difficult for someone other than the directly regulated to enter a court. The cases narrow the largesse of these precedents.

The first mechanism for restricting review occurred through Justice Scalia's insistence in *Lujan* on strict "ripeness." Unless Congress specifically provides for earlier review, a regulation cannot be judicially reviewed until "concrete effects" are felt.<sup>298</sup> The directly regulated will not feel the brunt of this as deeply as the purported beneficiaries of a regulation because of the acknowl-

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292. 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 31, at 887-88.

293. This was, of course, a tautology: if one was a "bystander" one would not have standing. See Sunstein, *supra* note 35, at 1436, n.18.

294. 397 U.S. 150.

295. 5 U.S.C. § 702 (1988).

296. See *supra* notes 51-56 and accompanying text. As then 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 31, at 889.

297. The "zone of interest" test so interpreted is broader than acknowledging situations where an act actually creates rights. Statutes could in that manner directly create "injuries": "The actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .'" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (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))). See also *Logan supra* note 32, at 59-69 (Freedom of Information Act gave right to receive information, which was not a common law right).

298. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3190 (1990).

edged exception to Scalia's ripeness requirement: review will be appropriate when a substantive rule requires a plaintiff to immediately modify behavior.<sup>299</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 be able to show an "individual" grievance.<sup>300</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>301</sup>

Beneficiaries are further frustrated because standing is problematic for persons other than the regulated. Some injuries could be deemed fortuitous in the sense that the law was designed for a purpose other than to prevent that harm.<sup>302</sup> Justice Scalia's hypothetical in *Lujan* would amount to such an example.<sup>303</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>304</sup> For a judge that con-

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299. *Id.* For a recent example of a case of standing for the regulated, see *Gas Appliance Mfrs. v. Department of Energy*, 773 F. Supp. 461, 464 (D.D.C. 1991).

300. Scalia, *supra* note 31, at 894. "That is the classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a 'generalized' one." 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.* In the latter situation, unless some individual harm distinguishes the plaintiff, Justice Scalia views the plaintiff as simply forwarding a majoritarian claim that acts required by law or the Constitution are being withheld. *Id.* Compare Justice Rehnquist's rationale in *Heckler v. Chaney* against review of a decision to not enforce an act: "When 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 are often called upon to protect." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

301. Richard J. Pierce, Jr., *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); Poisner, *supra* note 212, at 375-76 (unequal standing rights leads to unequal bargaining power before agencies). *Cf.* Note, *supra* note 267, at 643-44 (failure to review non-implementation skews administrative law in favor of regulated).

302. Scalia, *supra* note 31, at 895.

303. *Lujan*, 110 S. Ct. at 3186. For the text of the example, see *supra* text at note 215.

304. *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. 338, 403 (1987) (White, J.) (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984)). "[C]ompetitors who allege an injury that implicates the policies of the National Bank Act are very reasonable



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

Justice Scalia, while a judge on the District of Columbia Circuit Court of Appeals, identified two types of statutes that could have such 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>305</sup> Under Justice Scalia's view, classifying a statute ascertains who would have standing.

For the first type of statute, of which NEPA and its environmental concerns are an example, Congress may have intended to give standing to everyone impacted.<sup>306</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.<sup>307</sup> 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 interests through which their claims derive for judicial enforcement.<sup>308</sup>

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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.'" *Id.* See also Hutton, *supra* note 237, at 411-12 (discussing Justice White's view of separation of powers).

305. *Community Nutrition Inst. v. Block*, 698 F.2d 1239, 1257 (D.C. Cir. 1984). (Scalia, J., dissenting). 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.*

306. *Id.*

307. *Id.* The zone of interest test is ultimately a way of apprising Congress' intent as to who it anticipated would enforce the statute. See Scalia, *supra* note 31, at 896 (courts should not presume Congress designated a minority group broad enough to include the entire population).

308. Justice Scalia favorably cited *Stark v. Wickard*, 321 U.S. 288, 308 (1944). Scalia, *supra* note 31, at 883. For a discussion of *Stark*, see *supra* note 282. 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. *Stark*, 321 U.S. at 308. In *Community Nutrition Inst.*, Justice Scalia deemed the claims of consumers of milk to be derived from interests of both the producers and the milk handlers. Consumer interest in a high enough price to ensure a sufficient supply would be protected by the producers and the milk handlers would protect their interest in avoiding artificially high prices. *Community Nutrition Inst.*, 698 F.2d at 1257 (Scalia, J., dissenting). 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. To the Supreme Court, whether or not the handlers would pass on savings they received from appealing would be irrelevant. *Community Nutrition Inst.*, 467 U.S. at 352 n.3. This undercuts Justice Scalia's concept of derivative protection.

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 person 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 persons 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>309</sup>

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

Moreover, the distinction between indirect or consequential beneficiaries and immediate beneficiaries 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>310</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>311</sup> Liberal precedents have been modified.

In *Air Courier*, the Court looked directly to 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

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In fact, the Supreme Court did not adopt his view, but based its decision on the statutory scheme precluding additional remedies.

309. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 153-54 (1951) (Frankfurter, J.). Ironically, Professor Scott identified this case as one in which those only 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 35, at 679-80.

310. See *Air Courier Conference of America v. Postal Workers Union, AFL-CIO*, 111 S. Ct. 913, 913 (1991).

311. Justice Scalia, as a judge on the D.C. Circuit, objected to grants of competitor standing. See *Securities Indus. Ass'n v. Comptroller of the Currency*, 758 F.2d 739, 740 (D.C. Cir. 1985); 765 F.2d 1196, 1197 (1985) (Scalia, J., dissenting).

the zone of interest.”<sup>312</sup> Citing *Lujan*, 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>313</sup> The earlier use of “arguable” apparently was designed to lower the test’s threshold.<sup>314</sup> The recent 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. Also, both the zone test and its underlying justifications display a concern for immediacy and individual harm.<sup>315</sup> Therefore, it might signal a change in another of the prudential limitations on standing, namely, the inability to champion the rights of third-parties.<sup>316</sup> This criterion in the past was often honored in the breach<sup>317</sup> and viewed as a matter of degree.<sup>318</sup> Current trends suggest that the Supreme Court might strengthen

312. This terminology should have been used in the APA arena. *Community Nutrition Inst.*, 698 F.2d at 1256 (Scalia, J., dissenting) (“zone of interest” test developed for APA review with word “arguably”; Supreme Court only dropped “arguably” when test used as prudential limitation in non-APA setting). See also *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, 4129 (U.S. Jan. 22, 1992) (Scalia, J., dissenting) (stricter application in constitutional arena).

313. *Air Courier*, 111 S. Ct. at 917 (emphasis added) (citing *Lujan v. National Wildlife Fed’n*, 110 S. Ct. 3177 (1990)). See also *id.* at 918. (“Specifically, the plaintiff must establish that the injury he complains of (his aggrievement, 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 *Lujan*, 110 S. Ct. at 3186).

