Bennett v. Spear

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INTRODUCTION

The doctrine of standing is arguably the Hydra of American jurisprudence. Confusing and constantly changing, it has been called everything from "incoherent"[1] to "a word game"[2] that is "permeated with sophistry."[3] Efforts to understand the standing doctrine through the lens of any particular issue often fail for the same reason that efforts to slay the Hydra failed: after answering one question, two or more questions spring up in its place. Thus, as the Greek heroes and heroines who sought to destroy the Hydra created a worse monster, the Supreme Court's cases seeking to clarify the standing doctrine often create more questions than they actually answer. *Bennett v. Spear*[4] is no exception.

In *Bennett*, the Court faced three issues under the standing doctrine: (1) whether the zone of interests test applied to a broadly worded citizen suit provision (in this case, Section 11 of the Endangered Species Act[5]); (2) what role a statute's overall goals play in applying the zone of interests test; and (3) how Article III's redressability and traceability requirements affect a litigant asserting procedural injuries. This Casenote explores how *Bennett*'s analysis of these three issues fits within the United States Supreme Court's standing jurisprudence. It concludes

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1. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988).
2. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).
3. 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983).
4. 520 U.S. 154 (1997).
5. 16 U.S.C. § 1540(g)(1) (1994).

that although the *Bennett* Court left new questions in place of old, it nevertheless resolved some prudential standing issues and correctly, if obliquely, rejected an alternative approach to Article III standing that had arisen within the lower courts.

I

BACKGROUND

Courts have developed two doctrines to evaluate a litigant's standing to bring suit: prudential standing and Article III standing. The Court created the doctrine of prudential standing in response to the Administrative Procedure Act (APA),[6] which allows parties that are "adversely affected or aggrieved by [Federal] agency action within the meaning of a relevant statute" to seek judicial review.[7] The chief obstacle[8] to prudential standing is the zone of interests test,[9] which limits the availability of judicial review to those parties whom Congress actually intended to have it.[10] Under the zone of interests test, therefore, a plaintiff's claim must arguably fall "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[11]

While prudential standing rests on the Court's understanding of Congress' intent and thus may be broader or narrower depending on the law under which the plaintiff brings suit, standing under Article III imposes a constitutional limitation on the power of the federal courts to hear a plaintiff's case. The Article III standing doctrine has changed throughout the years,[12] evolving into a test that imposes three requirements on litigants

6. 5 U.S.C. §§ 551-559, 701-706 (1994).

7. *Id.* § 702.

8. For an excellent discussion of the prudential standing requirements within the Ninth Circuit, see Martha Colhoun & Timothy S. Hamill, *Environmental Standing in the Ninth Circuit: Wading Through the Quagmire*, 15 PUB. LAND L. REV. 249, 269 (1994) ("Traditionally, to survive a court's prudential scrutiny, the plaintiff's injury must fall within the 'zone of interests' protected by the relevant statute and involve the plaintiff personally, not as a third party nor as a member of a larger class of potential plaintiffs alleging a 'generalized grievance.'").

9. *See* Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987) (holding that the zone of interests test determines when, "in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision.").

10. *See id.* at 400 ("[T]he reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed.").

11. Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 154 (1970).

12. For a description of these changes, see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) and Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

seeking adjudication of their claims. First, at an "irreducible constitutional minimum," the party must suffer an "injury in fact."[13] An "injury in fact" is defined as "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent."[14] Second, the injury must be fairly traceable to the challenged governmental action or inaction.[15] Finally, the injury also must be redressable by a favorable decision.[16]

Prior to *Bennett*, circuit courts disagreed on how to apply the doctrines of prudential and Article III standing in two situations that commonly arise in environmental litigation: litigation brought under citizen suit provisions of environmental statutes and suits in which litigants assert procedural injuries. First, the circuits disagreed on how to apply the zone of interests test to claims brought under citizen suit provisions. This disagreement arose from the Court's lack of clarity concerning how the zone of interests test should be applied to statutes outside the purview of the APA, particularly the broadly worded citizen suit provisions of many environmental statutes.[17]

The circuit courts also disagreed on the correct way to apply the Article III requirements to litigants asserting procedural injuries.[18] In these cases, the harms alleged by litigants are usually the result of complex regulatory processes in which numerous factors, judgments, and politics play significant roles. This complexity makes it difficult to prove traceability, redressability, and imminent injury. In the midst of these conflicts, the Court granted certiorari in *Bennett*.

II
DESCRIPTION OF THE CASE

A. Facts

In *Bennett v. Spear*, the Court faced both of the issues discussed above: the plaintiffs brought suit under the citizen suit provision of the Endangered Species Act (ESA), asserting what were essentially procedural injuries. Two Oregon irrigation districts and the operators of two ranches within those districts

13. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
14. *Id.* (citations omitted).
15. *See id.* at 560.
16. *See id.* at 561.
17. *See* Air Courier Conference v. American Postal Workers Union, 498 U.S. 517, 524-28 (1991); *Clarke*, 479 U.S. at 396.
18. *See infra* note 36 and sources cited therein.

(Petitioners) brought suit against the director and regional director of the United States Fish and Wildlife Service (Service) and the Secretary of the Interior (Respondents) under Section 11(g) of the ESA[19] and Section 706 of the APA.[20] Subject to certain limitations, the ESA's citizen suit provision in Section 11(g)(1) allows "any person [to] commence a civil suit on his or her own behalf" against any person, governmental instrumentality or agency alleged to be in violation of any provision of the ESA.[21] Section 706 of the APA authorizes a court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[22]

Petitioners sought to compel the Service to withdraw portions of a biological opinion (Opinion) that the Service issued to the Bureau of Reclamation (Bureau) after formal consultation by the Bureau in 1992.[23] The Opinion evaluated the impact of the

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19. 16 U.S.C. § 1540(g) (1994).

20. 5 U.S.C. § 706 (1994).

21. 16 U.S.C. § 1540(g)(1) (1994). The statute states in full:

> 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; or . . .
>
> . . . .
>
> (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

Id. The next subsection provides:

> (A) No action may be commenced under subparagraph (1)(A) of this section—
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> (i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;
>
> (ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or
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> (iii) if the United States has commenced and is diligently prosecuting a criminal action . . . to redress a violation of any such provision or regulation.

Id. § 1540(g)(2)(A).

22. 5 U.S.C. § 706(2) (1994).

23. Under the ESA, federal agencies are required by law to consult with the Service whenever their actions may adversely affect a listed "threatened" or "endangered" species. Biological opinions are written statements to such federal agencies "explaining how the proposed action will affect the species or its habitat." *Bennett*, 520 U.S. at 158; *see also* 16 U.S.C. § 1536(b) (1994).

