Penn State Environmental Law Review

Volume 2 | Number 2 Article 4

5-1-1993

Lujan v. Defenders of Wildlife: Environmental Standing—When the Love is Gone

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Recommended Citation

David J. Raphael, *Lujan v. Defenders of Wildlife: Environmental Standing—When the Love is Gone*, 2 *Penn St. Envtl. L. Rev.* 199 (1993).

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COMMENTS

LUJAN V. DEFENDERS OF WILDLIFE ENVIRONMENTAL STANDING — WHEN THE LOVE IS GONE

> Whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government . . . . [I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[1]

I. Introduction

The doctrine of standing has travelled a precarious road since the above statement was rendered in *Flast v. Cohen* in 1968.[2] Recently, the Supreme Court, under the stewardship of Justice Antonin Scalia, has tightened the federal standing requirement to its most conservative position in the last two decades.[3] Environmental standing has not been spared the rigidity of the Court and no longer enjoys what Justice Antonin Scalia disdainly coined "the judiciary's love affair with environmental litigation."[4] The Supreme Court's recent decisions have shown little of the amorous tendencies which crept into its decisions during the 1970's.[5] As a result,

1. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983) (quoting Flast v. Cohen, 392 U.S. 83, 99-101 (1968)).

2. Flast v. Cohen, 392 U.S. 83 (1968). The taxpayer appellant established standing by alleging that the disbursement of the tax money violated the Establishment Clause of the First Amendment. The taxpayer established that the challenged disbursement was part of the Elementary and Secondary Education Act of 1965 and the constitutional limitation of the Establishment Clause provided a specific limitation on congressional spending power. The appellant's specific interest in the outcome of the suit was not a requisite to standing.

3. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (Blackmun, J. dissenting). Writing for two members in dissent, Justice Blackmun stated:

> I cannot join the Court in what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

Id. at 2160.

4. Scalia, *supra* note 1, at 884.

5. Scalia, *supra* note 1, at 890 (citing United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (Five law students brought suit against the Interstate Commerce Commission (ICC) for authorizing a surcharge on the shipment of scrap materials over rail lines without drafting an environmental impact statement mandated by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2)(c) (1988). The litigants claimed that such a rate structure created an economic incentive to use raw materials instead of scrap materials. This economic

numerous environmental litigants may lose the remedy of the judiciary by failing to meet the heightened standing requirements promulgated by the Court.

This Comment takes a critical look at *Lujan v. Defenders of Wildlife* [hereinafter *Lujan II*] in an effort to analyze the current position of environmental standing.[6] First, the historical framework of standing will be provided as a map for the reader. Second, Justice Scalia's philosophical ideology will be described in an effort to understand the strictness he and the Court now utilize in the application of environmental standing. Third, *Lujan II* will be examined in detail, with consideration given to the majority and plurality position on the essential elements of the case as well as the dissent's reservations with the decisions. Finally, the impact of *Lujan II* will be examined and paradigms given to illustrate the constraints now imposed upon environmental litigants.

II. The Doctrine of Standing

The doctrine of federal standing is a judicial strainer which a litigant must pass through before a finder of fact will address the merits of a case. A grant of standing provides a litigant with a key to the judicial system and a chance to present the particular facts of his or her "case or controversy." A denial of standing, however, closes the doors of the judicial system to the litigant who must then seek a remedy either from the legislative or executive branches of government. Standing has its foundation in Article III, Section 2 of the United States Constitution. The judicial purview of the federal courts is limited to "Cases" and "Controversies" arising under the "Constitution, the Laws of the United States, and Treaties made."[7] The doctrine of standing in the federal courts hinges upon whether a litigant has "a

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incentive, the law students asserted, would cause increased pollution thereby damaging the "forests, rivers, streams, mountains, and other natural resources," which they used for "camping, hiking, fishing, sightseeing, and other recreational and aesthetic purposes." 412 U.S. at 678. Additionally, the law students contended that each of its members consumed the air within the "Washington Metropolitan Area" which would incur increased pollution from the imbalanced rate structure. The Supreme Court granted standing without requiring any litigant to prove a specific injury to themselves. *Id.* It is important to note, however, that the case was examined under Fed. R. Civ. P. 12(b) motion to dismiss on the pleadings. Under such a standard only general allegations which "embrace" the "specific facts" are needed to support a claim. Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990))).

6. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992). *See also* Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) [hereinafter Lujan I]. This decision, rendered almost two years before *Lujan II*, involved an analogous standing issue. The National Wildlife Federation initiated litigation against the Bureau of Land Management to challenge the "land withdrawal review program." *Id.* at 875. The litigants asserted that their "recreational use and aesthetic enjoyment" were impaired by the program. *Id.* at 885. The United States District Court for the District of Columbia, granted summary judgment against the National Wildlife Federation. National Wildlife Federation v. Burford, 699 F. Supp. 327 (D. D.C. 1988). The Court of Appeals for the District of Columbia reversed and remanded. National Wildlife Federation v. Burford, 878 F.2d 422 (D.C. Cir. 1989). The Supreme Court granted certiorari and Justice Scalia wrote the opinion of the Court. The Court held that the affidavits filed by the National Wildlife Group members were insufficient to show that the interests of such members were sufficiently affected to confer standing. Further, the Court cited deficiencies in the affidavits which would prevent the granting of standing.