314. *Fletcher*, *supra* note 35, at 263-64 (“arguably” means to presume standing).

315. Evidence of this lies in the Court’s characterization of the PES as a “competition statute that regulates the conduct of competitors of the Postal Service.” *Air Courier Conference of America v. Postal Workers Union, AFL-CIO*, 111 S. Ct. 913, 920 n.5 (1991). Therefore, it could rely on other cases finding that employees are denied standing to enforce competition laws “because they lack competitive and direct injury.” *Id.*

316. See *Floyd*, *supra* note 24, at 891-93 (identifying it as a prudential limitation); *Monaghan*, *supra* note 56, at 282 (many so-called third party cases actually involve first party rights to interact with another or some other first party right; if not subject to such reformulation, then allowing third party standing is judicial creation of private attorneys general). See also *Nichol*, *supra* note 33, at 95-98 (problem also referred to as “issue standing,” because question is whether the plaintiff is proper party to raise the issue).

317. Two chains of thought were seemingly reconciled in *dicta* in *Sierra Club v. Morton*, 405 U.S. 727 (1972), in which the Court stated that injury in fact is required for standing, but those with standing may argue public interest on the merits. *Id.* at 737. See also *Conservation Law Foundation of New England, Inc. v. Reilly*, 743 F. Supp. 933, 939 n.7 (D. Mass. 1990), *reversed*, Nos. 91-1257, 91-1269, 1991 U.S. App. LEXIS 27942 (1st Cir. Nov. 25, 1991). Professor Davis maintained that modern courts generally allowed a plaintiff who had standing to argue third-party rights. *DAVIS*, *supra* note 33, at § 24.14.

318. See *Fletcher*, *supra* note 35, at 243-45 (shippers in *SCRAP* were more directly affected than the law students); *Albert*, *supra* note 35, at 465-66 (question is whether scope and purpose of nonparty’s protection give rise to derivative protection for his relationship with plaintiff).

this barrier as it has others.<sup>319</sup>

### C. CONSOLIDATION OF THE PRIVATE LAW MODEL AND FURTHER IMPLICATIONS

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>320</sup> Property and contract rights, which are most easily embraced within this model, will be protected.<sup>321</sup> Within limits, standing will also be available for those especially noted by Congress.<sup>322</sup> Nevertheless, ripeness doctrine may limit review to individual actions rather than allowing lawsuits to seek systemic relief. Standing and ripeness, interpreted in this manner, further the majority's view that under a government of distinct branches, the judiciary must avoid even appearing to invade prerogatives of the other branches.

Strict standing and ripeness analysis also may mark a resurgence of sovereign immunity in the guise of standing.<sup>323</sup> In an early article, Justice Scalia praised an opinion by Justice Brandeis which 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>324</sup> Use of standing in this manner would insulate the agency from judicial review.<sup>325</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 *Lujan* could seem ironic in light of his earlier writings. *Lujan* involved a challenge to actions of the Department of Interior. Justice Scalia's article noted

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319. For a discussion of how strict "injury in fact" requirements affect this component of standing, see *infra* text at notes 384-90.

320. See Scalia, *supra* note 31, at 881, 885 (arguing 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.").

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

322. Congress, however, cannot exceed the Constitution in granting standing. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (can define as broadly as Art. III permits). See Scalia, *supra* note 31, at 886 (case and controversy requirement limits Congress); *id.* at 894 n.58 (broad grants of standing would resemble two branches ganging up on the third, the executive).

323. Scalia, *supra* note 40, at 903-05 (standing can do the work of sovereign immunity).

324. *Id.* at 905-06 (discussing *Morrison v. Work*, 266 U.S. 481 (1925)).

325. Cf. Fallon, *supra* note 79, at 24-30 (standing analysis displacing more flexible doctrine of mootness in federal litigation predicated on past injuries).

that sovereign immunity was almost never raised as a defense to such suits.<sup>326</sup> Looking closer, however, there is consistency. The cases allowing review of Interior decisions cited by Justice Scalia involved individuals claiming they were denied specific resources.<sup>327</sup> The *Lujan* 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.

In addition to providing echoes of sovereign immunity, restricting judicial access may, in a roundabout manner, be forwarding the nondelegation doctrine. The nondelegation doctrine requires that Congress cannot delegate legislative authority and must confine administrative action by relatively precise standards.<sup>328</sup> No statute has been invalidated on the theory since 1935.<sup>329</sup> The doctrine has, however, garnered some recent express support.<sup>330</sup> More importantly, the doctrine's aims are underscored by the Supreme Court's standing and ripeness cases. Denying judicial review will force Congress' hand.<sup>331</sup>

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 directly against the agency by restricting its budget. To remove ripeness barriers, it may authorize courts to review specific regulations immediately upon promulgation.<sup>332</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

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326. Scalia, *supra* note 40, at 907-08.

327. Scalia, *supra* note 40, at 909 (citing *Udall v. Tallman*, 380 U.S. 1 (1965)).

328. See Stewart & Sunstein, *supra* note 53, at 1260-61 (doctrine promotes political accountability and predictability for those benefitted or regulated).

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

330. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting); *Indus. Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring.). For the pros and cons of reinstating the doctrine, see Symposium, *The Uneasy Status of the Administrative Agencies, Part I*, 36 AM. U. L. REV. 295-492 (1987). For criticisms, see Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 366-67 (1988) (a "draconian" response; judicial review should mandate internal and budgetary consistency to interpret statute); Pierce, *supra* note 118, at 489-502 (in abstract reinvigorating doctrine appealing but impractical); 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).

331. Cf. Murchison, *supra* note 126, at 173 (ripeness forces Congress' 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).

332. See *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3190 (1990) (Justice Scalia's point that early intervention is only allowed when congressionally authorized).

more specificity from Congress even without invalidating laws under the nondelegation doctrine.<sup>333</sup>

Congress is further challenged because the *Chevron* Doctrine also insulates agencies from judicial interference. Under the *Chevron* Doctrine, a court may not substitute its view of a statute's meaning for that of the agency if the statute interpreted is ambiguous.<sup>334</sup> More and more, statutes are found to have ambiguity of some degree.<sup>335</sup> This increases reliance on agency interpretation.<sup>336</sup> Because the courts must compel an agency to implement what Congress has clearly stated,<sup>337</sup> Congress will have to authorize both actions and priorities explicitly and cease granting agencies policy discretion<sup>338</sup> and execution discretion.<sup>339</sup> To do so will be difficult.<sup>340</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

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333. *Chevron*, which promotes this, does so perversely because it implicitly rejects the argument that Congress cannot delegate resolution of policies to other branches. The *Chevron* Court 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. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984). See also Pierce, *supra* note 118, at 505.

334. *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 110, at 517.