Klamath Irrigation Project[24] (Project) on two species of endangered fish, the Lost River sucker and the shortnose sucker.[25] The Opinion concluded that the "long-term operation of the Klamath Project was likely to jeopardize the continued existence of the [endangered fish]" because water levels would be too low to sustain them.[26] The Opinion identified alternatives designed to avoid such jeopardy,[27] including the maintenance of "minimum water levels" in several reservoirs within the Project.[28] After receiving the Opinion, the Bureau notified the Service that it intended to operate the Project in compliance with the Opinion's mandates.[29]

Petitioners sued for declaratory and injunctive relief, alleging several procedural violations by the Service in preparing the Opinion. Specifically, Petitioners claimed that the Service had violated Section 4(b)(2) of the ESA[30] by failing to consider the economic and other relevant impacts of the Opinion's alternatives.[31] Petitioners further claimed that the Secretary violated Section 7(a)(2) by failing to use "the best scientific and commercial data available"[32] in drafting the Opinion.[33]

Petitioners attempted to demonstrate standing under both Article III and the zone of interests test. They asserted that the Opinion's subsequent restrictions on water levels would have harmed them by irreparably damaging their "recreational, aesthetic, and commercial" use of the Project's waterways as their "primary sources of irrigation water."[34] While they therefore sued to protect their economic interests rather than to ensure the survival of an endangered species, Petitioners claimed that because the ESA allowed "*any* person" to sue under its citizen suit provi-

24. The Klamath Project is a federal reclamation scheme consisting of a "series of lakes, rivers, dams and irrigation canals in northern California and southern Oregon." *Bennett*, 520 U.S. at 158.

25. *See id.* at 159.

26. *Id.* (quoting Opinion).

27. Under Sections 7(a)(2) and 7(b)(3)(A) of the ESA, if the Service concludes that the proposed action will "jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat . . . ," the Biological Opinion must propose any "reasonable and prudent alternatives" that would allow the agency to take the proposed action without adversely impacting the endangered species. 16 U.S.C. §§ 1536(a)(2), (b)(3)(A) (1994).

28. *Bennett*, 520 U.S. at 159.

29. *See id.* at 159.

30. 16 U.S.C. § 1533(b)(2) (1994).

31. *See Bennett*, 520 U.S. at 160.

32. 16 U.S.C. § 1536(a)(2) (1994).

33. *See Bennett*, 520 U.S. at 159.

34. *Id.* at 160.

sion,[35] the zone of interests test did not apply at all; in other words, Congress had abrogated the test through the citizen suit's broad language.

At the same time, Petitioners were also asserting what were essentially procedural injuries.[36] Their allegations centered around the failure of the Service to follow required procedures for issuing Biological Opinions.[37] This raised the issue of whether Petitioners satisfied Article III standing requirements, since the restrictions on the reservoirs' water levels complained of by Petitioners were actually implemented by the Bureau rather than the Service.[38]

When Respondents first raised this issue at the Supreme

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35. 16 U.S.C. § 1540(g)(1) (1994).

36. Procedural injuries occur when a federal agency fails to follow a required procedure and then acts to harm an interest of the plaintiff. *See* Christopher T. Burt, Comment, *Procedural Injury Standing After* Lujan v. Defenders of Wildlife, 62 U. CHI. L. REV. 275, 276, 289 (1995) ("For a given plaintiff, the consequences of an agency's failure to follow a procedure are necessarily ambiguous since the agency might have reached the same result even if it had followed the correct procedure. Because procedural plaintiffs are never able to show that adherence to procedure will definitely avert subsequent harm, they are always unable to meet the redressability requirement of standing."); *see also* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1184-85 (1993) ("Typically, a plaintiff alleges denial of adequate notice, an adequate hearing, or an adequate explanation of the basis for an agency action adverse to that party's interests and seeks review based on the (usually implicit) assumption that the agency's provision of the mandatory procedure would be likely to affect the outcome of the case.") (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 345-46 (1989); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Mathews v. Eldridge, 424 U.S. 319, 324-25 (1976)).

37. *See* Reply Brief for the Petitioners at *8, Bennett v. Spear, 520 U.S. 154 (1997) (No. 95-813), *available in* 1996 WL 464181 ("[I]t is significant that each of the claims asserted by petitioners is in the nature of a procedural right."); *see also* William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 797 (1997) ("Thus, in most respects, the *Bennett* petitioners' case was based on allegations of agency procedural missteps.").

38. After engaging in formal consultation, an agency that has consulted the Service must determine "whether and in what manner to proceed with the action," in light of the Service's biological opinion and any other relevant information. 50 C.F.R. § 402.15(a) (1998). An agency that chooses to deviate from the Service's recommendations bears the burden of "articulating in its administrative record its reasons for disagreeing with the conclusions of a biological opinion." Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,956 (1986) (codified at 50 C.F.R. pt. 402). However, "[o]nce the mandatory consultation has taken place, . . . the ultimate responsibility for determining agency action . . . still rests with the particular Federal agency that was engaged in consultation." *Id.* at 19,928. Thus, Respondents successfully argued that "as a legal matter . . . the action agency retains the ultimate responsibility for determining whether, and in what manner, a proposed action can proceed in compliance with [the Biological Opinion]." Brief for the Respondents at *4, Bennett v. Spear, 520 U.S. 154 (1997) (No. 95-813), *available in* 1996 WL 396714.

Court, Petitioners offered a variety of arguments to prove that the Service's Opinion was the cause of the reservoirs' lowered water levels rather than the Bureau's independent decision. Among other things, Petitioners pointed out that the idea of maintaining minimal water levels in the reservoirs originated "in its entirety" in the Opinion, and that the Respondents had failed to proffer a single example of agency deviation from the terms of a biological opinion.[39] Petitioners also argued that a favorable judicial ruling would result in a revocation of the minimum water levels, since the Bureau's original mitigation measures did not include operating the Project at minimum water levels.[40] Additionally, Petitioners also argued that because they were asserting procedural rights, they did not need to meet the standards for redressability normally applicable under Article III.[41]

B. Procedural History

Neither the district court nor the Ninth Circuit addressed the issue of Petitioners' Article III standing because they dismissed Petitioners' suit on the grounds that the plaintiffs had failed to meet prudential standing requirements. The district court held that the zone of interests test still applied to suits brought under the ESA's citizen suit provision, despite the broad language in Section 11(g)(1).[42] Since the overall purpose of the ESA is the protection of endangered species, the district court concluded that Petitioners' assertion of solely economic interests in direct conflict with the interests of the endangered animals could not satisfy the zone of interests test.[43] The district court therefore dismissed Petitioners' complaint. Petitioners appealed the dismissal, and the Court of Appeals for the Ninth Circuit affirmed, agreeing with the district court's prudential standing analysis.[44]

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39. Reply Brief for the Petitioners at *5, *Bennett* (No. 95-813), *available in* 1996 WL 464181.

40. *See id.*

41. *See id.*

42. *See* Bennett v. Plenert, Civ No. 93-6076-HO, 1993 WL 669429, at *5 (D. Or. Nov. 18, 1993) ("[T]he recreational, aesthetic, and commercial interests advanced by plaintiffs do not fall within the zone of interests sought to be protected by ESA."), *aff'd*, 63 F.3d 915 (9th Cir. 1995), *rev'd sub nom.* Bennett v. Spear, 520 U.S. 154 (1997).

43. *See id.* at *4.

