HAS THE SUPREME COURT ARMED PROPERTY OWNERS IN THEIR FIGHT AGAINST ENVIRONMENTALISTS? *BENNETT V. SPEAR* AND ITS EFFECT ON ENVIRONMENTAL LITIGATION

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> It is well known that the Endangered Species Act protects little fish like the Shortnose and Lost River suckers that make their home in the reservoirs of Oregon and California. But the question before the Supreme Court yesterday was whether the act protects big fish too—landowners, that is, who claim their financial well-being has been damaged by the law's regulations.[1]

For many years, environmentalist groups have used the law to successfully challenge the government's underenforcement of environmental regulations.[2] After all, the underlying purpose of environmental protection legislation is to do just that—protect the environment. The logical nexus between the legislation and the environmentalists' suits is clear: who better to monitor whether governmental agencies are adequately enforcing environmental legislation than the various groups founded with the purpose of advocating a healthier environment?

Recently however, this "one-way" use of the law by environmentalist groups was called into question. [3] In *Bennett v. Spear*,[4] various groups, including developers, ranchers, and water districts, used the environmental legislation to, in effect, bring suit against governmental agencies for overenforcement of environmental regulations.[5] In *Bennett*, the U.S. Supreme Court effectively placed

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1. Joan Biskupic, *High Court Hears Landowners Assert Rights Under Species Act; Justices to Rule Whether Economic Loss Gives Rise to Suit*, WASH. POST, Nov. 14, 1996, at A2.

2. *See id. See also* Brennan Cain, Bennett v. Spear: *Did Congress Intend for the Endangered Species Act's Citizen-Suit Provision to be One Size Fits All?*, 20 ENVIRONS ENVTL. L. & POL'Y J. 2, 2 (1997).

3. *See infra* notes 77–79 and accompanying text.

4. Bennett v. Spear, 520 U.S. 154 (1997).

5. *See id.* at 166.

these individuals and organizations asserting *overenforcement* on level legal ground with environmentalists, allowing for causes of action to be brought against governmental agencies for "doing too much to protect an endangered species, as well as doing too little."[6]

In a unanimous opinion by Justice Scalia, the Court held that it is not only environmentalist groups asserting an interest in the preservation of endangered species who can challenge agency actions and seek judicial review under the citizen suit provisions of the Endangered Species Act ("ESA").[7] Rather, persons or entities with recreational, aesthetic, commercial or economic interests also have a right to bring suit against the government: "Now, those whose economic interests have been affected can use the citizen suit provisions of the Endangered Species Act, the Administrative Procedure Act and, perhaps other environmental laws to prevent what the Supreme Court called haphazard action based on speculation or surmise."[8]

This Note examines the Supreme Court's decision in *Bennett* and the effect it will have on environmental regulations and litigation. In Part I, the Note introduces the legal and factual background to *Bennett*, including the relevant structure of the ESA and the zone of interests test. Part II analyzes the Supreme Court's opinion in *Bennett*, together with its application of the zone of interests test, Constitutional standing requirements, and its specific application of the ESA and Administrative Procedure Act ("APA")[9] to the Petitioners' claims. Finally, Part III discusses the future impact of *Bennett*, including the resolution of the division among the circuit courts, the strength of Scalia's opinion, the benefit of relying on the "best scientific evidence" in making environmental determinations, and the favorable result of making standing available to all potential environmental litigants.

I. LEGAL AND FACTUAL BACKGROUND

A. The Endangered Species Act

In 1973, the United States Congress enacted the ESA[10] with the "plain intent" of halting and reversing the trend toward species extinction, "whatever the cost."[11] Within five years of its enactment, the United States Supreme Court described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[12] Although there has been frequent legislation designed to protect wildlife species throughout the United

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6. Mark Hansen, *Angling For A Right to Sue*, ABA J., June 1997, at 22.
7. Endangered Species Act of 1973 § 11(g), 16 U.S.C. § 1540(g) (1994).
8. Diance R. Smith et al., *High Court Levels Playing Field For Developers, Ranchers, Others*, ENVTL. COMPLIANCE & LITIG. STRATEGY, Apr. 1997, at 1.
9. Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06, 3105, 3344, 6362, 7562 (1994).
10. 16 U.S.C. §§ 1531–1544.
11. *See* Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978).
12. *Id.*

States' history, the ESA has created the most visible and serious conflicts between environmentalists and property owners.[13]

The ESA is administered primarily by the Secretary of the Department of the Interior ("Secretary"), who delegates that responsibility to the U.S. Fish and Wildlife Service ("USFWS").[14] The ESA not only requires the Secretary to specify species that are threatened or endangered, but also to designate their "critical habitat."[15] The ESA further requires all federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize a listed species or destroy or adversely modify its critical habitat.[16] If an agency determines that the proposed action has possible adverse effects on such species, the agency must formally consult with the USFWS.[17] The USFWS in turn must provide the agency with a written "Biological Opinion" explaining how the proposed action will affect the species or its habitat.[18] If the agency "concludes that the proposed action will 'jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat],' the Biological Opinion must outline any 'reasonable and prudent alternatives' that the [agency] believes will avoid that consequence."[19] Furthermore, if the Biological Opinion concludes that no jeopardy or adverse habitat modification will result, or if it offers reasonable and prudent alternatives to avoid that consequence, the USFWS must provide the agency with a written Incidental Take Statement. This statement must specify the "impact of such incidental taking on the species,"[20] and any "reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,"[21] as well as set forth the "terms and conditions...that must be complied with by the Federal agency...to implement those measures."[22]

B. The Zone of Interests Test

The primary issue in *Bennett v. Spear* was whether the Petitioners had standing to sue. The doctrine of standing refers to a person's right to bring a

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13. *See* Robin L. Rivett, *Why Are There So Few Takings Cases Under the Endangered Species Act, or, Some Major Obstacles to Takings Liabilities,* SB14 A.L.I.-A.B.A. 507, 511 (1996). Some notable examples of these conflicts can be found in *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978) (halting construction of the Tellico Dam because of snail darters); *Northwest Forest Resource Council v. Glickman,* 82 F.3d 825 (9th Cir. 1996) (demonstrating concerns over Northern Spotted Owl causing a reduction of timbering in the Pacific Northwest); and *Seattle Audubon Society v. Moseley,* 80 F.3d 1401 (9th Cir. 1996) (same).