7. U.S. CONST. art. III, § 2 specifically states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; to all cases of admiralty and maritime

sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[8] The facial simplicity of standing has been matched with a complexity of application infrequently paralleled in the Supreme Court's application of legal doctrines.[9]

In recent years, the Supreme Court has developed a two-prong test in an attempt to reduce the amorphous nature of the doctrine.[10] The first prong of the test addresses the constitutional considerations of Article III, Section 2. The test requires a litigant to prove three distinct elements: injury-in-fact, causation, and redressability.[11] Each of these elements must be proven independently and to a level commensurate with the evidentiary requirement of each successive stage of litigation.[12] Additionally, a litigant must meet the "prudential" standing requirements.[13] A litigant's injury-in-fact claim must address his or her own "legal rights and interests" and may not be a surrogate for an incidental party.[14] Finally, the litigants injury-in-fact must be encompassed by "the zone of interests" which the constitutional provision or relevant statute attempted to protect.[15]

III. Scalia's Philosophical Framework

Scalia's conviction is that the doctrine of standing [hereinafter doctrine] should be used to implement the separation of powers principle.[16] The doctrine is a means by which the courts may be restricted to their "undemocratic role" of shielding individuals and minorities from the inclinations of the majority. Furthermore, the doctrine must restrict the courts from deciding how the judicial and executive branches of government should function.[17] Where a person seeks to challenge a law for which he is the object of its construction or prohibition, standing

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Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between Citizens of the same State claiming Lands under the grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

8. Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

9. Michael A. Perino, *Justice Scalia: Standing, Environmental Law, and the Supreme Court,* 15 B.C. ENVTL. AFF. L. REV. 135, 137 (1985) (quoting J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 69 (1986)).

10. Sarah A. Robichaud, *Lujan v. National Wildlife Federation: The Supreme Court Tightens the Reins on Standing for Environmental Groups*, 40 CATH. U. L. REV. 443, 449 (1991).

11. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

12. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

13. Robichaud, *supra* note 10, at 461.

14. Robichaud, *supra* note 10, at 461.

15. Robichaud, *supra* note 10, at 461 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1974)).

16. Scalia, *supra* note 1, at 894.

17. Scalia, *supra* note 1, at 894.

is created automatically.[18] Scalia, however, would not afford such immediate relief to persons who seek judicial redress from an administrative agency's failure to impose analogous prohibitions upon "someone else."[19]

Scalia concedes that an agency's failure to act may harm a litigant, but such harm would be one of a "majoritarian" nature. The harm would be felt similarly by other citizens who also should benefit from the governmental intervention which the laws and Constitution require.[20] Whether a litigant may "care more" about a specific administrative activity than another citizen does not mean he has been harmed in a "distinctive" fashion. A person with a strong desire to correct a wrong may convince the public through "democratic debate" of the enormity of the problem.[21] If the harm is equally felt by the majority of citizens there is no reason to remove the grievance from the political forum and deliver it to the judicial system.[22] Scalia believes that harm to the majority is best remedied by the citizens who elect governmental officials and lobby for the passage of legislative bills.

Scalia therefore holds a "concrete injury" to be an essential prerequisite to the granting of standing.[23] It is through such an "injury-in-fact" that a litigant distinguishes himself from the ordinary citizen who may claim the benefit of a governmental social contract.[24] A citizen may then gain access to a judicial remedy. Although "injury-in-fact" is a necessary tool in maintaining the separation of the executive and judicial power, it may not be sufficient to do so without ancillary support.[25] Scalia maintains that certain "theoretical" interests suffered by the majority should not create a judicial grant of standing.[26] Standing, Scalia believes, should not be granted in situations where the injury asserted affects "all who breathe" the air.[27]

Scalia holds that there are compelling practical reasons not to allow the judiciary to attempt to protect the rights of the majority.[28] The judiciary is filled with an elite group of the hyper-educated who are immersed in a legal philosophy which espouses the premise that

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18. Scalia, *supra* note 1, at 894.

19. Scalia, *supra* note 1, at 894. *See* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

20. Scalia, *supra* note 1, at 894.

21. Scalia, *supra* note 1, at 894.

22. Scalia, *supra* note 1, at 895.

23. Scalia, *supra* note 1, at 895.

24. Scalia, *supra* note 1, at 895.

25. Scalia, *supra* note 1, at 895.

26. Scalia, *supra* note 1, at 895.

27. Scalia, *supra* note 1, at 896.

28. Scalia, *supra* note 1, at 896.

"abstract principle" should be valued above "concrete result."[29] Furthermore, such a judiciary is removed from all "accountability to the electorate."[30] Any attempt by the courts to enforce the "supposed" interest of the people which the executive branch has refused to enforce through political remedies will have a tendency to include the interest and "political prejudices of their own class."[31] Scalia puts his theory of class prejudice into practice by providing an example of the Court's action in environmental litigation:

> Their greatest success in such an enterprise — ensuring strict enforcement of the environmental laws, not to protect particular minorities but for the benefit of all people — met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia. It may well be, of course, that the judges know what is good for the people better than the people themselves; or that democracy simply does not permit the genuine desires of the people to be given effect; but those are not the premises under which our system operates.[32]

Scalia espoused that judicial discretion does not have a place in the application of the "doctrine." The Justice has applied such theory vigorously since his appointment to the Supreme Court.[33] Since that time, strict adherence to the doctrine has been most apparent in the Court's recent decisions involving environmental standing.[34]

IV. *Lujan v. Defenders of Wildlife*

The Endangered Species Act of 1973 bifurcates authority regarding the protection of endangered species between the Secretary of Commerce and the Secretary of the Interior.[35] Each federal agency must consult with the appropriate Secretary to confirm that any action

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29. Scalia, *supra* note 1, at 896.

30. Scalia, *supra* note 1, at 896.

31. Scalia, *supra* note 1, at 896. *See* Perino, *supra* note 9, at 151. *See also* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 174-75 (1921).

32. Scalia, *supra* note 1, at 897.

33. *See* Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

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

35. 16 U.S.C. §§ 1531-1544 (1988 & Supp. III 1991). Section 1532(d)(15) provides:

> The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior of the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

16 U.S.C. § 1532(d)(15) (1988).

funded by the agency will not jeopardize the future existence or habitat of any endangered or threatened species.[36] Two environmental organizations, Defenders of Wildlife and Friends of Animals and their Environment brought suit to challenge a regulation issued by the Secretary of the Interior limiting the consultation obligation under the Endangered Species Act to projects occurring in the United States or the high seas.[37] The United States District Court of Minnesota granted a request for summary judgment for failure to prove subject-matter jurisdiction on the basis of standing.[38] The case was reversed and remanded by the Court of Appeals for the Eighth Circuit.[39] On remand, after further discovery including supplemental affidavits and depositions, the environmental organizations were granted summary judgment and an appeal was taken.[40] In affirming the decision in favor of the environmental groups, the Eighth Circuit Court of Appeals held that standing to challenge the regulation had been established and Congress had not intended to limit the Endangered Species Act to government funded projects within the United States.[41] The United States Supreme Court reversed, focusing strictly on the issue of standing.[42]

A. Injury-in-Fact

Justice Scalia, writing for the majority, set forth the elements necessary to meet the injury-

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36. 16 U.S.C. § 1536(a)(2) (1988). It provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency [hereinafter in this section referred to as an "agency action"] is not likely to jeopardize the continued existence of any endangered species or threatened species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Section 1540(g)(1)(a) provides:

> Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf--(a) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

16 U.S.C. § 1540(g)(1)(a) (1988).

37. Defenders of Wildlife v. Hodel, 658 F. Supp. 43 (D. Minn. 1987). *See also* 16 U.S.C. § 1536(a)(2) (1988); 16 U.S.C. § 1540(g) (1988).

38. 658 F. Supp. at 47-8.

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

40. Defenders of Wildlife v. Hodel, 707 F. Supp. 1082 (D. Minn. 1989).

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

42. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992).

in-fact requirement. The majority explained that a plaintiff must suffer an injury-in-fact to a "legally protected right" which is both "concrete and particularized"[43] and "actual or imminent, not 'conjectural' or 'hypothetical'."[44] A party, Scalia continued, bears the responsibility of establishing the injury-in-fact requirement to invoke federal jurisdiction.[45] The Court determined that the degree of such requirement matches the specific stage of the litigation.[46] During the pleading stage, a plaintiff may assert "general factual allegations" of injury caused by the actions of the defendant which are presumed to encompass the specific facts needed to withstand a motion to dismiss.[47] Scalia emphasized, however, that a plaintiff responding to a summary judgment motion must "set forth" through an affidavit or other legally acceptable evidence the "specific facts"[48] causing such injury.[49]

Scalia, delivering the majority opinion in *Lujan II*, opined that the environmentalists did not suffer the requisite "injury-in-fact" to confer standing.[50] The environmentalists claimed that various government projects in Sri Lanka and Egypt would increase the rate of extinction of a variety of endangered and threatened species which they desired to observe in the future.[51] Although the majority agreed that the wish to use or observe a species for the purposes of even a "purely aesthetic" nature is an undisputable right for the purpose of standing, the Court held that the litigants failed to prove that they "were among the injured."[52] The Court found

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43. Allen v. Wright, 468 U.S. 737, 756 (1984). *See also* Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-41 (1972).

44. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Los Angeles v. Lyons, 461 U.S. 95, 102-03 (1983)).

45. *See* Lujan v. National Wildlife Federation, 497 U.S. 871, 883-89 (1990).

46. *Id.* at 871.

47. *Id.* at 889.

48. Fed. R. Civ. P. 56(e) specifically states:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers of parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific pacts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

49. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 115 (1979).

50. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137 (1992) [hereinafter Lujan II].