44. *See* Bennett v. Plenert, 63 F.3d 915, 918 (9th Cir. 1995) ("[W]e directly reject the plaintiffs' contention that it renders the zone of interests test inapplicable to claims brought under the ESA."), *rev'd sub nom.* Bennett v. Spear, 520 U.S. 154 (1997). The Ninth Circuit also noted that "[b]ecause the plaintiffs' interests consist solely of an economic (and recreational) interest in the use of water . . . and because, as the district court determined, their interests are inconsistent with the Act's pur-

On appeal to the United States Supreme Court, Petitioners challenged the lower courts' application of the zone of interests test. Rather than defend the lower courts' interpretations of the zone of interests test, the government advanced three alternative grounds to support the district court's decision. The government argued that (1) Petitioners did not have standing under Article III of the Constitution; (2) the ESA's citizen suit provision did not authorize judicial review of the Petitioners' claims; and (3) Petitioners could not obtain judicial review under the APA because the Opinion did not constitute final agency action.[45]

C. *The Supreme Court Decision*

In a unanimous decision written by Justice Scalia, the Supreme Court reversed. The Court held that the broad language of the citizen suit provision in the ESA negated the zone of interests test. Justice Scalia concluded that the phrase "any person" in Section 11(g) indicated a congressional intent to expand standing to *all* causes of action authorized by the Section. According to Justice Scalia, the broad language of Section 11(g) plainly contradicted the lower courts' interpretation that the Section "applie[d] to environmentalists alone."[46] According to the Court, Section 11(g) lacked the restrictions on standing that are typically found in similar citizen suit provisions.[47] The Court noted that the expansive language of the provision was "an authorization of remarkable breadth when compared to the language Congress ordinarily uses."[48] Two additional factors also increased the Court's willingness to accept the term "any person" at face value. First, the Court found it significant that the overall subject matter of the ESA was the environment because "it is common to think all persons have an interest" in the environ-

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poses, we conclude that they lack standing." *Id.* at 921.

45. *See Bennett*, 520 U.S. at 161.

46. *Id.* at 166.

47. In making this determination, the Court compared the ESA's citizen suit provision to the citizen suit provisions in the Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365(g) (1994) (Clean Water Act) ("[any person] having an interest which is or may be adversely affected"); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270(a) (1994) (same); Energy Supply and Environmental Coordination Act § 12, 15 U.S.C. § 797(b)(5) (1994) ("[a]ny person suffering legal wrong"); and Ocean Thermal Energy Conversion Act § 114, 42 U.S.C. § 9124(a) (1994) ("any person having a valid legal interest which is or may be adversely affected . . . whenever such action constitutes a case or controversy"). *See Bennett*, 520 U.S. at 165. For a discussion concerning these distinctions, see *infra* Part III.A.2.

48. *Bennett*, 520 U.S. at 164-65.

ment.[49] Second, the Court concluded that the "obvious purpose" of the citizen suit provision was to "encourage enforcement by so-called 'private attorneys general.'"[50] The Court therefore held that the broad wording of the citizen suit provision of the ESA "expanded the zone of interests" protected by the ESA to the limits of Article III, thus effectively "negat[ing]" the zone of interests test.[51]

The Court found, however, that Section 11(g) only authorized Petitioners' claims under Section 4, which requires the Service to balance economic factors when designating habitat as critical to a listed species. Petitioners' Section 7 claims, alleging that the Service had not used the best scientific and commercial data,[52] were not authorized under the Section. According to the Court, Subsection (A), which deals only with ESA violations, was an inappropriate vehicle for review of the Secretary's implementation of a statute.[53]

The Court therefore turned to the question of whether Petitioners had standing under the general judicial review provisions of Section 703 of the APA, which regulates agency action in implementing statutes. The Court found that Petitioners had standing to bring their Section 7 claims under the APA, despite the fact that their articulated interests were economic, or commercial, in nature. The Court focused on "the substantive provisions of the ESA" identified in Petitioners' complaint rather than the overall purpose of the ESA.[54] The Court admonished the lower courts for referring to the "overall purpose" of the ESA in their zone of interests tests, emphasizing that the question of whether a plaintiff's interest is "arguably . . . protected . . . by the statute"[55] under this test should be determined by "reference to the particular provision of law upon which the plaintiff relies."[56] Examining Section 7, which requires that each agency "use the best scientific and commercial data available," the Court concluded that the "obvious purpose" of Section 7 was to avoid the "haphazard" implementation of the ESA— which served the objective of "avoiding needless economic dislocation" caused by in-

49. *Id.* at 165.
50. *Id.*
51. *Id.* at 164.
52. *See id.* at 171.
53. *See id.* at 172-74.
54. *Id.* at 175.
55. *Association of Data Processing Serv. Org.*, 397 U.S. at 153.
56. *Bennett*, 520 U.S. at 175-76.

correct jeopardy determinations.[57] Thus, the Court held that Congress had intended to protect economic interests such as Petitioners' under the ESA,[58] even though these interests essentially amounted to a "competing interest" in water that the Opinion had concluded was necessary for the survival of endangered fish.[59]

Thus, Petitioners' standing to bring both claims was resolved. Petitioners' claim under Section 4 was directly reviewable under the ESA's citizen suit provision, and Petitioners' claim under Section 7 was reviewable under the APA's review provision. The Court thus arrived at an issue that neither the district court nor the Ninth Circuit needed to address: Petitioners' standing under Article III of the Constitution. Respondents alleged that since Petitioners were bringing claims against the Service rather than the Bureau, Petitioners' claims failed to meet the traceability and redressability requirements of Article III standing.[60] Since the Bureau retained "ultimate responsibility" for deciding whether to lower the water levels in the Project, Respondents argued that the alleged injury to Petitioners from the Bureau's decision to reduce irrigation levels was neither traceable to the Service nor redressable by a favorable judicial ruling.[61]

The Court rejected this argument. Justice Scalia wrote that, while "it does not suffice if the injury complained of is 'th[e] result [of] the independent action of some third party not before the court,' that does not exclude injury produced by determinative or coercive effect upon the action of someone else."[62] The Court concluded that the Opinion had such a determinative ef-

57. *Id.* at 176-77.

58. *See id.* at 177.

59. *Id.* at 160.

60. *See id.* at 167. Respondents also alleged that Petitioners had not alleged an adequate injury in fact. The Court concluded otherwise, noting that the requirements for proof of such injury at the pleading stage are limited to general factual allegations. *See id.* at 167-68. Since the Court is required to presume that general allegations embrace those specific facts that are necessary to support the claim, the Court deemed Petitioners' allegations sufficient. *See id.* at 168.

61. *Id.*

62. *Id.* (citations omitted) (alterations in original). This effect of the Biological Opinion also provided the basis for the Court's rejection of Respondent's argument that Petitioners could not obtain judicial review under the APA because the Biological Opinion did not constitute final agency action. *See id.* at 177. Since the Biological Opinion "alters the legal regime" of the Bureau, the Court held that it met the second prong of its test for final agency action, that the action is one in which "rights and obligations have been determined" or from which "legal consequences will flow." *Id.* at 178 (quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71, 91 (1970)).

fect on the Bureau's decision because under the ESA a biological opinion "alters the legal regime to which [an] action agency is subject," including possible civil and criminal penalties, and thus the Service was a proper respondent.[63]

III
ANALYSIS

A. *Prudential Standing*

Following the introduction of the zone of interests test in *Association of Data Processing*, the Supreme Court's decisions regarding the zone of interests test have been, to say the least, inconsistent.[64] First, the Court's early decisions left unclear when the zone of interests test should apply to suits based on statutes other than the APA. In *Clarke v. Securities Industry Ass'n*, the Court stated that "[w]hile inquiries into . . . prudential standing in other contexts may bear some resemblance to a 'zone of interest' inquiry under the APA, it is not a test of universal application."[65] Lacking additional guidance, lower courts were left to determine for themselves when the zone of interests test applied and when it did not.