14. *See* 16 U.S.C. §§ 1532(15), 1533(a)(1). *See also* 50 C.F.R. § 401.1 (1994).

15. 16 U.S.C. § 1533.

16. *Id.* § 1536(a)(2).

17. *See* 50 CFR § 402.14 (1995).

18. *See* 16 U.S.C. § 1536(b)(3)(A).

19. Bennett v. Spear, 520 U.S. 154, 158 (1997) (quoting § 1536(a)(2) and § 1536(b)(3)(A)).

20. 16 U.S.C. § 1536(b)(4)(C)(i).

21. *Id.* § 1536(b)(4)(C)(ii).

22. *Id.* § 1536(b)(4)(C)(iv).

lawsuit before a court.[23] Before a court even will consider the merits of a lawsuit, the person bringing the suit must meet the two main categories of standing: (1) "constitutional limitations of federal-court jurisdiction," and (2) "prudential limitations on its exercise."[24] First, Article III of the United States Constitution establishes the "irreducible constitutional minimum" of standing.[25] As discussed in Part II(B),[26] this constitutional minimum requires a plaintiff to have suffered an "injury" that is "fairly traceable" to the actions of the defendant, and that the injury will "likely be redressed by a favorable decision."[27]

Prudential limitations, constituting the second category of standing, are not based on the Constitution. Rather, they are policy-based limitations that the courts have created for the purpose of limiting and distinguishing the types of cases a court will hear.[28] The central prudential standing requirement in environmental cases is that a plaintiff must demonstrate that their complaints "fall within the *zone of interests* protected or regulated by the statutory provision or constitutional guarantee in question."[29]

As a prudential standing requirement, this zone of interests test limits what cases can be brought.[30] Similar to other standing requirements, this judicially self-imposed limit on federal jurisdiction was founded on a concern for the proper role of the courts in a democratic society.[31] By requiring the injury or damage to be within the zone of interests sought to be protected by the particular statute in question, the courts are able to filter out cases in which a person's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that the drafters intended to permit the suit.[32]

The zone of interests test was first used in *Association of Data Processing Service Organizations, Inc. v. Camp*.[33] There, the Supreme Court stated the

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23. R. Margaret Dobson, *Endangered Species Act: Standing to Sue*, 20 U. ARK. LITTLE ROCK L.J. 1003, 1006 (1998).

24. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975).

25. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). For a comprehensive discussion of standing under *Lujan*, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

26. *See infra* text accompanying notes 80–99.

27. Bennett v. Spear, 520 U.S. 154, 162 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

28. Dobson, *supra* note 23, at 1007.

29. *Bennett*, 520 U.S. at 162 (emphasis added). *See* Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 937 (1998).

30. *See* Allen v. Wright, 468 U.S. 737, 751 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474–75 (1982) (listing the zone of interest test as a prudential standing requirement). For a general discussion of the zone of interests test, see 2 AM. JUR. 2d, Administrative Law § 450; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12(f)(2) (4th ed. 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-19 (2d ed. 1988).

31. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975).

32. *See* Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987). *See generally* 2 AM. JUR. 2d, Administrative Law, § 450.

33. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

requirement to be "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[34] The Court noted that the statutes in question were not designed to protect a specified group, but rather, the Court held that "the 'general policy' of the [statutes] brought the competitors within the 'zone of interests' arguably protected."[35] In making its determination, the Court relied heavily on the legislative history of the act in question.[36]

C. Factual Background of Bennett

The environmental interests involved in *Bennett* concerned the Klamath Project, a series of lakes, rivers, dams, and irrigation canals in northern California and southern Oregon. The Klamath Project was constructed pursuant to federal law by the Bureau of Reclamation ("Bureau") in the early part of the Twentieth Century.[37] Its purpose was to store water from the Klamath and Lost rivers, control flooding, and provide irrigation water to reclaimed project lands.[38] The government paid for the project with the funds generated from the sale of rights to the water in its reservoirs.[39] Throughout most of this century, standard procedures were used for storing and releasing water from the project in order to produce a reliable supply of water for irrigation purposes.[40] During this time, a portion of the water was provided to the petitioners in *Bennett*.[41]

In 1988, the USFWS listed the Lost River sucker and the Shortnose sucker as endangered species[42] pursuant to Section 4 of the ESA.[43] Both species are found in some reservoirs of the Klamath Project. In 1992, the Bureau consulted with the USFWS to determine whether the operation of the project might effect these endangered fish,[44] and to comply with 16 U.S.C. § 1536(a)(2)'s mandate that

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34. *Id.* at 153.

35. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.3 (1994) (citing *Association of Data Processing*, 397 U.S. at 157).

36. *See Association of Data Processing*, 397 U.S. at 155 (bringing suit under the Banking Service Corporation Act of 1962, 12 U.S.C. § 24). *See also infra* notes 63–72 and accompanying text.

37. Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. § 371, and the Act of Feb. 9, 1905, 33 Stat. 714.

38. *See* Brief for Petitioner at 3, Bennett v. Spear, 520 U.S. 154 (1997) (No. 95-813).

39. *Id.*

40. *Id.*

41. Petitioners in this case were Brad Bennett, Mario Giordano, Langell Valley Irrigation District and Horsefly Irrigation District, Oregon ranch operators who received their primary source of water from the project, and irrigation districts organized as political subdivisions of the State of Oregon. Petitioners used the reservoirs for recreational and commercial irrigation purposes.

42. The USFWS report included a description of the fish, an examination of their population and reproductive trends, and the limited habitat in which they exist. For a copy of the USFWS report, see 53 Fed. Reg. 27,130–27,131 (1988).

43. *See* 16 U.S.C. § 1533 (1994).