51. *Id.*

52. *Id.* (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).

that the affidavits submitted by environmentalists Joyce Kelly and Amy Skilbred did not display an "imminent injury."[53]

Ms. Skilbred stated in her affidavit that she "observed the habitat of the Asian elephant and the leopard" in a trip to Sri Lanka in 1981.[54] Her study of such endangered species occurred at the present site of the Mahaweli Project funded by the Agency for International Development.[55] Further, because she "was unable to view any of the endangered species" the construction project would lessen her ability to spot the endangered Asian elephant and leopard in the future by reducing the "threatened, and endemic species habitat . . . which may severely shorten the future of the species."[56] During a subsequent deposition Ms. Skilbred stated: "I intend to go back to Sri Lanka." However, she further explained: "I don't know when. There is a civil war going on right know. I don't know. Not next year, I will say. In the future."[57] Ms. Kelly, in her affidavit, expressed a similar interest to return to Egypt and continue to "observe the traditional habitat of the endangered nile crocodile" that she previously observed in 1986.[58] Ms. Kelly averred that she would likely suffer injury through the "American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile" which may reduce the habitat of the nile crocodile.[59]

The Court concluded that the "someday intention[s]" of the environmentalists to return to places they previously visited, without a description of concrete plans, did not support an "imminent injury" which is needed to meet the injury-in-fact requirement.[60] In a footnote, Scalia addressed the dissent's contention that the finder of fact could reasonably infer that the environmentalists will "soon" return to the project sites therefore meeting the "imminent injury"[61] requirement. Scalia tersely discarded the dissent's argument that the defendants would "soon" return because he found it suffered from either a "factual" or "legal" defect.[62] As a factual matter, the affidavits, even if taken to mean they would "soon" return to the project sites, would still fall short of the "imminent injury" requirement because no specific time period may be attached to such a term.[63] As a legal matter, if the dissent wished to attach a

53. *Id.* (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

54. *Id.* at 2138.

55. Lujan II, 112 S. Ct. at 2138.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Lujan II, 112 S. Ct. at 2138 (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

61. *Id.* at 2138-39 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

62. *Id.* at 2138.

63. *Id.*

meaning of "in this lifetime" to the term "soon" it would clearly depart from recent precedent which attempted to reduce the possibility that the Court would decide a case for which no injury may ever occur.[64] Scalia buttressed his position by stating that this would go beyond the Article III purpose that the injury be "certainly impending."[65]

In the same footnote, Scalia further dismissed the dissent's concept that the "imminent injury" requirement should be relegated to cases where future injuries depend on the "affirmative actions of third parties beyond a plaintiff's control."[66] The Court explained that no principle existed to require evidence that "third persons will take actions exposing the plaintiff to harm while presuming that the plaintiff himself will do so."[67] The Court concluded that where no "actual harm" existed the element of imminence in all instances must be established.[68]

1. Dissent

In dissent, Justice Blackmun echoed a stern response to the Court's continued pension for formalism with regard to the injury-in-fact requirement.[69] Blackmun questioned the strictness of the Court's ruling in considering a summary judgment motion.[70] The dissent argued that sufficient evidence need only be provided so that a "reasonable jury could warrant a verdict for the respondents."[71] Reasoning further, Blackmun explained that the majority never mentioned the "genuine issue" standard and therefore the court premised its decision on the wrong standard.[72]

Extending his claim, Blackmun continued that a "reasonable" fact finder could have logically conceived that Kelly and Skillbred would "soon" return to the project sites, therefore meeting the "actual and imminent" injury requirement.[73] Additionally, the defense posited that the environmentalists possessed the "requisite resources" and "personal interest" to return to

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64. *Id.* at 2138. *See* Whitmore v. Arkansas, 494 U.S. 149, 155 (1990); Los Angeles v. Lyons, 461 U.S. 95, 102-06 (1983).

65. Whitmore v. Arkansas, 494 U.S. at 158.

66. Lujan II, 112 S. Ct. at 2139.

67. *Id.*

68. *Id.*

69. *Id.* at 2151.

70. *Id.*

71. Lujan II, 112 S. Ct. at 2152 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

72. *Id.* at 2152.

73. *Id.* (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

the project site as well as "professional backgrounds in wildlife preservation."[74] In dispelling the requirement of a "concrete plan" to return to the project site as "empty formalism," Blackmun contended that this was not a case where "imminence" turned largely on the action of third parties, but on the plaintiff's own action. The dissent maintained that the "imminent injury" standard applied by the Court is derived from cases which normally turn on the "affirmative actions" of third parties outside a litigant's control.[75] Blackmun ventured that although a plaintiff's unilateral control over exposure to harm does not remove all speculation from the harm, a finder of fact would be considerably more likely to consider such harm "imminent." In a final retort to what Blackmun admonished as a return to "code-pleading formalism," he mocked: "a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this court with a 'description of concrete plans' for her nightly schedule of attempted activities."[76]

B. Nexus Theories for Standing

The Court refused to adopt any of the "novel standing theories" which the environmentalists contended would create an injury-in-fact regardless of their geographic location.[77] The environmentalists' "ecosystem nexus" theory claimed that a person who uses a portion of a "contiguous ecosystem" which suffers injury from a federally funded activity suffers a "concrete injury" regardless of whether the activity is located a "great distance away."[78] Scalia, citing *Lujan I*, held that a plaintiff must use the specific geographic location where the actual damage occurred and not an area "in the vicinity" of such injury.[79] The majority continued, asserting that regardless of the fact that the Endangered Species Act states one of its goals as being to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," this will not confer an automatic injury upon a portion of an ecosystem not "perceptively effected."[80]

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74. *Id.* at 2153.