335. Shapiro & Glicksman, *supra* note 118, at 859 (presumption of ambiguity); Saunders, *supra* note 331, at 778-83 (final erosion of judicial review comes from ease with which courts find ambiguity). But see Scalia, *supra* note 110, 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)."); Sunstein, *supra* note 113, at 2091-92 (mere fact another plausible interpretation exists will not be sufficient ambiguity).

336. Professor Strauss explains this 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. Strauss, *supra* note 16, at 1114-22, 1126.

337. *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 Auth. v. Hill*, 437 U.S. 153, 194 (1978) (Supreme Court ruled that separation of powers precluded the Court from employing equitable balancing: "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.").

338. Koch, *supra* note 121, at 483-84 (policy discretion is the power to take action to forward societal goals).

339. *Id.* at 479 (executing discretion is the power to fill in details from vague, general or incomplete statutes).

340. Strauss, *supra* note 16, 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 118, at 820 (primarily spurred by congressional displeasure with Reagan appointees, not the Supreme Court).

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 confine that role to protecting individual rights that might be trammelled by agency action. The decisions 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 are weakened.

## V. IMPACT ON LOWER COURTS

The lower courts have not rushed to deny standing dramatically because of *Lujan* and *Air Courier*. There is, however, a sense in the courts that they must tread carefully because of a subtext in the cases. As a result, environmental cases may no longer have a relaxed standing threshold.<sup>341</sup> Some of the more intriguing post-*Lujan* cases include *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*,<sup>342</sup> *Sierra Club v. Yeutter*,<sup>343</sup> *Sierra Club v. Robertson*,<sup>344</sup> *City of Los Angeles v. National Highway Traffic Safety Administration*,<sup>345</sup> and *Conservation Law Foundation of New England, Inc. v. Reilly*.<sup>346</sup>

*Public Interest Research Group* generates interest more for the fears expressed in its concurrence than its actual holding, which was practical and pragmatic in finding standing for a citizen's group, Public Interest Research Group (PIRG). It allowed PIRG to pursue a citizen suit under the Clean Water Act<sup>347</sup> based on numerous permit violations by Powell Duffryn Terminals, Inc. (Powell). The only issue in the case was whether PIRG could prove "injury in fact."<sup>348</sup> The problem arose because the Kill Van Kull, into which Powell discharged, is one of the most polluted industrial waterways in the nation. Although pollution in the waterway "injured" the aesthetic and recreational pursuits of PIRG's members, they did not and could not trace the difficulty solely to Powell's permit violations.<sup>349</sup> Therefore, the "fairly trace-

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341. For the argument that the Supreme Court had previously allowed a relatively slight showing to suffice, see Perino, *supra* note 93, at 144.

342. 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991).

343. 911 F.2d 1405 (10th Cir. 1990).

344. 764 F. Supp. 546 (W.D. Ark. 1991).

345. 912 F.2d 478 (D.C. Cir. 1990).

346. 743 F. Supp. 933 (D. Mass. 1990), *reversed*, Nos. 91-1257, 91-1269, 1991 U.S. App. LEXIS 27942 (1st Cir. Nov. 25, 1991).

347. 42 U.S.C. § 1365 (1988).

348. *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 70 n.3 (1990) (prudential limitations immaterial because citizen suit provision "explicitly confers standing to the limits of the constitution").

349. *Id.* at 71.

able" and "likely to be redressed" elements of the equation came into play.

The Third Circuit ultimately found that these requirements did not defeat standing. Although the court insisted that more than a violation of the permit must be proven, causation for standing was not the equivalent of the doctrine in torts.<sup>350</sup> Moreover, the court found the injury to be redressable. Even if the waterway would not be returned to pristine condition, both the injunction against the specific violations and civil penalties would help.<sup>351</sup> To not interpret the requirement in this manner would allow the most polluted areas to never be addressed.

Judge Aldisert, in his concurrence, admitted this fact but wrote to express his "nagging doubt about standing."<sup>352</sup> To him, the *Lujan* Court had sent a distinct signal that rules of standing were not to be made more lenient for environmental claims.<sup>353</sup> The Supreme Court additionally warned courts not to assume that general averments contained the particular facts needed to prove an injury in fact.<sup>354</sup> Therefore, Judge Aldisert worried that the plaintiffs had not shown that their injury was "fairly traceable" to Powell's permit violation: "Each member/plaintiff complained of pollution in general . . . . [N]o individual plaintiff was able to say that in this highly polluted waterway, the specific condition that was the object of his or her complaint was caused by Powell Duffryn."<sup>355</sup> This proof of injury would be insufficient to charge one lone defendant in any context other than an environmental case.<sup>356</sup>

Judge Aldisert senses that the Supreme Court is tightening standing requirements despite the public interest character of environmental claims. If his qualms are correct, it might be impossible for any citizen to proceed against a known polluter of a generally polluted area. The fear expressed in *SCRAP*<sup>357</sup> would be a reality with a different twist: rather than denying relief

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350. *Id.* at 72 (plaintiffs need not show "to a scientific certainty that defendant's effluent, and defendant's effluent alone" caused plaintiff's harm).

351. *Id.* at 73 (civil penalties deter).

352. *Id.* at 83 (Aldisert, J., concurring).

353. *Id.* at 84.

354. *Id.*

355. *Id.* at 88-89.

356. *Id.* at 88.

357. "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973).



because many are injured, relief would be denied because many injure.

This problem reappears in another form in *City of Los Angeles v. National Highway Traffic Safety Administration*.<sup>358</sup> Cities, states and environmental groups attacked the lack of an Environmental Impact Statement (EIS) for decisions to lower Corporate Average Fuel Economy (CAFE) goals for mileage years 1987-88 and 1989. The statute at issue set a presumptive goal but allowed the agency to set a lower level if it was the "maximum feasible."<sup>359</sup> On standing, the primary issue was whether the Natural Resources Defense Council (NRDC) had standing based on injuries to its membership from global warming:

According to the NRDC, the NHTSA's failure to prepare an EIS creates the risk that the agency will overlook the possibility that a CAFE standard below 27.5 mpg will lead to an increase in fossil fuel combustion that will, in turn, lead to a global increase in temperature, causing a rise in sea level and a decrease in snow level that would damage the shoreline, forests, and agriculture of California; and these local consequences of such a global warming would injure the NRDC's members who now use these features of California for recreational and economic purposes

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Judges Wald and D.H. Ginsburg disagreed on the causation element of standing. According to Judge Ginsburg, to allow standing in this instance would eliminate the standing requirement "for anyone with the wit to shout 'global warming' in a crowded courthouse."<sup>361</sup> He considered the one m.p.g. difference to create a maximum theoretical increase of greenhouse gases of less than one percent. Because many third parties and independent variables influence global warming, NRDC had the burden of showing that but for the particular governmental action being challenged the

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358. 912 F.2d 478 (D.C. Cir. 1990).