44. Consultation with the Bureau was done in accordance with 50 CFR § 402.14 (1995).

any action it authorizes, funds, or carries out is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[45] The USFWS subsequently issued a Biological Opinion pursuant to ESA Section 7(b)[46] stating that unless mitigation actions were taken, the long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and Shortnose suckers.[47] However, consistent with the ESA,[48] the Biological Opinion identified "reasonable and prudent alternatives" the USFWS believed would "avoid the likelihood of jeopardizing the continued existence of listed species or result in the destruction or adverse modification of critical habitat."[49]

Included in these alternatives were restrictions on water deliveries that, consequently, would result in the maintenance of minimum water levels on the Clear Lake and Gerber reservoirs.[50] The Bureau informed the USFWS that it accepted the Biological Opinion's recommendations and intended to operate the project in compliance therewith.[51]

The Petitioners then filed suit for declaratory and injunctive relief in an effort to compel the government to withdraw portions of the Biological Opinion.[52] The complaint alleged that there was no scientific or commercial evidence to support the Biological Opinion's conclusion that the continued operation of the Klamath project would adversely affect the fish, nor that the maintenance of minimum water levels within the two reservoirs would favorably effect their population.[53] The complaint further alleged that the fish were currently "reproducing successfully" and did not need special protection.[54] Finally, it alleged that the USFWS violated 16 U.S.C. § 1533(b)(2) by failing to consider the economic impacts of its determination that the reservoirs' minimum water levels constituted critical habitats for the fish.[55]

The district court determined the Plaintiffs' interest in using the Klamath water for commercial and recreation purposes conflicted with the suckers' interest in using the water for habitat.[56] Therefore, on the Government's motion, the court dismissed the complaint for lack of standing, concluding that the Plaintiffs' claims were based upon interests "which conflict with the interests sought to be protected

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45. 16 U.S.C. § 1536(a)(2).
46. *See id.* § 1536(b)(3)(A).
47. *See* Bennett v. Spear, 520 U.S. 154 (1997).
48. *See* 16 U.S.C. § 1536(b)(3)(A).
49. Brief for Petitioner at 4, Bennett v. Spear, 520 U.S. 154 (No. 95-813).
50. *See Bennett*, 520 U.S. at 158.
51. *See id.*
52. *See* Bennett v. Plenert, Civ. No. 93-6076-HO (D. Or. 1993).
53. *See* Bennett v. Plenert, 63 F.3d 915, 916 (9th Cir. 1995), *rev'd sub nom.* Bennett v. Spear, 520 U.S. 154 (1997).
54. *See id. See also* 16 U.S.C. § 1536(a)(2) (1994) (requiring that in making jeopardy decisions, the agency "shall use the best scientific and commercial data available").
55. *See Bennett v. Plenert*, 63 F.3d at 916–17.
56. *See* Bennett v. Plenert, Civ. No. 93-6076-HO (D. Or. 1993).

by the Act."[57] Similarly, the Ninth Circuit believed the central issue was whether the complaint, brought under the ESA's citizen suit provision,[58] was precluded by the zone of interests test.[59] In determining that it was, they concluded that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA. Because the Plaintiffs have not alleged such an interest in their complaint, they do not have standing."[60]

II. THE SUPREME COURT DECISION

On March 19, 1997, Justice Scalia authored the unanimous decision that reversed the Ninth Circuit and held that the zone of interests test was not applicable to the citizen suit provision of the ESA. Thus, the Petitioners were granted standing to seek judicial review.[61] The Court further concluded that the Petitioners' claims that were not covered under the ESA were reviewable under the Administrative Procedure Act.[62]

A. Application of the Zone of Interests Test

The Court began its analysis by first turning to the question the Ninth Circuit found dispositive:[63] "whether Petitioners lack standing by virtue of the

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57. *Id.*

58. 16 U.S.C. § 1540(g) (1994) ("[A]ny 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...who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof."). For a discussion and other works on citizen suit provisions, see Sheldon K. Rennie, Bennett v. Plenert*: Using the Zone-of-Interests Test to Limit Standing Under the Endangered Species Act*, 7 VILL. L. REV. 375. *See also* MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1995); JEFFERY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987).

59. *See Bennett v. Plenert*, 63 F.3d at 917. The Ninth Circuit stated that it was not inquiring whether the constitutional standing requirements were met, because the zone of interests test applies even to plaintiffs who have established constitutional standing premised on a procedural injury. *Id.* at 917 n.1 (citing Douglas Country v. Babbitt, 48 F.3d 1495, 1500–01 (9th Cir. 1995)).

60. *Bennett v. Plenert*, 63 F.3d at 919. After an examination of relevant case law and other citizen suit provisions, the Ninth Circuit concluded the zone of interest test was applicable regardless of Congress's enactment of citizen suit provisions. *Id.* at 918–19 (examining Gonzales v. Gorsuch, 688 F.2d 1263 (9th Cir. 1982) (legislative history of clean water act)); Dan Caputo Co. v. Russian River County Sanitation, 749 F.2d 571 (9th Cir. 1984) (the Clean Water Act citizen suit provision) "The fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation.... [T]he ESA does not automatically confer standing on every plaintiff who satisfies constitutional requirements and claims a violation of the Act's procedures." *Id.* at 919.

61. *See generally* Bennett v. Spear, 520 U.S. 154 (1997).

62. *See infra* notes 109–39 and accompanying text.

63. Although petitioners argued that their claims were both under the ESA and the APA, the Court first directed its analysis toward the ESA because it may permit petitioners to recover their litigation costs, 16 U.S.C. § 1540(g)(4), and because the APA

zone of interests test."[64] Unlike the Article III counterparts,[65] prudential standing requirements such as the zone of interests test can be modified or abrogated by Congress.[66] Therefore, the Court held that the zone of interests test will apply to the action unless it is specifically negated through the particular congressional legislation.[67]

In order to find Congress' intent, the Court dissected the ESA's citizen suit provision[68] to determine whether it effectively negated the zone of interests test.[69] The first "operative" phrase of the provision states that "any person may commence a civil suit on his own behalf."[70] The Court found this phrase to be remarkably broad in comparison with the language Congress ordinarily uses.[71] In other legislation, including statutes involving the environment, Congress has employed more restrictive language.[72] Moreover, the Court stated:

> Our readiness to take the term "any person" at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called "private attorneys general...."[73]

The combination of the strong, clear statutory language combined with the subject matter of legislation "makes the intent to permit enforcement by everyman even

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only authorizes review when "there is no other adequate remedy in a court." 5 U.S.C. § 704 (1994).

64. *Bennett*, 520 U.S. at 160.

65. *See* U.S. CONST. art. III, § 2. *See also infra* text accompanying notes 77–97.

66. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975). For a further discussion of Congress' ability to modify standing requirements, see NOWAK & ROTUNDA, *supra* note 30, § 2.12(f) ("[I]f Congress speaks, either explicitly or implicitly, the Court will accept Congress' decision to confer standing to litigate constitutional or statutory claims.").

67. *See Bennett*, 520 U.S. 154. *See also* Block v. Community Nutrition Inst., 467 U.S. 340, 345–48 (1984).