75. *Id.* at 2153. *See* Whitmore v. Arkansas, 495 U.S. 149 (1990) (injury to plaintiff death-row inmate from fellow inmate's execution hinges on the court reversing plaintiff's conviction or sentence and considering comparable sentences at re-sentencing); Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (harm contingent upon police arresting plaintiff again and subjecting him to choke-hold); O'Shea v. Littleton, 414 U.S. 488, 495-98 (1974) (harm from discriminatory conduct of county magistrate and judge dependant on plaintiff being arrested, tried, convicted, and sentenced); Gold v. Zwinckler, 394 U.S. 103, 109 (1969) (harm to plaintiff dependant on a former Congressman, currently serving a 14-year term as a judge, running again for Congress).

76. Lujan II, 112 S. Ct. at 2154.

77. *Id.*

78. *Id.*

79. *Id.* at 2139. *See also* Lujan v. National Wildlife Federation, 497 U.S. 871, 887-89 (1990).

80. Lujan II, 112 S. Ct. at 2139. *See* 16 U.S.C. § 1531(b) (1988). Section 1531(b) states:

> The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species depend may be conserved, to provide a program for the conservation of such endangered species

Scalia further rejected the "animal nexus theory" and "vocational nexus theory" proposed by the environmentalists.[81] The "animal nexus theory" allowed a litigant who "has an interest" to see or study an endangered species in any geographic location the ability to meet the "injury-in-fact" requirement when such endangered species will be injured through a government funded project.[82] Similarly, the "vocational nexus theory" afforded a litigant who had a professional interest in an endangered species in any geographic area a means of reaching the "injury-in-fact" requirement if such endangered species suffered an injury caused by a government funded project.[83] The Court rejected these theories on the breadth of their inclusiveness and the lack of specificity regarding the relationship between the litigant and endangered species injured.[84]

The majority reasoned that a litigant who observes or works in a professional capacity with a particular member of an endangered species may suffer the requisite injury because the subject may no longer exist.[85] Scalia extended this reasoning to litigants who study specific members of a particular species in the area of the world where federal assistance may cause the depletion of such species.[86] However, Scalia and the majority refused to extend such "injury-in-fact" status where a litigant claims a federally funded project will affect a "certain portion" of an endangered species to which the litigant has no connection.[87] In a footnote, the Court explained that "geographic remoteness" does not necessarily prevent a finding of "concrete injury;" but where no further facts are provided to display how the injury to such portion of the endangered species will affect the litigant in a distant geographic area, the "injury-in-fact" requirement has not been met.[88] Scalia and the majority categorically rejected the notion that distance will "*never*" prevent harm.[89]

1. Dissent

Blackmun attacked the majority's rejection of the environmentalists' nexus theories with

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and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

81. Lujan II, 112 S. Ct. at 2139.

82. *Id.*

83. *Id.*

84. *Id.* at 2140.

85. *Id.* at 2139.

86. Lujan II, 112 S. Ct. at 2140. *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 223 n.4 (1986).

87. Lujan II, 112 S. Ct. at 2140.

88. *Id.* at 2140 n.3.

89. *Id.*

fervor.[90] The dissent contended that in admonishing the "ecosystem nexus" theory the majority did not properly characterize the decision in *Lujan I*.[91] The Court in *Lujan I* mandated "geographical specificity" because the specific harm was the visible enjoyment of nature disturbed by mining activities.[92] The minority further opined that often "environmental injuries" may cause harm distant from the area of immediate harm.[93] Environmental destruction may disturb species moving across wide expanses of territory.[94] An "ecosystem nexus" theory should therefore be given greater deference where the injuries are not of a visual nature.

Blackmun gave particular scrutiny to the "vocational nexus" theories rejected by the majority.[95] The dissent pondered how a "zoo keeper" would not suffer a "concrete injury" where his government contributed to the eradication of all Asian elephants in a distant area of the world.[96] Blackmun dismissed the premise that distance could mitigate the injury to a zoo keeper's livelihood simply because of the location of the Asian elephants' habitat.[97] The dissent added that the Court would find difficulty applying such "geographic formalism" outside the area of environmental claims.[98] Blackmun reiterated that environmental plaintiffs need only show that the action has injured them, not that the injury occurred near the alleged wrong.[99]

C. Procedural Injury

Scalia, delivering the *Lujan II* majority opinion, set forth the Court's sharpest rejoinder in revoking the Court of Appeals grant of standing under the "procedural injury theory."[100] Finding standing, the Court of Appeals looked to the Endangered Species Act which provides: "any person may commence a civil suit on his behalf (A) to enjoin any person including the United States and any other governmental instrumentality or agency . . . who is alleged to be

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90. *Id.* at 2154.

91. *Id.* (citing Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)).