359. *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 482 (D.C. Cir. 1990). Ultimately, the challenges failed. The cities and states had standing for the first year based on their need to comply with the Clean Air Act, but lost on the merits. *Id.* For the 1988-89 year, two judges found standing for the NRDC, but one judge who admitted standing found that the claim was not meritorious. *Id.*

360. *Id.* at 483 (Ginsburg, J.). The specific local problems in California gave the plaintiffs a sufficient geographical nexus for a world-wide problem. In this regard, *Lujan* was distinguished. *Id.* at 494 (Wald, J.). Moreover, the judge found the injury to be redressed was not the global warming phenomenon, which could not be delineated with precision. The risk of overlooking a potential injury from failing to do environmental studies was the injury. *Id.*

361. *Id.* at 484 (Ginsburg, J.).

injury would not occur.<sup>362</sup>

Judge Wald disagreed both on what the evidence revealed and the standard necessary to prove standing:

If . . . we force a NEPA plaintiff to prove or allege with exquisite precision how the agency action "will [cause] particular environmental effects, we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." . . . A demand for that degree of certainty runs contrary to the broad remedial purposes of NEPA and is inconsistent with NEPA's standing jurisprudence.<sup>363</sup>

NRDC's data showed that a lower CAFE standard causes both gasoline consumption and carbon dioxide emissions to increase in ways that "synergistically contribute to the likelihood that the complained of environmental injuries will occur."<sup>364</sup> The debate between the judges on the necessary level of proof of causation, as Judge Wald notes, exemplifies problems regulatory beneficiaries have in seeking relief from harms that are "probabilistic and systemic, with widespread impact . . ."<sup>365</sup>

The third case, *Sierra Club v. Robertson*,<sup>366</sup> confronted *Lujan* more directly and sought to limit its scope. The plaintiffs appealed adoption of a Land and Resource Management Plan (LRMP) for a national forest because they objected to the plan's treatment of timber management and timber sales.<sup>367</sup> The Forest Service alleged that the LRMP was not an agency action subject to review, because it was a mere "'programmatic statement of intent'" which "'does not commit the agency to conduct any ground disturbing project.'<sup>368</sup> It argued that *Lujan* changed prior law, which had allowed review of such plans.<sup>369</sup> The district court

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362. *Id.* For a comparison, see earlier cases in which Judge Scalia dissented from a grant of standing to challengers of other CAFE standards: *In re Center for Auto Safety*, 793 F.2d 1346, 1354 (1986); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1343 (D.C. Cir. 1986) (injury not personal and too attenuated; plaintiffs cannot show that a change would force production of more fuel efficient automobiles). *But see Perino, supra* note 93, at 171-72 (arguing that this was not an environmental case and that Judge Scalia had easily allowed standing for environmentalists while on the D.C. Circuit).

363. *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 496 (D.C. Cir. 1990) (Wald, J.).

364. *Id.* at 497.

365. *Id.* at 495 n.5.

366. 764 F. Supp. 546 (W.D. Ark. 1991).

367. *Sierra Club v. Robertson*, 764 F. Supp. 546, 549 (W.D. Ark. 1991).

368. *Id.* at 553 (quoting the government brief).

369. *Id.*

both distinguished *Lujan* and rejected the argument on pragmatic grounds.

First, the district court noted that in *Lujan* there was a question whether a program actually existed. Here, the LRMP was definitely an "integrated plan."<sup>370</sup> Moreover, it was a statutory prerequisite for timber sales.<sup>371</sup> The fact that further implementing measures might be needed, or that the LRMP could be altered, did not automatically preclude review, even under *Lujan*. The court cited *Lujan* for the proposition that orders or regulations which would apply uniformly to individual actions may be challenged when ripe.<sup>372</sup> The LRMP was such an "action" because it set guidelines for future site-specific management decisions.

The district court in *Sierra Club v. Robertson* gave a second reason for not adopting the Forest Service's interpretation of *Lujan*. The court wanted to assure an effective remedy for the plaintiffs. To await individual timber sales and then seek judicial review on each sale individually would be costly. Moreover, if the Forest Service would later withdraw individual sales, as it had throughout the present controversy, the plaintiffs might never have an opportunity to have their worries addressed.<sup>373</sup> Pragmatic concerns forced the district court to allow judicial review of allegations of systemic problems in timber management. The court did not accept the answer that the plaintiffs should seek redress through either Congress or the agency.

The fourth case, *Conservation Law Foundation of New England, Inc. v. Reilly*,<sup>374</sup> also refused to read *Lujan* as precluding far-ranging relief at the district court level. A citizens' group challenged the Environmental Protection Agency's failure to comply with a non-discretionary duty to list and rank federal hazardous waste facilities.<sup>375</sup> The EPA claimed that there was no injury in fact and that one must be alleged for each site. The court rejected both contentions. Unlike the situation in *Lujan*, however, the court found that each site was a defined geographic area and members who lived near various unassessed or unevaluated sites

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370. *Id.* at 553-54.

371. *Id.*

372. *Id.* at 554 (citing *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3190 n.2 (1990)).

373. *Id.* at 554-55.

374. 743 F. Supp. 933 (D. Mass. 1990).

375. *Conservation Law Found. of New England, Inc. v. Reilly*, 743 F. Supp. 933, 935 (D. Mass. 1990).

alleged injury.<sup>376</sup>

More importantly, the court determined the scope of relief to be national. The group could argue the public interest after properly invoking the court's jurisdiction by an individual injury.<sup>377</sup> The citizen suit provision in the statute removed any prudential limitation on the right to argue third party rights. The court maintained that *Lujan* did not affect this law, because it merely found no individual injury: "There is not the slightest hint that if injury in fact to particular individuals is established, the law of third party standing . . . was to be fundamentally altered *sub silentio*."<sup>378</sup>

On appeal, however, the First Circuit Court of Appeals disagreed and found the plaintiffs had no standing to seek a nationwide injunction.<sup>379</sup> The First Circuit did not find that *Lujan* directly foreclosed standing,<sup>380</sup> but based its decision on the Article III injury in fact requirement, which demands particularized injury.<sup>381</sup> To the court, this meant that members residing near ten sites could seek an injunction forcing assessment of those sites, but injury with reference to such sites would not suffice to compel action in regard to the remaining 830 sites. As an illustration, the court noted that a plaintiff in Massachusetts could only have the status of a "concerned bystander" in regard to public health concerns from hazardous waste in Hawaii.<sup>382</sup> Separation of power concerns motivated it to deny standing.<sup>383</sup>

The court of appeals in *Conservation Law Foundation* also relied on the Supreme Court's rejection of pure public interest standing, citing *Sierra Club v. Morton*.<sup>384</sup> It quoted *Sierra Club's* exegesis that requiring injury would not insulate agency action from judicial review, but would put control in the hands of those

376. *Id.* at 938. The "injury" was that any potential harm from any site was unknown. *Id.* Without the sites being evaluated, the members did not know if they should alter their behavior in regard to the area. *Cf. City of Los Angeles v. Highway Safety Admin.*, 912 F.2d 478, 494 (D.C. Cir. 1990) (Judge Wald's definition of "injury") discussed in text accompanying note 363. Judges continue to manipulate injury in fact to take into account the special nature of regulatory harms. *Id.* at 494 n.5.