68. *See supra* note 58.

69. *See Bennett*, 520 U.S. at 164.

70. 16 U.S.C. § 1540(g).

71. *See Bennett*, 520 U.S. at 164–65.

72. *See id.* at 165 (citing examples of such language, including: "[any person] having an interest which is or may be adversely affected," (Clean Water Act), "[a]ny person suffering legal wrong," (Energy Supply and Environmental Coordination Act), and "any person having a valid legal interest which is or may be adversely affected...whenever such action constitutes a case or controversy" (Ocean Thermal Energy Conversion Act)).

73. *Bennett*, 520 U.S. at 165. The Supreme Court's reasoning behind its determination that the provision's purpose was to encourage enforcement by "private attorneys general" rested largely in the provision's elimination of the usual amount-in-controversy requirements, its provision for recovery of the costs of litigation, and its reservation to the government of a right of first refusal to pursue the action initially and a right to intervene later.

more plausible."[74] Thus, the requisite congressional intent to negate the application of the zone of interests test under the ESA was apparent to the Court.[75]

However, the question remained: did this broad interpretation of "any person" apply to causes of action seeking to *prevent* application of environmental restrictions or only those seeking to *implement* them? The Court answered in the affirmative, stating that "the 'any person' formulation applies to all the causes of action authorized by § 1540(g)...not only to actions against the Secretary asserting *underenforcement* under § 1533, but also to actions against the Secretary asserting *overenforcement*."[76]

The Court's conclusion that there was no textual basis for allowing the expansion of standing requirements to apply only to environmentalists was consistent with Justice Kennedy's stern questioning of the Government's lawyer during oral argument.[77] After accusing him of advocating a "one-way law,"[78] Justice Kennedy stated, "We should be very cautious about receiving an argument that destroys the usual neutrality that we think underlies the rule of law in this country."[79]

B. Constitutional Standing Requirements

Having concluded the Ninth Circuit erred[80] in its application of the zone of interests test to deny standing to the Petitioner's ESA claims, the Court next turned to the alternative grounds advanced by the Government to affirm the dismissal of the Petitioner's suit.[81]

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74. *Id.* at 166.

75. *Id.*

76. *Id.* (emphasis added).

77. The government was represented by Mr. Edwin Kneedler.

78. QUESTION: They have a one-way—it's slightly differently articulated, but it's also a one-way construction of the statute.

MR. KNEEDLER: Well, with all respect, I think one-way is an unfair characterization.

QUESTION: Well, if we can characterize it, the Ninth Circuit says one-way, then yours is also one-way, is not [sic]?

MR. KNEEDLER: It's one-way in the sense that, yes, the citizen suit is designed to advance the purposes of species protection.

United States Supreme Court Official Transcript at 41, *Bennett*, 520 U.S. 154 (No. 95-813).

79. *Id.* at 46.

80. In the last four years, the Ninth Circuit has had a disproportionately high number of its decisions reviewed by the Supreme Court in comparison will all other federal circuits. More significantly, in addition to having a disproportionately high number of cases reviewed, the Ninth Circuit has consistently had an exceedingly large percentage of those cases reversed by the Supreme Court. Since 1990, the Supreme Court has reversed or vacated 73 percent of the decisions on review from the Ninth Circuit, while the average for all other circuits has been 46 percent. *See, e.g.*, Jeff Bleich, *The Reversed Circuit: The Supreme Court Versus the Ninth Circuit*, OR. ST. BAR BULL., May 1997, at 17; *Reversal Rate Highlights Ideological Battle Between U.S. Supreme Court and 9th Circuit, Reinhardt*, WEST'S LEGAL NEWS, Dec. 17, 1996, *available in* WESTLAW, 12-17-96 WLN 13448.

81. Because the lower courts determined the zone of interests test to be dispositive, they did not discuss the respondent's alternative grounds. The asserted grounds

The Government's first contention was that the Petitioners failed to satisfy the Constitutional Article III standing requirements.[82]

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.[83]

The Government asserted that the Petitioners' complaint failed to meet each of these three "irreducible" requirements.

The Petitioners professed compliance with the first requirement, "injury in fact," based upon their allegation that they currently received water from Clear Lake, and the restrictions on lake levels imposed by the Bureau's adherence to the Biological Opinion would substantially reduce the quantity of available irrigation water.[84] The Government contended that these allegations failed to satisfy the "injury in fact" requirement because they only demonstrated a diminution in the total amount of available water, and did not establish that the petitioners themselves would actually receive less water.[85] However, as stated by the Court, this contention overlooked the fact that the manner and degree of proof required varies with the successive stages of litigation.[86] Thus, while "specific facts" must be set forth to survive a motion for summary judgment,[87] "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'"[88] Because the Court felt it was "easy" to presume specific facts of injury under the general allegation of water loss, they acknowledged the requisite injury in fact was present at this stage of the litigation.[89]

The Government further argued that the Petitioners' injury was neither "fairly traceable" to the Biological Opinion, nor "redressable" by a favorable judicial ruling.[90] The first argument was based upon the premise that the Bureau

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were raised in the lower courts and were briefed and argued before the Supreme Court. Therefore, because they were supported by the record, the respondent was entitled to use these alternative grounds to defend the judgment. The Court determined it was an appropriate exercise of their discretion to "consider them now rather than leave them for disposition on remand." *Bennett*, 520 U.S. at 167.

82. *Id.*

83. *Id.* at 162 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). *See also* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471–72 (1982).

84. *See* Brief for Petitioners at 8, *Bennett*, 520 U.S. 154 (No. 95-813).

85. *Bennett*, 520 U.S. at 167.

86. *Id.* at 167–68 (citing *Lujan*, 504 U.S. at 561).

87. FED. R. CIV. P. 56(e).

88. *Bennett*, 520 U.S. at 168 (quoting *Lujan*, 504 U.S. at 561).