92. Lujan II, 112 S. Ct. at 2154.

93. *Id.*

94. *Id. See* Japan Whaling Assn. v. American Cetacean Soc., 478 U.S. 221 (1986) (Japanese whaling activities causing harm to American whale watchers).

95. Lujan II, 112 S. Ct. at 2154.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Lujan II, 112 S. Ct. at 2142.

in violation of any provision of this chapter."[101] The Court of Appeals found that under this Act inter-agency consultation is required before commencement of a government funded project.[102] Consequently, the Department of Interior's failure to consult with the Agency for International Development before commencement of the project created a "procedural right" for a citizen suit.[103] Scalia held that the Court must reject a decision which would permit the injury-in-fact requirement to be satisfied by allowing every citizen the "abstract, self-contained, non-instrumental 'right' to have the Executive observe the procedures required by law."[104]

Scalia found that to allow Congress, under the Endangered Species Act, the ability to convert the "public interest" of mandating an agency's observation of a specific statutory procedure to an "individual right" would remove powers properly delegated to the executive branch.[105] The majority held that permitting such suits without any "concrete harm" would be tantamount to allowing the courts, with the "permission" of Congress, to supersede the President's right to "take care that the Laws be faithfully executed."[106] Scalia further assailed that the courts would then be granted "authority" over the government actions of a co-equal department as the "continuing monitors of executive action."[107]

The Court maintained that there is a distinct difference between Congress legislatively including previously inadequate injuries which are "cognizable" and "concrete" and abrogating the requirement that a litigant must suffer an injury-in-fact.[108] Scalia further noted that this analysis does not contradict the principle that the "'injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing."'"[109] This will not extend to government suits unless a "concrete injury exits."[110] Scalia refused to allow the Endangered Species Act to remove the regulation of the "public interest" from the Chief Executive and Congress.[111]

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101. *Id.*; 16 U.S.C. § 1540(g) (1988).

102. Lujan II, 112 S. Ct. at 2142; 16 U.S.C. § 7(a)(2) (1988).

103. Lujan II, 112 S. Ct. at 2142; 16 U.S.C. § 1540 (g).

104. Lujan II, 112 S. Ct. at 2143.

105. *Id.* at 2143.

106. *Id.* at 2145 (quoting Frothingham v. Mellon, 262 U.S. 477, 489 (1923)); U.S. CONST. art. III, § 3.

107. Lujan II, 112 S. Ct. at 2154.

108. *Id.*; Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 218-21 (1972) (Congress elevated the individuals personal interest in living in a racially integrated neighborhood); Hardin v. Kentucky Utils. Co., 390 U.S. 1, 6 (1968) (Congress recognized a company's right to market its product free from competition).

109. Lujan II, 112 S. Ct. at 2145 (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))).

110. Lujan II, 112 S. Ct. at 2146.

111. *Id.*

1. Dissent

Blackmun centered his rebuttal on the majority's dismissal of the "procedural injury theory" for its violation of the separation of powers doctrine.[112] The minority contended that Congress does not legislate in "black and white" terms but often in "complex regulatory areas" in "procedural shades of gray." Blackmun contended that substantive goals are often attained through the use of procedural regulations.[113] Blackmun also maintained that certain procedural injuries are "so enmeshed" with the "prevention of an individual concrete harm" that a litigant may demonstrate the requisite injury-in-fact "through the breach of that procedural duty."[114] The dissent asserted that the Endangered Species Act requirement of consultation between a federal agency and the Secretary of the Interior involves a hybrid injury which automatically creates the injury-in-fact requirement.[115]

D. Redressability

Justice Scalia led a plurality of the *Lujan II* Court (four justices) in rejecting the environmentalists' claim of standing for failure to demonstrate redressability.[116] The plurality held that the environmentalists had not proven "a substantial likelihood" that a favorable decision would "remedy" their injury.[117] Scalia explained that standing must be determined at the commencement of the suit.[118] He continued that Agency for International Development (hereinafter AID) was not a party to the suit and therefore would not be bound by a district court determination.[119] The plurality determined that the district court pursuant to 16 U.S.C. § 1536(a)(2) had the ability to order the Secretary of the Interior to consult with AID, but such an order was not reciprocal against the agency.[120] Scalia determined that because the AID had insisted that the consultation requirement only pertained to domestic actions, the agency had "no reason . . to honor an incidental legal determination the suit produced."[121] Scalia concluded that even a favorable decision of the District Court would not redress the environmentalists "injury-in-fact" because the AID could not be bound to terminate funding

112. *Id.* at 2159.

113. *Id.* at 2158.

114. *Id.* at 2159.

115. Lujan II, 112 S. Ct. at 2159.

116. *Id.* at 2140.

117. *Id.* at 2154 (quoting Duke Power Co. v. Carolina Envtl. Study Group Inc., 438 U.S. 59, 74-5 n.20 (1978)).