377. *Conservation Law Found.*, 743 F. Supp. at 939.

378. *Id.* at 940 n.11.

379. *Conservation Law Found. v. Reilly*, Nos. 91-1257, 91-1269, 1991 U.S. App. LEXIS 27942 (1st Cir. Nov. 25, 1991).

380. The court characterized *Lujan* as holding that even if the affidavits of the plaintiffs would have shown aggrievement, no standing would exist under the APA because the "Land Withdrawal Review Program" was not a "final agency action." *Id.* at 13-14. As predicted, the Supreme Court's "hypothetical" has become a holding.

381. *Id.* at 6-7.

382. *Id.* at 12.

383. *Id.* at 14-15 (citing *Allen v. Wright*, 468 U.S. 737 (1984); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974)).

384. *Id.* at 16 (citing *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)).

with "a direct stake in the outcome."<sup>385</sup> The *Conservation Law Foundation* appellate opinion ignores the more expansive dicta of *Sierra Club v. Morton*, which maintained that once injury is shown, the public interest may be argued.<sup>386</sup> Therefore, *Conservation Law Foundation* could signal a tightening of the restriction against asserting the rights of third parties.<sup>387</sup> Because the case involves distinct federal facilities throughout the nation, however, it could be distinguished from a case in which a party injured by a specific action simply desires to raise issues more pertinent to another. This focus on issues is the heart of the prudential limitation against third party standing. Therefore, the district court's insistence that *Lujan* did not change the law of third party standing<sup>388</sup> might be unaffected by its reversal.

Nevertheless, *Conservation Law Foundation* is a significant restriction on standing. The case was brought under a distinct citizen suit provision that allows "any person" to seek redress for the Environmental Protection Agency's failure to act.<sup>389</sup> To require individual injury for each of numerous generic failures would undercut the remedy's efficacy.<sup>390</sup> The First Circuit's insistence on a distinct and palpable injury throughout the nation in order to obtain systemic relief strengthens all doctrinal barriers to standing.

One additional case bears mentioning<sup>391</sup> and appears to have been influenced by *Lujan*. The case refused to find an issue ripe for resolution. *Sierra Club v. Yeutter*<sup>392</sup> involved a clash over

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385. *Id.*

386. *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972). For a discussion of *Sierra Club*, see *infra* note 422.

387. See *supra* notes 316-18.

388. *Conservation Law Found. v. Reilly*, 743 F. Supp. 933, 940-42, n.11 (1990).

389. 42 U.S.C. § 9659(a) (1991).

390. See Comments of the Plaintiff's Attorney, Stephen H. Burrington, 22 *Env't Rep.* 1935-36 (BNA) (Dec. 6, 1991). Burrington noted that individual suits would drive the EPA to first consider sites that had been the subject of a suit regardless of other rational priorities. Therefore, a class action suit might be the next avenue for the Foundation.

391. Other post-*Lujan* cases are of lesser note. See, e.g., *People for Ethical Treatment of Animals v. Department of Health & Human Serv.*, 917 F.2d 15, 17 (9th Cir. 1990) (no standing based on use of broad area through which hazardous wastes that might be generated by animal research pass). This *SCRAP*-like allegation of injury might not have sufficed even without *Lujan*. Four cases hold that those not truly interested in the environment do not come within the "zone of interest" of environmental laws. *Sabine River Auth. v. United States Dep't of Interior*, 745 F. Supp. 388, 397 (E.D. Tex. 1990); *Region 8 Forest Serv. Timber Purchase Council v. Alcock*, 736 F. Supp. 267 (N.D. Ga. 1990); *Association of Significantly Impacted Neighbors v. City of Livonia*, 765 F. Supp. 389 (E.D. Mich. 1991); *North Shore Gas Co. v. Environmental Protection Agency*, 930 F.2d 1239, 1243 (7th Cir. 1991). The last case is interesting because Judge Posner likens the concept of primary beneficiaries to anti-trust cases; additionally, the "zone of interest" test is compared to the common law tort principle that only allows people who belong to the class that a law was designed to protect to allege a violation of a statutory duty of care. *North Shore Gas Co.*, 930 F.2d at 1243.

392. 911 F.2d 1405 (10th Cir. 1990).

whether wilderness areas in national forests had reserved water rights and whether the Forest Service had to pursue these rights in water adjudications. The government responded to the suit in the alternative: either no reserved rights existed, or the decision to not file in state adjudications was nonreviewable.<sup>393</sup> The Tenth Circuit found the Forest Service decision reviewable, but only on the limited question of whether there was an irreconcilable threat to the wilderness character of the area.<sup>394</sup> Therefore, the case was not yet ripe for review. Mixed questions of law and fact existed,<sup>395</sup> and the Forest Service had not conclusively ruled out filing for water rights if needed. Its current position was therefore tentative.

Most importantly, the Tenth Circuit felt that the harm the plaintiffs alleged was speculative.<sup>396</sup> If harm is only speculative, any judicial opinion would be an advisory one. The court believed such opinions should be avoided, especially when the issue to be resolved is a political one: "Because the existence of federal reserved water rights based on the Wilderness Act is an important public issue of great moment in Colorado, and because of the uncertain and tenuous nature of the record, we conclude that forbearance is justified in this case."<sup>397</sup> To the Tenth Circuit, the situation resembled that in *Lujan*.<sup>398</sup> The circuit seemed to accept that courts do not decide certain questions.

Despite some influence, the Supreme Court's standing and ripeness decisions have not yet made it impossible for those seeking systemic reform to enter the courthouse. If fact, some courts chafe at the restrictions and actively distance themselves from *Lujan*. Some courts, however, have noted the tone of the Supreme Court and have been more cautious in determining ripeness and injury in fact. Moreover, some courts have used the zone

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393. *Sierra Club v. Yeutter*, 911 F.2d 1405, 1408 (10th Cir. 1990).

394. *Id.* at 1414. "Because the Wilderness Act does not provide meaningful standards to review all land and water management decisions, we hold that the Forest Service's decision to use or not to use federal reserved water rights allegedly created by the Wilderness Act is 'committed to agency discretion by law,' except in those situations where the agency's conduct cannot be reconciled with the Act's mandate to preserve the wilderness character of the wilderness area." *Id.*

395. Although whether reserved rights existed is a question of law, whether their assertion is necessary to preserve wilderness character is not. *Id.* at 1417.