89. *Id.*

90. *See id.* at 168–69. *See also* Brief for Respondents, Part I, *Bennett*, 520 U.S. 154 (No. 95-813).

retained the final responsibility for determining whether and how an agency action shall proceed.[91] Thus, the proximate cause of the harm to the Petitioners could not be traced to the USFWS Biological Opinion itself, but rather to future Bureau action based on the Biological Opinion.[92]

Though this argument may have merit in theory, the Court found its practical application to be tenuous at best.[93] The Government readily admitted that the Biological Opinion has a powerful coercive effect on the Bureau's actions.[94] The Court recognized that "[t]he Service itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions."[95] However, it held that although causation cannot be traced to an independent action of a third party not involved in the judicial proceedings,[96] "that does not exclude injury produced by determinative or coercive effect upon the action of someone else."[97] Thus, the Court concluded that the Petitioners had met their modest burden[98] of showing that their injury is "fairly traceable" to the Biological Opinion, and that it will "likely" be redressed by the fact that the Bureau will not impose the water level restrictions if the Biological Opinion were set aside.[99]

C. Application of the ESA's Citizen-Suit Provision to the Petitioners' Specific Claims

Up until this point, the Supreme Court addressed the issue of standing, concluding that neither the Constitutional nor the prudential standing limitations precluded the Petitioners' suit. Having thus concluded that the zone of interests test did not preclude the petitioners' complaint under the ESA's citizen suit

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91. *See Bennett*, 520 U.S. at 168 ("Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.").

92. *See id.*

93. *Id.* at 170.

94. *See* Brief for Respondents at 20–21, *Bennett*, 520 U.S. 154 (No. 95-813).

> [A] federal agency that chooses to deviate from the recommendations contained in a biological opinion bears the burden of 'articulat[ing] in its administrative record its reasons for disagreeing with the conclusions of a biological opinion'.... In the government's experience, action agencies very rarely choose to engage in conduct that the Service has concluded is likely to jeopardize the continued existence of a listed species.

Id. (quoting 51 Fed. Reg. 19,956 (1986)). Furthermore, the Court stated that "[t]he action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril...for 'any person' who knowingly 'takes' an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment. *See* §§ 1540(a) and (b)." *Bennett*, 520 U.S. at 170.

95. *Bennett*, 520 U.S at 170.

96. *See Lujan*, 504 U.S. at 560–61 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).

97. *Bennett*, 520 U.S. at 169.

98. *Id.* at 170–71 ("[I]t is not difficult to conclude that petitioners have met their burden-which is relatively modest at this stage of the litigation.").

99. *See id.*

provision generally, the Court next considered which of the Petitioners' specific claims were authorized under the provision.[100]

The Court noted that the relevant portions of the provision were subsections (A) and (C).[101] The Government then argued that judicial review was not available under subsection (C) because the Secretary had not failed to perform any nondiscretionary duty under § 1533.[102] The Court steadfastly agreed that the scope of the statute "covers only violations of § 1533 is clear and unambiguous."[103] Thus, the Petitioners' first two claims asserting violations of § 1536 were clearly not reviewable under subsection (C). However, the Court held that the Petitioners' third claim, alleging that the Biological Opinion implicitly and improperly determined critical habitat without adhering to § 1533(b)(2)'s mandate that the Secretary consider economic impact, did fall within the authority of subsection (C).[104] Therefore, this claim was reviewable under the ESA.[105]

Because the Petitioners' two § 1536 claims were not reviewable under subsection (C), the Court next examined whether they were reviewable under subsection (A)'s authorization of injunctive actions against anyone who is alleged to be in violation of the ESA or its regulations.[106] The Court agreed with the respondents' contention that Congress intended for subsection (A) to provide a means by which "private parties may enforce the substantive provisions of the ESA against regulated parties...but [subsection (A)] is not an alternative avenue for judicial review of the Secretary's implementation of the [ESA]."[107] Consequently, the Court held that the reference in subsection (A) to a "violation" does not include the Secretary's failure to perform his duties as administrator of

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100. The Petitioners asserted three claims for relief in their complaint. The first and second claims alleged that the USFWS's determination that the species was in danger and its imposition of minimum water levels violated 16 U.S.C. § 1533(a)(2) because the USFWS failed to use the best scientific and commercial data available. The third claim alleged that the imposition of minimum water levels violated 16 U.S.C. § 1533(b) because the USFWS failed to take into economic impact into consideration. Each of these claims also alleged that the relevant action violated the APA's prohibition of agency action that is arbitrary, capricious, or an abuse of discretion. *See* Brief for Petitioners at 8–9, *Bennett*, 520 U.S. 154 (No. 95-813).

101. 16 U.S.C. § 1540(g)(1) (1994) states:

> [A]ny 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...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.

102. *See Bennett*, 520 U.S. at 170. *See also* Brief for Respondents at 36, *Bennett*, 520 U.S. 154 (No. 95-813).

103. *Bennett*, 520 U.S. at 170.

104. *See id.*

105. *See id.* at 172.

106. *Id.* at 173.

107. *Id.*

the ESA. Thus, the Petitioner's claims could not be reviewed under subsection (A) of the ESA's citizen suit provision.[108]

D. Application of the APA to the Petitioners' Claims

Because the ESA did not authorize review of Petitioners' § 1536 claims, which alleged that the Biological Opinion was not supported with the best scientific and commercial data available,[109] the Court dedicated the final portion of their opinion to whether these claims may be brought under the APA.[110] The APA, by its own terms, "provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court.'"[111] The APA applies universally "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[112] Because nothing in the ESA's citizen-suit provision expressly precludes review under the APA, and because the Court did not detect anything in the statutory scheme suggesting a purpose to do so, examination under the APA was clearly appropriate.

The portion of the APA at issue is its authorization for the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[113]

Unlike the ESA, the APA does not specifically negate the zone of interests test. Therefore, the Court correctly returned to this test to properly assess the Petitioners' claims under the APA.[114] In order to determine whether the Petitioners' had standing to assert their APA claims under the zone of interests test, the Court looked to the substantive provisions of the ESA rather than its citizen suit provision.[115] In the words of the Court, it was the alleged violations of the substantive provisions "which serve[d] as the gravamen of the complaint."[116] The Court determined the Ninth Circuit erred in its conclusion that the zone of interests test was not met.[117]

In reaching this decision, the Court expressed that the question of whether an interest is arguably protected by the statute within the meaning of the zone of interests test is not to be determined by reference to the overall purpose of the ESA (here, species preservation), but rather by the particular provision of law upon

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108. *Id.* at 174.

109. *See* Murry D. Feldman, Bennett v. Spear*: Supreme Court Confirms Standing to Challenge Excessive Government Regulation Under Endangered Species Act*, ADVOCATE, June 1997, at 21.

110. 5 U.S.C. § 706 (1994) (defining the scope of review).

111. *Bennett*, 520 U.S. at 175 (quoting 5 U.S.C. § 704 (1994)).