This uncertainty led to a split in the circuits concerning the application of the zone of interests test to citizen suit provisions in environmental statutes. Some circuits held that the scope of a citizen suit provision determined the zone of interests to be protected by a particular statute, and that a broadly worded citizen suit provision could negate the zone of interests inquiry. For example, in *Defenders of Wildlife v. Hodel*,[66] the Eighth Circuit held that the zone of interests test did not apply to citizen suits under the ESA. The court concluded that the phrase "any person" evinced a legislative intent to dispense with the prudential standing requirements enforced by the zone of interests test.[67]

63. *Id.* at 169.

64. *See* Sam Kalen, *Standing on Its Last Legs:* Bennett v. Spear *and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1, 41 (1997) ("The zone-of-interests test has been lost in a terminal sea of inconsistency.").

65. 479 U.S. 388, 400 n.16 (1987). The Court also stated that the "invocation of the 'zone-of-interest' test . . . should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the APA apply." *Id.* (quoting *Association of Data Processing*, 397 U.S. at 156).

66. 851 F.2d 1035, 1038 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds sub nom.* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

67. *See Hodel*, 851 F.2d at 1039. The Supreme Court reversed because plaintiffs

In contrast, other circuits held that prudential requirements were not extinguished by broad citizen suit provisions.[68] For example, the D.C. Circuit in *Idaho v. ICC*[69] applied the zone of interests test to an ESA citizen suit, holding that the essential question was whether Congress intended to permit a particular class of plaintiffs to challenge agency violations of a statute.[70]

Underlying this split lay a more fundamental disagreement. Prior to *Bennett*, courts were divided concerning not only *when* to apply the zone of interests test, but also *how* to apply it.[71] The Supreme Court's decisions were unclear whether a statute's zone of interests was determined by reference to the particular provision of the statute, or by reference to the objectives of the act as a whole.[72] On the one hand, the Supreme Court indicated that

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failed to meet the injury-in-fact and redressability requirements of Article III. *See Defenders of Wildlife*, 504 U.S. at 562. At the time, the Court did not address the circuit court's conclusion that the "any person" language of the citizen suit provision of the ESA removed prudential limitations to standing.

68. The Ninth Circuit, like the D.C. Circuit, also applied the zone of interests test in this manner. For Ninth Circuit decisions prior to *Bennett* in which the Ninth Circuit used the zone of interests test to determine standing in cases with broad citizen suit provisions, see, for example, *Bennett*, 63 F.3d at 918-19; Pacific Northwest Generating Coop. v. Brown, 38 F.3d 1058, 1065 (9th Cir. 1994) (holding zone of interests test applies to suits brought under the ESA's citizen suit provision); Mount Graham Red Squirrel v. Espy, 986 F.2d 1568, 1581 (9th Cir. 1993) (applying zone of interests test to Arizona-Idaho Conservation Act); Gonzales v. Gorsuch, 688 F.2d 1263, 1266 (9th Cir. 1982) (applying zone of interests test to citizen suit provision of the Clean Water Act); Dan Caputo Co. v. Russian River County Sanitation, 749 F.2d 571, 575 (9th Cir. 1984) (same); Alvarez v. Longboy, 697 F.2d 1333, 1337-38 (9th Cir. 1983) (concluding the Farm Laborer Contractor Registration Act (FLCRA) conferred standing on plaintiffs after careful consideration of the Act's overall purposes to determine if plaintiffs were in the statute's zone of interests); Davis Forestry Corp. v. Smith, 707 F.2d 1325, 1328 (11th Cir. 1983) (concluding plaintiffs' interests were not within the zone of interests protected by the FLCRA).

69. 35 F.3d 585 (D.C. Cir. 1994). There, the state of Idaho and three mining companies brought suit under the ESA and challenged an Interstate Commerce Commission order that authorized a railroad to abandon a portion of track without requiring the railroad to clean up alleged pollution. *See id.* at 588.

70. *See id.* at 590-91.

71. For a summary of the circuit splits concerning these issues, see, for example, Lynette McCloud, *A Hot Debate: Application of the Zone of Interests Test to the Endangered Species Act*, 4 MO. ENVTL. L. & POL'Y REV. 38, 40-45 (1996); Sheldon K. Rennie, Casenote, Bennett v. Plenert*: Using the Zone of Interests Test to Limit Standing Under the Endangered Species Act*, 7 VILL. ENVTL. L.J. 375, 383-90 (1996); Alyssa Wardrup, Casenote, Bennett v. Plenert*: The Ninth Circuit's Application of the Zone of Interests Test to Citizen Suits Under the Endangered Species Act*, 48 MERCER L. REV. 917, 922-24 (1997).

72. For further analysis of this problem, see Buzbee, *supra* note 37, at 777. For two other critiques of the Court's zone of interests test, see generally Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. REV. 1 (1992); Sanford A. Church, Note, *A Defense of the "Zone-of-Interests" Standing Test*, 1983 DUKE L.J. 447 (1983).

the statutory objectives of a particular statute determine the zone of interests to be protected.[73] On the other hand, the Court noted that the zone of interests test is determined by reference to "the statutory provision whose violation forms the legal basis for [the plaintiff's] complaint."[74]

Thus, some circuits defined the zone of interests to be protected based on the specific portion of the statute alleged to be violated. For example, the D.C. Circuit took this approach in *Tax Analysts and Advocates v. Blumenthal*.[75] There, the competitors of several large oil companies challenged certain published and private rulings of the Internal Revenue Service that allowed tax credits for payments made to foreign nations in connection with oil extraction and production. The petitioners claimed that the rulings violated Section 901(b) of the Internal Revenue Code (Code), but argued that they passed the zone of interests test based on different sections within the Code other than Section 901(b).[76] The Court of Appeals rejected the petitioners' argument, expressly holding that the zone of interests test is determined only by reference to the text of the particular statutory provision that formed the basis of the lawsuit.[77]

Other courts, such as the Ninth Circuit, defined the zone of interests based on the purpose of the entire statute in question.[78] For example, in *Mount Graham Red Squirrel v. Espy*,[79] environmental groups brought suit against the University of Arizona, seeking an injunction to halt construction of an observatory in

73. *See Clarke*, 479 U.S. at 396. In *Clarke*, Justice White stated that the zone of interests test is designed to ensure that a plaintiff will be a "reliable attorney general," and that the test "seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Id.* at 397 n.12. In *Air Courier*, the Court denied plaintiffs standing on prudential grounds because the protection of their interests was not the overriding purpose of the relevant statute. *Air Courier Conference*, 498 U.S. at 524-28.

74. Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1990).