118. Lujan II, 112 S. Ct. at 2154.

119. *Id.*

120. *Id.*

121. *Id.*

of the Mahaweli Project and the Aswan High Dam Project.[122]

Additionally, the plurality held that the environmentalists failed to prove that the removal of AID's funding would stultify the projects. Scalia asserted that the AID had provided less than 10 percent of the funds for the Mahaweli Project.[123] The environmentalists, the plurality reasoned, did not produce the requisite evidence that such a funding reduction would suspend the Mahaweli project or reduce the harm to the pertinent endangered species.[124] Scalia maintained that the "conjectural" link between the AID's funding and the continuance of the foreign projects failed to show a "substantial likelihood" that the environmentalists' "injury-in-fact" would be redressed.[125]

1. Dissent

Justice Blackmun, in dissent, attacked the revocation of redressability on three premises. First, the minority contended that there is not an iron clad rule that the "'existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.'"[126] Therefore, redressability was created when the AID petitioners made admissions in the answer to the complaint previously filed by the Secretary of the Interior.[127] Second, the AID attorneys' involvement in the motion to dismiss and subsequent testimony by AID officials clearly displayed their involvement in this case.[128] Consequently, the "extensive involvement" of AID from the outset of the litigation binds AID to the decision under principles of collateral estoppel.[129] Third, the minority contended that the impact of the AID's funding upon the completion of the foreign projects presents a "reasonable question" for the finder of fact.[130] Blackmun stated the withdrawal of AID's portion of the Mahaweli Project of 170 million

122. *Id.* at 2142.

123. Lujan II, 112 S. Ct. at 2142.

124. *Id.*

125. *Id.*

126. *Id.* at 2156 n.4 (quoting Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989)).

127. *Id.* at 2155.

128. Lujan II, 112 S. Ct. at 2155.

129. *Id.* (quoting Souffront v. Compagnie des Sucreries, 217 U.S. 475, 487 (1910)).

> [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel to an adverse party, as he would be if he had been a party to the record.

Id.

130. *Id.* at 2157.

dollars should provide a sufficient question of redressability to survive a summary judgment motion.

E. Conclusion

The *Lujan II* decision further restricts the access of environmental groups to the federal judicial system. Regardless of whether Justice Scalia wanted to tighten the standing requirements to uphold his belief in an absolute separation of powers or as a political means of reducing the influx of environmental cases, the impact is the same. The Court's requirement of increased specificity to prove the injury-in-fact requirement may create problems for litigants whose injury falls within the gray area of the "imminent injury" definition. A recent district court case which used the *Lujan II* decision lends support to this contention. In *Animal Protection Institute v. Mosbacher,* the plaintiffs were held to have met the "imminence" standard of *Lujan II* by including in their affidavits that they planned to visit areas of the "false killer whales" during "this summer."[131] However, the court hedged and would not state whether additional plaintiff's affidavits stating that they would visit the "areas" during the "summers of 1993 and 1994" would meet the "imminent injury" standard.[132] Since a number of the plaintiffs were students in the "false killer whales" case, a question may arise if the "imminent" injury standard would have a prejudicial effect on their ability to study endangered species. Presently, a student who possesses a strong desire to study a specific endangered species but cannot afford to visit the indigenous area for two, three, or even five years may not be held to suffer an "imminent" injury. Conservatives may contend this is a small price to pay for the removal of frivolous environmental claims and the protection of the separation of powers, but such a philosophy may be difficult to maintain where the cure for Acquired Immune Deficiency Syndrome (AIDS) or cancer may have been locked inside the immune system of an endangered species now extinct.[133]

The Court in *Lujan II* also placed restraints upon the Congress to create new forms of "legal injuries" where such injuries did not previously exist. Scalia's rejection of pure "procedural injuries" for the granting of citizen suits against governmental agencies could have far reaching effects. Congress has previously used such grants of standing as a safeguard

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131. Animal Protection Inst. v. Mosbacher, No. 92-0223, 1992 U.S. Dist. LEXIS 11436, at *8 (D. D.C. July 31, 1992) (per curiam). Although the whale watchers met the "imminent" injury standard, summary judgment was granted against them because the "false killer whales" were previously in captivity and were not listed as "threatened" or "endangered" under the Endangered Species Act.

132. *Id.*

133. *See* Michael Rogers, *Penicillin From a Screen,* NEWSWEEK, Sept. 14, 1992, at 59. "A compound such as the cancer drug taxol, derived from the bark of the Pacific yew tree, is so complex that it's unlikely someone would have invented it from scratch." *Id. See also* Joan O. C. Hamilton & Fleur Templeton, *Turbocharging the Race for Drugs,* BUS. WEEK, Mar. 1, 1993, at 94. "Many modern drugs come from plants: morphine from poppies, aspirin from willow bark, oral contraceptives from the Mexican yam . . . . In rain forests, for example, competition among plants for space, light, and nutrients is fierce. To survive, many species have evolved chemicals that combat insects, viruses, or fungi. Merck has signed a two-year, $1 million deal with Costa Rica's Institute for Biodiversity to get access to these goodies." *Id. But see* Peter Huber, *Biodiversity vs. Bioengineering,* FORBES, Oct. 26, 1992, at 266. "The business of mining genes from the wild, even from the rich biological lodes of the rain forest, will probably decline rather than grow as the years go by." *Id.*

against "hostile agencies" who wish to ignore or delay legislative mandates.[134] Interestingly, Scalia's foreclosure on the consultation requirement of the Endangered Species Act removes a power which "originates and emanates" in the legislative branch and transfers it to the executive branch.[135] Congress will no longer have the ability to expand standing to accommodate the contemporary needs of society without meeting stringent judicial requirements. A citizen will not be able to play watchdog over his or her environmental interests without proving an "imminent" and "concrete" injury. Scalia maintains that it is the job of the executive branch under Article II, Section 3 of the Constitution to make sure the "[l]aws are faithfully executed."[136] However, additional citizen safeguards should provide a valid exception where environmental problems loom larger every day.