112. 5 U.S.C. § 701(a).

113. *Id.* § 706(2).

114. *See* Feldman, *supra* note 109, at 21.

115. *See Bennett*, 520 U.S. at 175.

116. *Id.*

117. *Id.* ("The Court of Appeals concluded that this test was not met here, since petitioners are neither directly regulated by the ESA nor seek to vindicate its overarching purpose of species preservation.").

which the Petitioners rely.[118] The Petitioners' two claims alleged violations of the ESA's specific provision requiring that each agency "use the best scientific and commercial data available."[119]

Petitioners argued the available data did not show that the continued operation of the Klamath Project would have an adverse effect upon the endangered fish, nor that the imposition of minimum water levels would necessarily protect the fish.[120] Thus, the argument continued, by issuing a Biological Opinion with contrary findings, the government acted arbitrarily in violation of this provision.[121] The Court explained, "[w]e think it readily 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."[122] Following this reasoning, the Court concluded that the Petitioners' claims were "plainly within the zone of interests"[123] protected by § 1536(a)(2).[124]

The Supreme Court's essential conclusion that the zone of interests test should be determined by the specific provision of law in question is wholly consistent with the Court's reasoning in two earlier cases, *Association of Data Processing*[125] and *Lujan*.[126] In *Data Processing*, the Court concluded that it was not necessary for the plaintiffs to vindicate the overall purpose of the Bank Service Corporation Act of 1962.[127] Rather, the fact that the plaintiffs' sought to protect their commercial interest through the specific provision they alleged had been violated was sufficient.[128] Furthermore, in *Lujan* the Court examined judicial review under the APA. The Court concluded that to be adversely affected within the meaning of a statute is not to be determined by the statute as a whole, but rather by the particular provision upon which the complaint is alleged.[129] In reaching this decision, the *Lujan* Court relied on *Clarke v. Securities Industry Association*,[130] a case which held that to be "adversely affected or aggrieved...within the meaning of the statute, the plaintiff must establish that the injury he complains of...falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his

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118. *See id.* (relying on Association of Data Processing Serv. Org. Inc. v. Camp, 397 U.S. 150, 155–56 (1970)). With sharp criticism toward the Ninth Circuit, Justice Scalia remarked, "It is difficult to understand how the Ninth Circuit could have failed to see this from our cases." *Id.*

119. 16 U.S.C. § 1536(a)(2) (1994).

120. *See Bennett*, 520 U.S. at 176.

121. *See* 16 U.S.C. § 1536(a)(2).

122. *Bennett*, 520 U.S. at 176–77.

123. *Id.* at 177.

124. *See id.*

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

126. Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

127. *See Association of Data Processing*, 397 U.S. at 156–57.

128. *See id.*

129. *See Lujan*, 497 U.S. at 883.

130. Clarke v. Securities Indust. Ass'n, 479 U.S. 388 (1987).

complaint."[131] Thus, the Court's conclusion that the plaintiffs' interest under the zone of interests test should be determined by reference to the particular statutory provision is well-founded in the relevant case law.[132]

Finally, the Government argued that the Petitioners could not obtain judicial review under the APA because the Biological Opinion did not conclusively determine the manner in which water would be allocated,[133] and thus did not constitute "final agency action."[134] This argument was quickly dismissed through the Court's application of the relevant two-part test addressing "finality" and "legal consequences."[135] The Court determined that the Biological Opinion was final because the action signified the end of the USWFS's decision making process, and had "direct and appreciable legal consequences."[136]

Thus in a strong, unanimous opinion, the Supreme Court overruled the Ninth Circuit ruling and held that not only did the Petitioners' complaint meet the Article III standing requirements, but also that their ESA claims were not precluded by the zone of interests test.[137] Furthermore, the Court held that the § 1533 claim was reviewable under the ESA's citizen-suit provision,[138] and all remaining claims were reviewable under the APA.[139]

III. IMPLICATIONS OF THE DECISION

The Court's decision in *Bennett* will undoubtedly have a significant and lasting impact not only on environmental litigation but on other areas as well. First, the decision provides an authoritative answer to the proper application of the zone of interests test, thus resolving a split among various circuit courts. Second, Scalia's opinion also achieves unusual strength by the fact that it was a unanimous, 9–0 decision, as well as by the fact that it addresses many alternative arguments which could arise on remand or in future lawsuits. Third, the decision will add credibility and legitimacy to the ESA by requiring environmental decisions to be increasingly based upon the best scientific evidence available. Lastly, the decision provides a sense of fairness and equality to the ESA by allowing everyone, environmental groups and property owners alike, to bring suit regarding proper and appropriate environmental regulation.

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131. *Lujan*, 497 U.S. at 883 (quoting *Clarke*, 479 U.S. at 396–97). *See also* Air Courier Conference of Am. v. American Postal Workers Union, 498 U.S. 517 (1991).

132. *See* Bennett v. Spear, 520 U.S. 154, 174 (1997).

133. *See* Brief for Respondents at 33, *Bennett*, 520 U.S. 154 (No. 95-813).

134. 5 U.S.C. § 704 (1994) (requiring final agency action in order for judicial review to occur under the APA).

135. *See Bennett*, 520 U.S. at 178. In expressing this test (that an action (1) "mark the 'consummation' of the agency's decision making process" and be (2) one from which "legal consequences will flow"), the Court relied on the requirements set forth in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). *Id.*

136. *See Bennett*, 520 U.S. at 178.

137. *See id.* at 166.

138. *See id.* at 172.

139. *See id.* at 177.

A. Division Among the Circuits

One important effect of the Bennett decision is its resolution of the split among the circuit courts. The circuit courts had previously addressed the question of the proper application of the zone of interests test to suits brought under the ESA, but reached differing conclusions. These decisions increased the controversy surrounding this volatile issue and likely influenced the Supreme Court's decision to grant certiorari.