396. *Id.* at 1419 (no proof that concrete harm to land would follow because it is not known when or if diversions would occur at locales that would injure wilderness qualities).

397. *Id.* at 1420 n.8.

398. *Id.* at 1421. "We find this case similar to *Lujan*. Both cases involve challenges to the cumulative effect of numerous agency actions that allegedly render the actions illegal. Both cases involve conjectural or speculative harms to the challenger. In light of the Supreme Court's decision in *Lujan*, we cannot say the Sierra Club's challenge to the Forest Service's administration of the wilderness areas is ripe for review." *Id.*

of interest test to control access.<sup>399</sup>

## VI. CONCLUSION

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. The Court is reaffirming the private rights model of standing. One reason for this is that strictly interpreting standing and ripeness doctrines is fundamental to the more general conservative agenda.<sup>400</sup> 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.

Despite the recent flurry of cases, the Supreme Court has not completed its look at judicial access. It granted certiorari to review *Defenders of Wildlife v. Lujan*.<sup>401</sup> On the merits, the case presents the question of whether federal agencies involved in activities in foreign lands must consult with the Secretary of Interior under the Endangered Species Act to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat of such species . . . ." <sup>402</sup> As intriguing an issue as this may be, the case also poses standing and ripeness questions that may further narrow access for those seeking broad-based relief from agency action. As with *Lujan*, the question was provocatively phrased:

[Do] respondents have standing to challenge a regulation . . . that merely interprets the statutory obligations of federal agencies under Section 7(a)(2) of the Endangered Species Act, . . . [when] respondents have not challenged any specific action by an agency upon [which] statutory

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399. See *supra* note 391 (cases cited therein); *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 937-38 (Fed. Cir. 1991) (plaintiff not within "zone" of patent law simply because it emphasizes the public interest and benefit of patents); *Dist. 2, Marine Engineers Beneficial Ass'n v. Burnely*, 936 F.2d 284, 286-87 (6th Cir. 1991) (Jones Act protects American seaman, not right of union to seek closed shops). *But see* *City of St. Louis v. Department of Transp.*, 936 F.2d 1528, 1532-33 (8th Cir. 1991) (allowing city and unions to challenge decision transferring routes from TWA without mentioning zone test; city's airport and union members would be injured if TWA's viability hurt).

400. The Supreme Court has discussed standing when not argued by the parties. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990). *Cf.* Comment, *supra* note 93, at 157 n.173 (Scalia wrote 18 opinions on standing in four years on the D.C. Court of Appeals).

401. 911 F.2d 117 (8th Cir. 1990).

402. 16 U.S.C. § 1536(a)(2) (1973).

obligations actually fall?<sup>403</sup>

Unlike *Lujan*, there is no question that a distinct "agency action" within the meaning of the APA existed: the Fish and Wildlife Service promulgated a regulation defining "action" for the consultation duty and limited it to activities in the United States or on the high seas.<sup>404</sup> A regulation is defined as agency action that is subject to review.<sup>405</sup> Therefore, the scope of review and ripeness questions are clearly broached.<sup>406</sup>

The government now seeks to limit review to specific instances of a rule's application, rather than to its overall validity. If an organization is only able to challenge a regulation by challenging an individual action, then litigation shatters into diffuse pieces.<sup>407</sup> Each circuit court of appeals could more easily arrive at different conclusions about the specific action before it.<sup>408</sup> Agencies may decide to acquiesce in only certain decisions.<sup>409</sup>

This limitation of a suit would 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>410</sup> However, congressional value determinations may be lost if beneficiaries of programs are precluded from 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. Not even a deferential *Chevron* review will occur.

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403. Petition for writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990) (No. 90-1424).

404. The regulatory definition is: "all activities or programs of any kind authorized, funded, all or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.01 (1986).

405. See 5 U.S.C. § 501(4); *id.* at § 501(13).

406. In the case below, the government challenged whether an "injury in fact" existed. The members, however, presented detailed affidavits that showed use of the land involved in some foreign activities. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 120-121 (8th Cir. 1990). *But see* Arguments Before the Court, 60 U.S.L.W. 3451 (Jan. 7, 1992) (injury in fact questioned).

407. *Sierra Club v. Penfold*, 857 F.2d 1307, 1322 (9th Cir. 1988) (review cumulative EIS in court and do not relegate plaintiff to administrative appeal of each mine plan because that would be a questionable administrative remedy). See also Sheldon, *supra* note 144, at 1057 (fragmented suits likely to produce inconsistent results and have little overall impact); Poisner, *supra* note 212, at 364-66 (exceedingly burdensome and can make nationwide programs so divided up as to evade review).

408. Cf. Strauss, *supra* note 16, at 1115 (episodic review by one three-judge appeals panel not likely to generate integrated view).

409. See *id.* at 1110-16.

410. Either Congress or the agency should make actual factual allocations of limited resources, which require value judgments because these types of entities 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 *ECOLOGY L.Q.* 43, 91 (1991).



Judicial review is a necessary component of the checks and balances of our system. Congress cannot micro-manage every agency. 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.

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. The Court 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. Restricted judicial access and restricted judicial review enfeeble not only the judiciary, but Congress as well. The voice of Congress may be lost unless it reasserts its priority in policymaking. The Court itself mutes the voice of the judiciary as it swings the pendulum of power toward the executive.<sup>411</sup>

## APPENDIX

### A. THE PURPORTED "BLACK LETTER" LAW OF STANDING

Standing rules are, to a certain extent, easy to state, but they are not necessarily easy to explain.<sup>412</sup> This Appendix will provide the purported rules garnered by taking the Supreme Court's words literally without examining inconsistencies in application.<sup>413</sup> According to the Supreme Court's ostensible rules, standing questions have two parts.<sup>414</sup>

The first facet has constitutional import: without an injury in fact, there is no "case or controversy" and hence no federal court jurisdiction.<sup>415</sup> In order to have a "personal stake" in the question, the prospective plaintiff must be among those affected by the action. If this were not required, then the courts purportedly would become mere debating societies. A generalized interest in

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411. Strauss, *supra* note 245, at 604 (continual flex, growth and competition between branches).

412. As one environmental practitioner put it, "it is still easier to plead standing than to discuss it." Sheldon, *supra* note 144, at 10558. See also *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such.")

413. *Cf.* Fallon, *supra* note 79, at 16 (some uniformity exists in verbal expression of rules despite variation in application).

414. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) ("The term 'standing' subsumes a blend of constitutional requirements and prudential considerations.")

415. *Allen v. Wright*, 468 U.S. 737, 751 (1984) ("a core component derived directly from the Constitution")

a topic, no matter how strong, however, cannot suffice for standing without injury.<sup>416</sup> Supposedly, the inquiry into whether an injury exists is not normative but a purely factual exercise.<sup>417</sup> Standing is thus to be a preliminary matter divorced from the merits of the case.<sup>418</sup>

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.<sup>419</sup> In theory, without such proof, the plaintiff was not truly "injured" by the agency action.