Congressional enactments under the Clean Air Act which allow a citizen suit for the "failure of an Administrator [Administrator of the Environmental Protection Agency] to perform an act or duty" may be voided under the *Lujan II* ruling.[137] A citizen who brings a suit alleging that an Administrator has failed to prosecute an industrial polluter will not be automatically granted standing. A citizen must additionally prove that the procedural injury "could impair a separate concrete interest."[138] If the industrial polluter is emitting chlorofluorocarbons (CFCs) which deplete the ozone layer, such a "concrete interest" may be difficult to prove, but the cumulative effects of such emissions may be devastating.[139] Congress, in recognizing the enormity of regulating the emissions of the nation, has relaxed standing requirements to allow citizens to bear part of the burden. Thus, *Lujan II* may maintain the separation of powers distinction at the expense of efficient prosection of industries which continue to pollute the atmosphere. Although Scalia could only muster a plurality in the dismissal of standing for failure to prove redressability, a strong message has been sent to

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134. Robert Gordon, *The U.S. Supreme Court Year in Review; Standing Up for the Executive*, N.J.L.J., Aug. 24, 1992, at 9.

135. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2158 (1992).

136. *Id.*

137. *See* 42 U.S.C. §§ 7604(a)(1) & (2) (1988). Section 7604(a)(1) & (2) provides:

> Except as provided in subsection (b) of this section, any person may commence a civil action of his own behalf: (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The term "Administrator" is defined as the "Administrator of the Environmental Protection Agency" pursuant to 42 U.S.C. § 7602 (1988).

138. Lujan v. Defenders of Wildlife, 112 S. Ct. at 2142.

139. WORLD RESOURCES INSTITUTE, THE 1992 ENVIRONMENTAL ALMANAC (1992). "The CFCs released to the atmosphere eventually reach the stratosphere, where they release chlorine gas, each molecule of which can catalyze the destruction of many ozone molecules." *Id.*

Congress regarding statutory construction. Any federal statute which contains "consultation requirements" or any other requirements which do not mandate agency action could be held invalid. Congress must therefore enact statutes which do not leave any discretion for government agencies to act on their own behalf. Litigants bringing suit under environmental statutes with such "consultation" requirements may be turned away because they cannot prove that a decision in their favor would force federal agency action to remedy their injury-in-fact. Additionally, lower courts may look to the dicta of *Lujan II* and require litigants to give detailed explanations of how judicial orders will bind the government agencies in question.

V. Future of Environmental Standing

The *Lujan II* decision represents the continued trend away from preferential standing treatment of environmental litigants. Environmental groups will receive no reprieve from the tightening of the "doctrine" at least until the end of the 1993 Supreme Court term. Justice Byron White's retirement from the Court at the end of this term should, however, provide a softening of the Court's position on environmental standing after his departure.[140] Justice White, the last democratic appointment to the Court, has proven to be a consistent supporter of Scalia's tightening of the doctrine.[141]

The environmentalists' gains from the retirement of Justice White will be tempered by the likely retirement of the Court's strongest supporter of a flexible environmental standing doctrine. Justice Harry Blackmun, the Court's oldest member at the age of 84, has hinted that this will likely be his last term on the Court.[142] Scalia, even without the support of Justice White, may be able to move the doctrine further to the right without the hindrance of Blackmun's cogent rebuttals. Regardless of the eloquence of any Clinton appointments, they will not likely carry Blackmun's deference among the moderates of the Court. At the very least, Scalia should be able to maintain the doctrine's current position while newly appointed justices orient themselves to the Court.

In short, *Lujan II* may become the high water mark in a series of conservative environmental decisions delivered by a Scalia-led majority of the Court. Environmentalists will continue to suffer from the Court's conservative agenda until Clinton appointments take full effect. Environmental litigants who remember the Court's propensity toward granting environmental standing during the 1970's will gain little solace from Lord Tennyson's time worn phrase "Tis better to have loved and lost than never to have loved at all."[143]

David J. Raphael

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140. James J. Kilpatrick, *Justice Byron White, Hard to Classify, Will be Missed on the Supreme Court*, ATLANTA J. & CONST., Mar. 31, 1993, at A19.

141. *Id. See* Lujan v. National Wildlife Federation, 110 S. Ct. 3181 (1990); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992). Justice White joined Justice Scalia in denying standing to the environmental litigants in both *Lujan I* and *Lujan II*.

142. Joan Biskupic, *Court Vacancies Await New President*, WASH. POST, Nov. 6, 1992, at A1.

143. LORD TENNYSON, IN MEMORIAM A.H.H. (1850).