In *Defenders of Wildlife v. Hodel*,[140] several environmental groups[141] filed suit under the ESA to challenge a governmental regulation that they alleged violated the consultation provision of the ESA.[142] The Eighth Circuit ruled that the zone of interests test was not applicable to claims made under the citizen suit provision.[143] The court further stated that when Congress enacts statutes affecting judicial review, the question of standing "must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."[144] Because the ESA's citizen suit provision allows "any person" to bring an action to enjoin anyone who is alleged to be in violation of the ESA, the environmental groups were only required to meet the constitutional prerequisites for standing for their claim under the ESA.[145]

Conversely, in *Humane Society of the United States v. Hodel*,[146] the U.S. Court of Appeals for the District of Columbia held that the zone of interests test did apply to a claim brought under the ESA's citizen suit provision.[147] The court stated that the zone of interests test was a guide for deciding, in view of congressional intent, if a plaintiff should have standing to challenge a particular agency action.[148] Accordingly, the court subsequently found that the plaintiffs' claim did fall within the zone of interests protected by the ESA.[149]

Because the circuit courts had reached these very contrary positions, it was important for the Supreme Court to decisively resolve the split.[150] If they had

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

141. Plaintiffs were members of Defenders of Wildlife, the Humane Society of the United States, and Friends of Animals and Their Environment. *Id.* at 1036.

142. A federal agency must consult with the Secretary of the Interior to ensure that any action it authorizes is not likely to jeopardize the continued existence of an endangered species. *See* 16 U.S.C. §§ 1533, 1536 (1994).

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

144. *Id.* at 1039.

145. *See id.* Likewise, in *Mausolf v. Babbitt*, 913 F. Supp. 1334 (D. Minn. 1996), the federal district court in the Eight Circuit held that plaintiffs were only required to meet the Constitution's Article III standing requirements. *See* Kathleen C. Becker, Bennett v. Plenert*: Environmental Citizen Suits and the Zone of Interest Test*, 26 ENVTL. L. 1071, 1080 (1996).

146. Humane Soc'y of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988).

147. *See id.* at 60–61.

148. *See id.* at 60.

149. Rennie, *supra* note 58, at 386 (citing *Hodel*, 840 F.2d at 61).

150. For further discussion of the division among the circuits, see Rennie, *supra* note 58, at 384–90.

decided the case on other grounds, irrelevant procedural matters[151] or with a vague, loose holding, the division among the circuits would have continued to grow. However, the Supreme Court squarely confronted the issue in a strong, determined opinion, leaving little doubt as to the zone of interests test's applicability to the ESA's citizen suit provision.[152]

B. The Strength of the Bennett *Decision*

The significance of the Bennett decision is largely due to the fact that Justice Scalia wrote not only a strong, decisive opinion, but also managed to gather the unanimous support of the entire Court. Though Scalia's opinion has been criticized as inconsistent with his usual "strict textualist" approach,[153] perhaps it was this different approach, a balancing of the interests of property owners and environmentalists, which allowed him to garner the rare unanimous support of his colleagues.[154]

Furthermore, because there was neither a dissenting opinion nor even a concurring opinion, the split among the circuits[155] regarding the application of the zone of interests test as a prudential limitation on ESA citizen suits should be firmly put to rest. "It is most instructive that the court's ruling was unanimous. When justices as philosophically and politically diverse as those sitting on the Supreme Court reach the same conclusion, it is not simply a decision—it's a mandate."[156] Furthermore, even in the unlikely event that the same issue makes its way back before the Court in the near future, the Court's unanimous agreement makes it difficult to conceive of a different result.

The strength of the Bennett opinion also derives from the Court's willingness to consider the Government's alternative arguments (to the Ninth Circuit's reasoning) for a dismissal of the Petitioners' suit. Because the Ninth Circuit found the zone of interests test to be dispositive, they did not address any additional arguments.[157] However, the Supreme Court felt it "an appropriate exercise of discretion to consider them now rather than leave them for disposition on remand."[158] By rejecting these alternative arguments, the Court strengthened the

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151. Petitioners filed their complaint after the requisite sixty-day written notice requirement.

152. *See infra* text accompanying notes 153–159.

153. *See* Robert S. Nix, Bennett v. Spear*: Justice Scalia Oversees the Latest "Battle" in the "War" Between Property Rights and Environmentalism*, 70 TEMP. L. REV. 745, 772–73 (1997).

154. *See generally id.* at 774 n.277 (describing the difficulty Scalia has had in obtaining the broad support of his colleagues).

155. *See supra* text accompanying notes 140–149.

156. W. Henson Moore, *Endangered Species Act Must Be Enforced for the Benefit of All*, CHRISTIAN SCI. MONITOR, Apr. 21, 1997, at 19.

157. Bennett v. Spear, 520 U.S. 154, 163 (1997).

158. *Id.* (explaining that these alternative arguments were asserted below and had been fully briefed and argued before the Court, and explaining that respondent is allowed to defend the judgment on any ground supported by the record).

significance and longevity of its opinion by preventing the same issue from emerging again under one of the alternative arguments.[159]

C. Insistence on the Use of Accurate Scientific Evidence

The *Bennett* decision will also help to ensure that valid, accurate scientific evidence is considered in determining endangered species and designating critical habitat. While § 1533(b) of the ESA mandates the Secretary make determinations "on the basis of the best scientific data available,"[160] prior to *Bennett* there was little a landowner could do to challenge whether such data had actually been used.[161] By granting standing to landowners to sue under the ESA, the *Bennett* decision provides a means through which they can challenge the validity of such data. Thus, federal agencies implementing the ESA can now be held accountable through judicial review for the adequacy of their scientific evidence.[162] Landowners now have the opportunity "to look behind, and perhaps overturn, agency decisions via court challenges to technical information used by the agency in making a decision."[163]

Similarly, this heightened reliance on the best scientific evidence will also contribute to an increase in the credibility and legitamacy of the ESA. Prior to *Bennett*, our society's belief in "checks and balances" and judicial review was diluted by the inability of landowners to effectively question the validity of the scientific data relied upon in making agency determinations. This inability to subject an Agency decision to judicial review allowed for the possibility of such decisions to be viewed as arbitrary or unsubstantiated. As stated by the Court, "[t]he obvious purpose of the requirement that each agency use the best scientific and commercial data available is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise."[164] This potential for "haphazard implementation" or "speculation" intensified property owners' distrust in the ESA.[165] The erosion of credibility[166] in the ESA eventually reached the point

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159. *See* Nix, *supra* note 153, at 776.

160. 16 U.S.C. § 1533(b)(1)(A) (1994) ("The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him...."); 16 U.S.C. § 1533(b)(1)(B)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available....").

161. *See* Smith, *supra* note 8, at 3.