An injury may be grounded in economics, that is, a loss of money or property.<sup>420</sup> This would be analogous to harms that fit traditional common law causes of actions. Moreover, injuries to aesthetics and environmental concerns will also suffice.<sup>421</sup> Nevertheless, in order to be a proper plaintiff, not only must an injury be caused by the agency action and be redressable by the court, but the plaintiff must be counted "among the injured."<sup>422</sup> In cases

416. *Valley Forge*, 454 U.S. at 473. *But see* Winter, *supra* note 29, at 1394-1417 (at time of Constitution, courts did allow public enforcement of rights); DAVIS, *supra* note 33, at § 24:5 (advisory opinions given at time of Constitution).

417. Nichol, *supra* note 126, at 158-59 (injury test designed in theory to be "an objective, concrete, independent barrier" that removes Article III "case" determination from decision on merits). *But see* Fletcher, *supra* note 35, at 231-33 (injury determination is normative and related to whether legal right exists).

418. *Association of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153 (standing differs from legal interest test, which looks at merits); *Valley Forge*, 454 U.S. at 484 (rejecting contention that various constitutional values may justify a "sliding scale" of standing).

419. Equating causation with "traceable" alone and separately treating redressability is not universal. In the past, "fairly traceable" and "redressability" were treated as two aspects of causation:

To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. . . . Even if the relief respondents request might have a substantial effect on the desegregation of public schools, whatever deficiencies exist in the opportunities for desegregated education for respondents' children might not be traceable to IRS violations of law—grants of tax exemptions to racially discriminatory schools in respondents' communities.

*Allen*, 468 U.S. at 753 n.19 (plaintiffs sought to challenge IRS regulations as interfering with their children's ability to attend a desegregated school).

420. *Sierra Club v. Morton*, 405 U.S. 727, 733-34 (1972) ("palpable economic injuries" justify standing).

421. *Id.* at 734.

422. *Id.* at 735, 738. The requirement "serve[s] at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Id.* at 740. For a defense of standing requirements as preserving autonomy, see Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

dealing with natural resources, generally this means that the plaintiff uses resources that the agency action would impact.<sup>423</sup>

An injury in fact to the plaintiff provides the minimum indicia of Article III standing.<sup>424</sup> Nevertheless, the Supreme Court has enumerated prudential limitations on standing,<sup>425</sup> which Congress may eliminate by legislatively granting standing.<sup>426</sup> The prudential limitations, if operative, are designed to meet needs of the judiciary itself.<sup>427</sup> Therefore, they are grounded in the premise that standing rules should foster adversariness in a concrete setting.<sup>428</sup> Through the prudential inquiry, the court determines whether the party is the appropriate one to assert the substantive issue.<sup>429</sup> Standing will be denied prudentially if the injury is a generalized grievance,<sup>430</sup> if the plaintiff is asserting the rights of third parties,<sup>431</sup> or the injury is not within the "zone of interest" of the "relevant statute."<sup>432</sup>

This last prudential concern, the "zone of interest" test, arose in the context of administrative review.<sup>433</sup> In an interconnected society, any agency action could affect a myriad of people. Therefore, the Supreme Court felt the complained of injury should at least "arguably" fall within the zone of interests the statute is to protect or regulate.<sup>434</sup> In explicating this test, the Supreme Court

423. *Sierra Club*, 405 U.S. at 735.

424. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

425. *Id.* at 474.

426. *Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 584 (1982); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). *See also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (statute intended standing to limits of Article III; only injury in fact needed).

427. The doctrines theoretically promote separation of powers and allocate judicial resources efficiently. Rationales include avoiding judicial entanglement in politics and preventing the court from using up its "moral capital." Logan, *supra* note 32, at 47-48.

428. As stated in *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968):

The 'gist of the question of standing' is whether the party seeking relief had 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker v. Carr*, 369 U.S. 186, 204 (1962). . . . So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits, or those which are feigned or collusive in nature.

*Id.* (citations omitted).

429. Nichol, *supra* note 126, at 160.

430. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982).

431. *Id.* at 474.

432. *Id.* at 475. *See also* *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

433. *Association of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153. *See also* *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987) (test is primarily for APA and not universal despite some reference to it in constitutional cases).

434. *Association of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153. For a defense of

stated in 1987 that it was not meant to be onerous.<sup>435</sup> In fact, applications of the test should reflect the legislative trend to expand the categories of persons entitled to judicial review. Review was to be denied only if the plaintiff's interests were "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."<sup>436</sup>

One reason the Supreme Court gave for broadly interpreting standing to protest agency action was the Administrative Procedure Act (APA) of 1946.<sup>437</sup> To the Court, the APA was a "generous" grant of standing.<sup>438</sup> Under the APA, judicial review exists for "[any] person suffering a legal wrong . . . or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . ."<sup>439</sup> "Injury in fact" can show aggrievement or adverse effect.<sup>440</sup> The APA also impacts the second aspect of standing—prudential limitations. They should be interpreted in light of another APA section which provides that judicial review will be available for actions for which there is no other remedy.<sup>441</sup> Review is the norm, with limited exceptions.

Nevertheless, in order to seek judicial intervention under the APA, there must be two things: an agency "action" and, additionally, this "action" must be "final."<sup>442</sup> The APA states that an "agency action" includes any "rule,"<sup>443</sup> defined by the Act as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."<sup>444</sup> The APA does not define "final,"<sup>445</sup> but the Supreme

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the test as a principled constitutional basis on which to limit the class of plaintiffs, see Floyd, *supra* note 24, at 887-91. *But see* Albert, *supra* note 35, at 492 (determining cognizable injury from policy of statutory and constitutional guarantees should be done under rubric of whether claim exists, not as a threshold matter of standing).

435. *Clarke*, 479 U.S. at 396-97 (referring to *Association of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153-54).

436. *Id.* at 399-400. The case continues: "The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Id.* In 1987, one commentator observed that the "zone of interest" test restricted almost nothing. Perino, *supra* note 93, at 143-44.

437. Codified, as amended, at 5 U.S.C. § 551-706 (1988).

438. *Clarke*, 479 U.S. at 395 n.9.

439. 5 U.S.C. 702. *See also Clarke*, 479 U.S. at 395. (APA applies to "aggrieved" persons even if relevant act makes no such reference and when it does not directly provide for review.)

440. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973). " 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved.'" *Id.*

441. 5 U.S.C. § 704 (1988).

442. 5 U.S.C. § 551(13) (1988).

443. 5 U.S.C. § 551(4) (1988).

444. 5 U.S.C. § 551(13) (1988).