75. 566 F.2d 130, 140-41 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *c.f.* Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972) (determining zone of interests based on general and specific provisions of statute). The court in *Blumenthal* distinguished its approach in *Constructores Civiles* based on the fact that the specific and general provisions of the statute at issue in that case shared a "unity of purpose." 566 F.2d at 141.

76. Specifically, Petitioners pointed to Sections 501, 502, 511-513, and 7805(b) of the Code. *See* 566 F.2d at 140 n.68.

77. *See id.* ("[W]e shall look only to Section 901 of the Code in our application of the zone test.").

78. *See, e.g.*, Nevada Land Action Ass'n v. United States Forest Service, 8 F.3d 713, 715 (9th Cir. 1993) (noting that the zone of interests test weeds out suits that are more likely to impede than to further a statute's purpose).

79. 986 F.2d 1568 (9th Cir. 1993).

the habitat of an endangered red squirrel. The plaintiffs alleged that the University violated the requirements of the Arizona-Idaho Conservation Act of 1988 (AICA).[80] The University argued that the plaintiffs lacked prudential standing because their purposes were inconsistent with the "sole purpose" of the AICA.[81] The Ninth Circuit looked to the overall purposes of the AICA, holding that even if plaintiff's interests were inconsistent with the overall purpose of the AICA, the University was required to demonstrate that "this inconsistency is so fundamental as to make it impossible to believe that Congress intended to permit the Sierra Club to bring suit."[82]

Bennett v. Spear highlights the importance of this conflict. If Petitioners' standing had been judged according to the overall purpose of the statute, they would have lacked standing, as the lower courts found. The ESA is noted for the strong protection it affords endangered species, and a focus on the overall intent of the act would have led almost certainly to the conclusion that Petitioners would have had no standing to sue for economic interests. If, however, the Court would have focused on the specific provision of the ESA that Petitioners alleged had been violated, which requires the Service to consider the economic impact of a critical habitat designation, the Petitioners would have been much more likely to have had standing. *Bennett* was therefore an appropriate case to address this circuit conflict.

However, the *Bennett* Court only partially succeeded in resolving the split. As to the circuit split concerning *how* to apply the zone of interests test, the Court was clear that the zone of interests test governing a plaintiff's statutory claim "is to be determined *not* by reference to the overall purpose of the Act in

80. Pub. L. No. 100-696, 102 Stat. 4571 (1988) (codified as amended at 16 U.S.C. §§ 460xx to 460zz-11, 25 U.S.C. §§ 640d-11 to 640d-31, 40 U.S.C. §§ 188a to 188c-1 (1994)). The AICA is the result of requests for congressional intervention by the University, which feared that the normal requirements of the ESA would obstruct the construction of an observatory complex. The AICA cleared the way for the immediate construction of three telescopes on Mount Graham and provided that an additional four might be built in the future if certain conditions were met. *See Mount Graham*, 986 F.2d at 1570. The Act declared that the requirements of Section 7 of the ESA were satisfied with respect to the first phase of the project, thus ending the process of formal consultation, and instructed the Secretary of Agriculture to issue "immediately" through the Forest Service a "special use permit" allowing construction to go forward. *Id.* (citing AICA, Pub. L. No. 100-696, § 602(a), 102 Stat. 4571, 4597 (1988)).

81. *Mount Graham*, 986 F.2d at 1582. The University argued that the "sole purpose" of Title VI of the AICA was to "allow the observatory project to go forward at once, thereby eliminating the delays that might be caused by judicial challenges like this one." *Id.*

82. *Id.* at 1582-83.

question . . . ," but rather "by reference to the particular provision of law upon which the plaintiff relies."[83] The Court specifically criticized the lower courts for denying Petitioners standing because Petitioners' interests conflicted with the ESA's "overall purpose,"[84] and for essentially ignoring its holdings in *National Wildlife Federation v. Lujan*[85] and *Air Courier Conference v. American Postal Workers Union*.[86] The Court cited its holding in *National Wildlife Federation* that the zone of interests test involved those interests "sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[87]

Yet, *Bennett* provides a good example of how hard it is to distinguish between the overall goals of a statute and those of a particular provision. The Petitioners asserted that the Service had violated Section 7 of the ESA, which requires that each agency "use the best scientific and commercial data available."[88] The Court concluded that while this provision may serve the "overall goal" of protecting endangered species, it was "apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."[89] The Court based this conclusion on a related provision of the ESA, Section 7(h),[90] which the Court concluded demonstrated that "economic consequences are an explicit concern of the Act."[91]

Thus, the *Bennett* Court's criticism of the lower courts for using the "overall purposes" of an act to define a provision's zone of interests is rather misleading. *Bennett* does not necessarily rule out defining a statutory provision's zone of interests by referring to other provisions of the statute or even referring to the overarching goals of a statute. Rather, the Court's holding in

83. *Bennett*, 520 U.S. at 175-76 (emphasis added).

84. *Id.* at 175.

85. 497 U.S. 871, 884 (1990) ("The relevant statute, of course, is the statute whose violation is the gravamen of the complaint . . . .").

86. 498 U.S. 517, 523-24 (1991) ("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 for his complaint.'").

87. 497 U.S. at 883.

88. 16 U.S.C. § 1536(a)(2) (1994).

89. *Bennett*, 520 U.S. at 176-77.

90. Section 7(h) provides an exemption from the Section 7(a)(2) no-jeopardy mandate where there are no reasonable and prudent alternatives to the agency action and the benefits of the action clearly outweigh the benefits of any alternatives. *See* 16 U.S.C. § 1536(h) (1994).

91. *Bennett*, 520 U.S. at 177.

Bennett should be interpreted as a warning to lower courts not to be blinded in their zone of interests inquiry by looking to only one of many overarching goals found in a statute as a whole. It reflects a recognition that almost all statutes are the result of an adversarial process in which compromise is essential. In reality, most statutes contain provisions that protect the interests of many different groups, often with conflicting goals. Even the ESA, noted as the most absolute of the environmental statutes, demonstrates this phenomenon. While the driving purpose behind the ESA is to protect endangered species, the ESA's protective ability is tempered in some places by the protection of commercial interests as well.[92] The *Bennett* opinion affirms the fact that examining the particular provision that forms the gravamen of a plaintiff's complaint is crucial. Identifying and focusing on the particular provision at issue is necessary to determine the set of interests Congress sought to protect when it included the particular provision within the statute.

The problem with the Court's opinion in *Bennett* is that it failed to clarify the required connection between the statute's overall purpose and the particular provision alleged to be vio-

92. *See* H.R. REP. NO. 97-567, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810 ("Designations of the critical habitat of the species listed may be altered by the Secretary to reflect economic considerations unless the failure to designate an area would result in the extinction of the species."); *id.* at 11, 1982 U.S.C.C.A.N. at 2812 (noting that, by requiring the Secretary to reach a decision on the listing proposal based on biological information alone, Congress attempted to restrict the "balancing between science and economics" to the exemption process); H.R. REP. NO. 95-1625, at 27-29 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9466-67 (noting that Section 4(b) of 16 U.S.C. § 1536 was amended to give the Secretary "the discretion to alter a critical habitat designation for an invertebrate species if he determines that the economic benefits of excluding a portion of the critical habitat outweigh the benefits of designating the area as part of the critical habitat. . . . Up until this time, the determination of critical habitat has been a purely biological question. With the addition of this new paragraph . . . [e]conomics . . . shall be considered by the secretary in setting the limits of critical habitat for [invertebrates]."); *id.* at 41, 1978 U.S.C.C.A.N. at 9472 ("In the context of [Section 7(h)], the Committee intends that the term 'benefits' shall include, but not be limited to, economic considerations."). Even those opposed to the amendments adding economic considerations to Section 7(h) did not do so because they felt that such considerations did not belong in the Act, but rather because they disagreed with the procedure adopted for considering them. *See id.* at 67, 1978 U.S.C.C.A.N. at 9483 ("We want to emphasize that we do believe that *economic considerations should be considered* when weighing the desirability of granting an exemption to the Endangered Species Act. We simply believe that such consideration should be included in the basic exemption process, rather than singled out in a separate procedure where it does not logically belong.") (emphasis added).

As is well known, other sections of the ESA do not allow for any sort of balancing of economic considerations. As the Supreme Court noted in *Tennessee Valley Auth. v. Hill*, a project that directly jeopardizes the survival of an endangered species is forbidden by the ESA. 437 U.S. 153, 187-88 (1978).

lated. The majority of provisions within a statute can be related to one of its overarching purposes. In *Bennett*, the particular provision at issue mandated that the Secretary use "the best scientific and commercial data available"[93] in drafting a biological opinion.[94] The *Bennett* Court interpreted that provision to mean that parties asserting commercial interests had standing to sue just as those seeking environmental protection had standing. The *Bennett* Court held that Congress meant to protect economic as well as environmental interests through this provision, but never explained the basis for this conclusion. By not addressing this connection, the Court has given the lower courts free rein to pick and choose the set of interests behind a particular statute that it will recognize in applying the zone of interests test, giving them substantial latitude to engage in outcome-oriented manipulation of the zone of interests analysis.[95]

Another question that goes completely unanswered in *Bennett* is how courts are to identify these "overarching" purposes in the first place. Should the courts attempt to harmonize the various provisions of an act in determining its overall goals, or should it turn to the legislative history, or both? In *Bennett*, the Court referred to another section of the ESA to justify its conclusion that an objective of the Act was to prevent "uneconomic" jeopardy determinations by agency officials "unintelligently pursuing their environmental objectives."[96] This seems to imply that, within the context of a zone of interests inquiry, a court may determine the overall purposes of a statute based on the text of *any* provision within the statute, not just the particular statutory provision that formed the basis for the lawsuit. The Court was silent as to whether reliance on the text of such provisions alone will always be sufficient to establish a statute's overarching goals. In *Bennett*, the Court's sole justification for its conclusion concerning the goals of the ESA is not particularly troubling, considering the vast legislative history indicating that economic consequences are an explicit concern of the ESA. Nevertheless, the Court failed to provide an overall justification or approach that can guide lower courts' searches for statutes' overall purposes in the future. Without reference to the legislative history behind such provisions (or comparisons to other provisions within the statute), at best the analysis seems incom-

93. 16 U.S.C. § 1536(a)(2) (1994).
94. *See Bennett*, 520 U.S. at 159.
95. *See* Buzbee, supra note 37, at 784.
96. *Bennett*, 520 U.S. at 177.

plete. The Court's lone justification for its conclusion concerning the goals of the ESA is particularly curious, considering the vast legislative history suggesting that economic consequences are indeed an explicit concern of the ESA.[97]

Thus, the Court's articulation of the zone of interests test in *Bennett* was unfortunately incomplete. It rejected the lower courts' reliance on the overarching goal of the ESA to determine the zone of interests sought to be protected by its provisions, implicitly recognizing that statutes may have many different goals and are crafted to protect different and often conflicting interests. Yet, it left new questions in place of old ones by failing to provide enough guidance for lower courts to determine the interests a particular provision was designed to protect.

Regarding the application of the zone of interests test to citizen suit provisions, *Bennett* made clear that the zone of interests test does *not* apply to claims based on the ESA's citizen suit provision.[98] The Court also made several distinctions between the ESA's citizen suit provision and other statutes that suggest that *Bennett*'s holding regarding the negation of the zone of interests test does not apply outside the ESA's citizen suit provision.[99] First, the Court was careful to distinguish citizen suit provisions in environmental statutes from those in statutes with different goals or purposes.[100] One of the factors which led the Court to conclude that Congress had negated the zone of interests test was that the ESA's overall subject matter was the environment.[101] Moreover, it noted that "in contexts other than the environment, Congress has often been even more restrictive."[102] Yet, the Court in *Bennett* was also careful to distinguish the ESA's citizen suit provision from other environmental citizen suit provisions with "more restrictive" formulations,[103] such as the citizen suit provisions of the Clean Water Act,[104] the Surface Mining Control and Reclamation Act,[105] the Energy Supply and Environmental Coordination Act,[106] and the Ocean Thermal Energy

97. *See supra* note 86.
98. 520 U.S. at 164.
99. *See id.* at 165.
100. *Id.*
101. *See id.*
102. *Id.*
103. *Id.*
104. 33 U.S.C. § 1365(g) (1994) ("[any person] having an interest which is or may be adversely affected").
105. 30 U.S.C. § 1270(a) (1994) (same).
106. 15 U.S.C. § 797 (b)(5) (1994) ("[a]ny person suffering legal wrong").

Conversion Act.[107] These distinctions are important, since citizen suit provisions have been included in almost all environmental legislation enacted since their introduction in 1970.[108] Most of these provisions have additional restrictions similar to those cited above and do not use the absolute "any person" language of the ESA, instead limiting citizen suits to those by "any person having an interest which is or may be adversely affected."[109] Even those statutes that do not provide such limits, such as the Emergency Planning and Community Right-to-Know Act (EPCRA),[110] have limits concerning the basis for a plaintiff's suit.[111] Thus, it is unlikely that *Bennett* will allow litigants

107. 42 U.S.C. § 9124(a) (1994) ("any person having a valid legal interest which is or may be adversely affected . . . whenever such action constitutes a case or controversy").

108. *See* Clean Air Act § 304, 42 U.S.C. § 7604 (1994); Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365 (1994); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1994); Safe Drinking Water Act § 7002, 42 U.S.C. § 6972 (1994); Public Health Service Act § 1449, 42 U.S.C. § 300j-8 (1994); Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270 (1994); Emergency Planning and Community Right-to-Know Act § 326, 42 U.S.C. § 11046 (1994); Noise Control Act § 12, 42 U.S.C. § 4911 (1994); Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1349 (1994). Citizen suit provisions were first introduced into the lexicon of environmental law when Congress included a citizen suit provision within the 1970 amendments to the Clean Air Act. *See* Pub. L. No. 91-604, § 304, 84 Stat. 1676, 1706 (1970) (codified as amended at 42 U.S.C. § 7604 (1994)).

109. OCSLA, 43 U.S.C. § 1349(a) (1994) ("any person having a valid legal interest which is or may be adversely affected").