445. It does state, however, that if an agency review procedure does not stay the

Court has declared that a determination of "finality" should be made "in a pragmatic way."<sup>446</sup> The quest for a final action attempts to conserve judicial resources and ensure that a concrete and focused event exists for the court to review. Therefore, the concept of finality also is related to the doctrine of ripeness.

#### B. THE PURPORTED "BLACK LETTER" LAW OF RIPENESS

"Standing" deals with the "who" of a lawsuit; "ripeness"<sup>447</sup> deals with the "when."<sup>448</sup> It is generally considered a prudential limitation on judicial action, although the Supreme Court has occasionally hinted that ripeness derives from the "cases" and "controversy" language of Article III.<sup>449</sup> Nevertheless, its primary justifications are pragmatic. The doctrine seeks to protect all three players in any dispute:

[I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties.<sup>450</sup>

It tries to avoid judicial embroilment in inappropriate areas, to allow an agency to proceed to formal action, and to assure that the private party knows the true impact of an agency's action.

Since the 1967 *Abbot Laboratories* decision,<sup>451</sup> 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."<sup>452</sup> The first criterion may be related to other justiciability problems, such as the political question doctrine.<sup>453</sup>

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effectiveness of a decision during the pendency of an appeal, the original decision could be deemed "final" for purposes of judicial review. 5 U.S.C. § 704.

446. *Abbott Lab., Inc. v. Gardner*, 387 U.S. 136, 149 (1967).

447. As with "standing," current commentators speak of this justiciability concept as being a metaphor. Compare Winter, *supra* note 29, with Murchison, *supra* note 126, at 174 (ripeness as metaphor acknowledges time, which thus acknowledges political nature of administration).

448. It is therefore related to exhaustion of remedies and primary jurisdiction, which also have timing elements. See Gelpe, *supra* note 269, at 8-10.

449. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81 (1978). See Nichol, *supra* note 126, at 163 (criticizing attempt to constitutionalize doctrine).

450. *Abbot Lab., Inc.*, 387 U.S. at 148-49.

451. *Id.*

452. *Id.* at 149.

453. See generally Henkin, *supra* note 257.

Issue appraisal in the ripeness context, however, often centers on whether the question is one of law.<sup>454</sup> The second criterion—hardship to the parties—looks to difficulties that either prompt or delayed review would create for either the private party or the agency.<sup>455</sup> In essence, it may ask whether the situation would ever be better suited for judicial intervention.<sup>456</sup>

Three cases decided together in 1967,<sup>457</sup> to a certain extent, explain how the two-fold inquiry would work.<sup>458</sup> In the so-called “*Abbot* trilogy,” two regulations were found to be ripe for review before a Federal Drug Enforcement action to enforce the regulations. The third was not ripe for pre-enforcement review.

One ripe regulation required drug manufacturers to use the generic drug name on labels whenever the proprietary name was used. The Court found this had an immediate and expensive impact on the day-to-day activities of the drug companies. Moreover, they would risk a substantial sanction if they did not comply.<sup>459</sup> The second regulation defined color additives under a statute that required clearance before such additives could be used.<sup>460</sup> To the Court, the regulation was ripe because it was “self-executing, and . . . [had] an immediate and substantial impact.”<sup>461</sup> In both instances, the primary issue was whether the regulations were within the legislative intent of the statute.<sup>462</sup>

In the third case, the Court refused to allow pre-enforcement review of a regulation that required free access to manufacturing

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454. See, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

455. See, e.g., *Lotz Realty Co. v. United States*, 757 F. Supp. 692, 697 (E.D. Va. 1990) (Corps of Engineers' decision that individual permit is needed is not final action because judicial review “would burden the agency by diverting manpower from its normal functions.”).

456. *Duke Power* discusses whether a nuclear accident with damages in excess of the statutory liability limits is needed before determining if the limit was constitutional:

[D]elayed resolution of these issues . . . would frustrate one of the key purposes of the Price-Anderson Act—the elimination of doubt concerning the scope of private liability in the event of a major nuclear accident. . . . Since we are persuaded that ‘we will be in no better position later than we are now’ to decide this question, . . . we hold that it is presently ripe for adjudication.

*Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 82 (1978).

457. *Abbot Lab., Inc. v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 167 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 158 (1967).

458. *But see* Murchison, *supra* note 126, at 160.

459. *Abbot Lab., Inc.*, 387 U.S. at 153-54.

460. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 167 (1967).

461. *Id.* at 171.

462. *Abbot Lab., Inc.*, 387 U.S. at 149. (“[B]oth sides have approached this case as purely one of [legislative] intent”). Additionally, in both cases, the agency had reached an authoritative position that did not have to be elaborated.

facilities and formulas.<sup>463</sup> In contrast to the findings on the other two regulations, here the Court found no immediate consequence for the regulated entities. There had been no specific inspection challenged, no one had refused to permit an inspection, and no certification had been suspended as a result of a failure to allow an inspection.<sup>464</sup> Although the issue of whether the regulation was authorized would eventually be a question of law, facts needed to be developed on several fronts in order to understand the legal justification for the regulation.<sup>465</sup> Therefore, the inquiry required more than a mere examination of legislative intent. Balancing equities required delay. The private parties were not immediately harmed, but early review could harm the agency because it might curtail the agency's ability to develop its position.

The two-part *Abbot* formula, therefore, allows for flexible results. Courts still tend to cite the formula to apprise whether a case is ripe. They look to the fitness of the issues for judicial resolution and the hardship to parties.<sup>466</sup> Although the *Abbot* cases dealt with regulations promulgated after notice and comment, review of less formal agency action has also been found ripe when it was an authoritative statement of agency policy.<sup>467</sup> At times the question comes down to whether or not waiting for subsequent actions would "significantly advance . . . [a court's] ability to deal with the legal issues presented . . . [or] aid in their resolution."<sup>468</sup>

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463. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 158 (1967). Loss of certification was possible if a company did not comply.

464. *Id.* at 163.

465. *Toilet Goods Ass'n*, 387 U.S. at 163-64. The regulation was promulgated under general authority to regulate "for the efficient enforcement" of the relevant act, thus requiring investigation of both the statutory purpose and FDA's enforcement scheme. The latter requires:

[A]n understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets.

*Id.*

466. *See, e.g., Ciba-Geigy Corp. v. Environmental Protection Agency*, 801 F.2d 430 (D.C. Cir. 1986); *State Farm Mut. Auto. Ins. v. Dole*, 802 F.2d 474 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); *Air New Zealand Ltd. v. CAB*, 726 F.2d 832 (D.C. Cir. 1984).

467. *See, e.g., National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 701 (D.C. Cir. 1971).

468. *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 82 (1978) (discussing whether waiting for a nuclear accident with damages in excess of the statutory liability limits would be necessary). For a discussion of the flip-side: that harm could occur from delay, see *supra* note 456.