110. 42 U.S.C. § 11046(a)(1) (1994) ("any person may commence a civil action on his own behalf").

111. EPCRA's citizen suit provision provides that citizen suits may only be brought against the following:

> (A) An owner or operator of a facility for failure to do any of the following: (i) Submit a followup emergency notice under section 11004(c) of this title. (ii) Submit a material safety data sheet or a list under section 11021(a) of this title. (iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title. (iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.
>
> (B) The Administrator for failure to do any of the following: (i) Publish inventory forms under section 11022(g) of this title. (ii) Respond to a petition to add or delete a chemical under section 11023(e)(1) of this title within 180 days after receipt of the petition. (iii) Publish a toxic chemical release form under 11023(g) of this title. (iv) Establish a computer database in accordance with section 11023(j) of this title. (v) Promulgate trade secret regulations under section 11042(c) of this title. (vi) Render a decision in response to a petition under section 11042(d) of this title within 9 months after receipt of the petition.
>
> (C) The Administrator, a State Governor, or a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with section 11044(a) of this title.

bringing suit under other citizen suit provisions to escape the requirements of the zone of interests test.

B. *Article III Standing*

The Court's analysis of Petitioner's Article III standing is remarkable more for what it does not say than for what it does say. While *Bennett* provided the Court with a good opportunity to resolve this split, the Court chose to remain silent on this important issue. Prior to *Bennett*, a circuit split had developed concerning the application of Article III standing requirements to litigants asserting procedural injuries.

As noted earlier, litigants asserting procedural injuries have great difficulty meeting the traditional Article III standing requirements because the harms usually alleged by litigants are the result of complex regulatory processes in which numerous factors, judgments, and politics often play significant roles.[112] Perhaps as a result of such difficulties, in 1992 the Court noted in *Lujan v. Defenders of Wildlife*[113] that litigants asserting procedural rights may assert these rights "without meeting all the normal standards for redressability and immediacy."[114] However, the Court was unclear concerning just how relaxed these standards should be, creating considerable confusion within the circuits.[115] Some circuit courts resolved the redressability and traceability requirements for procedural injuries by utilizing implicit legislative judgments concerning the causal role of a procedure in relation to certain outcomes.[116] Other courts, such as

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(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 11022(e)(3) of this title within 120 days after the date of receipt of the request.

Id.

112. *See supra* note 36.

113. 504 U.S. 555 (1992).

114. *Id.* at 572 n.7.

115. *See* Brian J. Gatchel, *Informational and Procedural Standing After* Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75, 95 ("Simply put, *Defenders* is a fragmented and convoluted opinion on the issue of redressability.").

116. For a discussion of this approach within the Ninth Circuit and other courts, see Buzbee, *supra* note 37, at 812-16. For additional examples of this approach within the lower courts, see Pacific Northwest Generating Coop. v. Brown, 38 F.3d 1058, 1065 (9th Cir. 1994) (holding that because plaintiffs are "entities whose way of conducting business may be affected by the alleged failures of the federal agencies under the Endangered Species Act," they are "arguably in the position of the hypothetical plaintiff in *Defenders*," and thus have standing, since while "the redress sought is not certain in its effect. . . . *Congress has linked agency consultation causally* to the continuation of the protected species.") (emphasis added); Idaho Farm Bureau Fed'n v. Babbitt, 900 F. Supp. 1349, 1364 (D. Idaho 1995) ("Having satisfied all

the D.C. Circuit, have criticized this approach[117] and opted for a more traditional approach to Article III standing.[118]

Prior to *Bennett*, the Court had not evaluated the usefulness of these different approaches. *Bennett* arguably provided the Court with the perfect opportunity to do so. Petitioners' case presented the classic procedural injury dilemma, in that the causal role of the alleged procedural misstep that brings about the alleged harm remains largely uncertain.[119] The Service could have taken the Opinion's economic impact into account and used the "best scientific data possible," and *still* ended up with the same recommendation of lower water levels. The redressability of a decision in favor of Petitioners was thus rather unclear: forcing the Service to go back and take such things into account may not have done any good at all.

Yet, in its analysis of Petitioner's Article III standing, the Court failed to address the different approaches within the lower courts to the Article III requirements of redressability and trace-

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three elements for procedural standing, Plaintiffs need not satisfy the standards of causation and redressability because 'Congress has linked [these procedures] causally' to unbiased recommendations."). For an example of how this approach would apply to a case such as *Bennett*, see Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 931 (D. Mont. 1992) (allowing plaintiffs to sue the Fish and Wildlife Service for alleged failure to take proper steps in providing biological opinion on ground that failure will result in substantive jeopardy to threatened or endangered species).

117. *See* Sierra Club v. Robertson, 28 F.3d 753, 759 (8th Cir. 1993) (declining to follow the Ninth Circuit's approach to procedural injury standing); Wilderness Soc'y v. Alcock, 867 F. Supp. 1026, 1039-40 (N.D. Ga. 1994) (same); Barnes v. Shalala, 865 F. Supp. 550, 563 (W.D. Wis. 1994) ("To the extent that *Mumma* can be read as holding that Article III standing can be based on a procedural violation of the National Environmental Policy Act without demonstrating a concrete injury, it has been overruled by *Lujan*.").

118. *See* Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 670 (D.C. Cir. 1996) (en banc) ("We do not defer to the views of the IRS or of Congress or its individual members in determining whether a particular rule will cause injury to a particular plaintiff or as proof of any causal chain necessary for standing."); *cf. id.* at 682 (Rogers, J., dissenting) ("Although the court maintains that hearing this lawsuit would set us up as 'a back-seat Congress,' the court, by denying standing, effectively second-guesses Congress' determination to create an inherently predictive right in NEPA."); Dellums v. Nuclear Regulatory Comm'n, 863 F.2d 968, 984 (D.C. Cir. 1988) (Ginsburg, J., dissenting) ("As the majority notes, the question of redressability is predictive. When Congress has determined that a certain action will achieve a given end, courts generally should defer to that judgment. Deference should be at its zenith when Congress has predicted that a foreign country will react to sanctions in a particular way, because such a prediction is outside the judiciary's expertise. So long as Congress' prediction seems plausible, courts should not speculate to the contrary."); International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 811-12 (D.C. Cir. 1983) ("[A]s Congress passed the Act partly to provide redress to employers from unfair competition, the suggestion that effective enforcement of the Act will not have this effect directly contravenes the congressional judgment underlying the Act.").

119. *See supra* note 36 and accompanying text.

ability in the context of procedural injuries. The Court analyzed the causal relationship between the procedure at issue and the alleged harm without *once mentioning* its holding in *Lujan* or the Ninth Circuit's use of implicit legislative judgments to resolve causality disputes.[120] Instead, the Court insisted on an independent review of the causal role of the Opinion in the Bureau's decision to lower the water levels.[121] Its inquiry focused on the relationship between the Service and the Bureau and the legal effect that the Opinion had on the Bureau and its employees. It concluded that because the Opinion had a "coercive effect" on the Bureau, it satisfied the redressability and traceability requirements of Article III.[122]

The effect of the Court's failure to address the different approaches is thus unclear for the simple reason that the Court's silence can be interpreted in so many ways. Some might argue that by ignoring these approaches and using a different analysis, the Court was overturning them. Others might argue the opposite, claiming that by failing to address them, the Court was letting them stand. Until the Court squarely addresses the issue of the applicability of Article III requirements to litigants asserting procedural injuries, the split among the circuit courts will probably continue.

Nevertheless, the Ninth Circuit's approach to procedural injury cases will probably be overruled by the Court at some point. The Ninth Circuit's approach basically replaces judicial evaluation of the causal relationship between an agency's alleged procedural errors or omissions and a litigant's alleged harm with implicit legislative judgments concerning the importance of congressionally mandated procedures.[123] Under this approach, a

120. *See Bennett*, 520 U.S. at 168-71.

121. *See id.*

122. *Id.*

123. A recent example of this approach is found in *Pacific Northwest*, where a group of energy consumers claimed that various agencies failed to engage in mandatory consultation processes in response to the listing of three salmon populations as threatened or endangered. *See* 25 F.3d at 1445. As a result of these agencies' responses, the Army Corps of Engineers had decided to increase the Columbia River's water flow to help juvenile salmon reach downstream. *See id.* The increased flow hampered the dam's ability to generate power, costing the plaintiffs approximately $3.5 million more a month. *See id.*

The Ninth Circuit reversed after the district court rejected plaintiffs' standing based in part on their inability to demonstrate causation and redressability. The court held that while the redressability of the alleged harm was indeed "speculative," the plaintiffs still had standing because they were "entities whose way of conducting business may be affected by the alleged failures of the federal agencies under the Endangered Species Act." *Id.* at 1449. The court held that this made the plaintiffs like the hypothetical plaintiff in *Lujan* and subjected them to a different standard: so long

court takes Congress at its word that the procedure or sanction in question is needed to prevent *X* or to cause *Y*, and grants the litigants standing to bring suit on the assumption that the regulatory procedure at issue is sufficiently connected to the alleged harm.

Given the Court's past reluctance to substitute the legislature's judgment for its own regarding issues of causation within a standing inquiry, the Ninth Circuit's approach will probably be overruled by the Court. The Ninth Circuit approach merely shifts the courts' focus from whether the procedure at issue causes the particular harm to Congress' opinion of whether the procedure causes the harm. Such reliance on Congress' judgment was explicitly rejected by the Court in *Simon v. Eastern Kentucky Welfare Rights Organization*[124] and *Linda R.S. v. Richard D.*[125] Another problem with the Ninth Circuit's approach is

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as there was a "reasonable probability" that a successful challenge to the consultation process would have an impact on the conduct of the agency causing their harm, the Court allowed the plaintiffs standing. *Id.*

However, the Court amended its opinion four months later, omitting the "reasonable probability" language altogether. After concluding that plaintiffs were comparable to the hypothetical plaintiff in *Lujan*, it simply noted that "Congress has linked agency consultation causally to the continuation of the protected species." Pacific Northwest Generating Coop. v. Brown, 38 F.3d 1058, 1065 (9th Cir. 1994), *amending* Pacific Northwest Generating Coop. v. Brown, 25 F.3d 1443 (9th Cir. 1994). Because of this connection, the speculative nature of the redressability was rendered irrelevant to plaintiff's standing. *See id.*

124. 426 U.S. 26 (1976) (denying indigents standing on redressability grounds to bring suit against Secretary of Treasury and Commissioner of Internal Revenue for failing to condition favorable tax treatment of hospitals on their willingness to provide emergency care to indigents). The Court held that the plaintiffs had failed to show that putting such conditions on hospitals would actually result in a decision by hospitals to give such care again. *See id.* at 42-43. The Court noted:

> It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications. It is equally speculative whether [putting conditions on the tax break] would result in the availability to respondents of such services. . . . [I]t is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.

Id.

125. 410 U.S. 614 (1973). In *Linda R.S.*, the mother of an illegitimate child brought suit seeking to enjoin the "discriminatory application" of a Texas State law subjecting parents who refuse to provide child support for their children to punishment of up to two years in jail. *Id.* at 614-15. Because Texas courts had consistently interpreted this law as applying solely to parents of legitimate children, the mother sought an injunction against the district attorney of the State of Texas forbidding him from declining prosecution on the ground that the unsupported child was illegitimate. *See id.* at 615-16. The Court denied standing on redressability grounds, concluding that "[t]he prospect that prosecution will, at least in the future, result in

that it weakens the redressability and traceability requirements of Article III, which the Court has held are the "irreducible constitutional minimum" required for standing.[126] Without some redressability and traceability requirement, the Court has held that a litigant's interest in a case's outcome would be limited to the "psychic satisfaction" that "the nation's laws are faithfully enforced."[127] According to the Court, such a limited interest would be insufficient to guarantee "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 . . . ."[128]

The Court's approach in *Bennett* retains this guarantee without denying the majority of litigants their day in court. This approach arguably goes a long way toward resolving the difficulties procedural injury litigants have in court without sacrificing the values that the Article III requirements were designed to protect. In *Bennett*, the Court avoided some of the inherent problems involved in a causal analysis of executive agency decisionmaking[129] by assuming that the Opinion would have been different had the procedural error not occurred. The Court was thus able to focus on the causal relationship between the alleged harm and the Opinion itself, rather than becoming mired in a debate over the technical details of the Opinion. The Court thus avoided second-guessing the Service's decisionmaking process, while ensuring that those bringing suit have a stake in the case beyond the mere psychic satisfaction that the Court has rejected in the past. Thus, while the Court failed to address the different approaches to procedural injuries within the lower courts, it adopted an ap-

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payment of support can, at best, be termed only speculative," and that the "'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing [was] absent in the case." *Id.* at 618; *see also id.* at 621 (White, J., dissenting) (noting that the State of Texas does not share the Court's "surprisingly novel view" that the result of the threat of penal sanction was merely "speculative": the state "assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children.").

126. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

127. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S. Ct. 1003, 1019 (1998) (rejecting such an interest as a basis for standing).

128. Baker v. Carr, 369 U.S. 186, 204 (1962).

129. One of the principal justifications for lowering the requirements for redressability and traceability in the context of procedural injuries is that it is extremely difficult to meet these requirements in these cases. This is because the harms usually alleged by litigants are the result of complex regulatory processes in which numerous factors, judgments, and politics often play significant roles. *See* Burt, *supra* note 36, at 276.

proach that reconciled the problems faced by litigants alleging procedural injuries with traditional Article III requirements.

CONCLUSION

The *Bennett* case presented the Court with two very different sets of questions, the first dealing with the application of the zone of interests test for prudential standing, and the second dealing with the requirements of constitutional standing. While the *Bennett* decision failed to adequately resolve the uncertainty surrounding the zone of interests test, it did establish that the ESA's citizen suit provision extended to the limits of Article III, effectively negating a zone of interests analysis. The Court's Article III analysis failed to address the different approaches to procedural injures in the lower courts, yet adopted an approach that recognized the difficulties that those asserting procedural injuries face without diluting the redressability and traceability requirements for Article III standing. Thus, *Bennett*, like so many other standing cases, has partially answered some questions, only to see others spring up in their place.