162. *See* Feldman, *supra* note 109, at 22–23 (citing three older cases, *Endangered Species Comm. of the Bldg. Indus. Ass'n v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995); *Mausloff v. Babbitt*, 913 F. Supp. 1334 (D. Minn. 1996), in which federal courts have overturned agency actions because they did not follow the proper procedural guidelines, failed to make full public disclosure of relied upon data, and used anecdotal evidence over which the court had deep concern as to whether it constituted the best scientific and commercial data).

163. *See* Smith, *supra* note 8, at 3.

164. Bennett v. Spear, 520 U.S. 154, 168 (1997) (quoting 16 U.S.C. § 1536(a)(2)).

165. *See* Nix, *supra* note 153, at 779.

166. *See* Cain, *supra* note 2, at 4–5.

where the Republican controlled Congress began criticizing its validity and even sponsored several bills that "seemed intent on gutting the ESA."[167]

Since the *Bennett* decision alleviates many of the complaints by Congress and property owners (specifically, that the validity of the scientific data relied upon and the impact of economic factors were outside the scope of review), the ESA's credibility is not only enhanced but its continued existence in its current form is more likely. Thus, *Bennett* can even be viewed as a victory for environmentalists who support the ESA. As expressed by an attorney for an environmental organization, "I actually agree with the Court's decision.... It demolishes an argument that the far right in Congress uses in seeking to gut the Endangered Species Act—that the government doesn't take socioeconomic impact into account and that the poor little landowner has no recourse."[168]

D. Equal Access for All

Perhaps the most encouraging effect of *Bennett* will be the ability of both sides, property owners and environmentalist groups alike, to have equal access to the courts. After years of frustrating inability to effectively challenge agency regulations, property owners rejoice at the judicial access provided in *Bennett*. As one lawyer stated, "'It's a home run for equal access to the courts, a home run for property rights.... It levels the playing field so that those most affected by species preservation, the landowners, also get their day in court.'"[169] The *Bennett* Court's concern with this ability of both property owners and environmentalists to sue under the ESA's citizen suit provision was evident in their questioning during oral argument. Justice Kennedy criticized the Government as advocating a "one-way application" of the law which destroyed the law's usual neutrality.[170] Such criticism appropriately reflects a fundamental characteristic of our modern legal system—that laws should be interpreted equally and consistently regardless of to whom they are being applied.[171] "From the standpoint of the general public, *Bennett* brings a welcome fairness and equal opportunity of review of agency actions."[172]

While this newfound standing certainly represents a small victory for property rights advocates, their celebration should be modest at best, and may be

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167. Nix, *supra* note 153, at 779. Nix cites several sources outlining the recent political battle in Congress over the ESA, including Congress' refusal to reauthorize the ESA, which expired in 1992. Rather, Congress has only appropriated funds each year for its continuance. For an additional discussion of the recent congressional reaction to the ESA and proposed ESA reforms, see Deanne M. Barney, *The Supreme Court Gives an Endangered Act New Life:* Bennett v. Spear *and its Effect of Endangered Species Act Reform*, 76 N.C. L. REV. 1889, 1918–22 (1998).

168. Arron Epstein, *Ruling Allows Suits to Fight Species Protection, Supreme Court Backs Landowners, Developers*, THE RECORD, NORTHERN NEW JERSEY, Mar. 20, 1997, at A9 (quoting Bill Snape, an attorney for Defenders of Wildlife).

169. *Id.* (quoting Reed Hopper, an attorney for Pacific Legal Foundation and National Cattlemen's Beef Association).

170. *See supra* notes 78–79 and accompanying text.

171. *See supra* note 79.

172. Smith, *supra* note 8, at 3.

short-lived. Environmentalist groups will be the first to state that standing to sue is merely the first step in a long and difficult fight.[173] They will still face the formidable task of proving the government disregarded the law in making its decisions.[174] One primary reason for this difficulty is that even when judicial review is granted for agency action, the court must use an "arbitrary and capricious" standard.[175] As a result, the courts are deferential to agency decisions.[176] Subsequently, in most lawsuits challenging agency action, the court has ruled in favor of the agency.[177] For this reason, both the federal government[178] and environmental groups[179] believe *Bennett* will not alter ESA administration nor drastically affect the outcome of future judicial proceedings.[180]

Thus, while *Bennett* is a positive advance for property owners, it could be viewed less as a victory in the war between property owners and environmentalists but, more importantly, as a "leveling of the playing field".[181] It provides a certain fairness and equality in bringing suit regardless of whether or not the plaintiff is wearing the hat of an environmental preservationist—a fairness and equality lacking prior to *Bennett*. While standing is merely the first step in the long journey toward a favorable judicial ruling, it allows for the issue to be decided on its merits. The state of the environment should be a concern for everyone, not solely environmentalists. However, the only way to assure appropriate and responsible preservation is to evaluate the real issues and merits of problems as they arise. In an adversarial system such as ours, this is best done by allowing both sides access to the courts. Evaluation on the merits will not only add legitimacy and scientific accuracy to our country's efforts to preserve our environment, but it will also allow for the consideration of the economic effect those efforts will have on individuals

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173. The reader should be reminded that *Bennett* did not decide the merits of the petitioners' original claims, but rather simply granted standing to pursue these claims and remanded for further proceedings.

174. *See* Epstein, *supra* note 168, at A9.

175. *See* 5 U.S.C. § 706 (2)(A) (1994) ("[T]he reviewing court shall—(2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

176. *See* Nix, *supra* note 153, at 777. Nix discusses *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995), and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as well as the Court's reluctance to interfere in agency discretion. Nix also reviews Justice Scalia's recent views regarding agency discretion. *But cf. Endangered Species Act—Judicial Deference to Agency Interpretation*, 109 HARV. L. REV. 299 (1995) (pointing out that *Sweet Home* and *Chevron* may actually infer that the court has too much discretion in reviewing agency action).

177. *See* Cain, *supra* note 2, at 15.

178. *See id.* ("The Department of the Interior's Solicitor, John Leshy, predicted that Bennett would not significantly affect the Service's administration of the ESA.").

179. *See id.*

180. Furthermore, under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), even if a property owner were to allege a regulatory taking based upon economic loss, they would be faced with the heavy burden of demonstrating that the regulation has resulted in the loss of *all* economic value. For a discussion on the difficulty of successfully proving such a takings claim, see Nix, *supra* note 153, at 776 n.284.

181. *See, e.g.*, Epstein, *supra* note 168, at A9; Smith, *supra* note 8, at 3.

and industries.[182] As one environmentalist lawyer put it, "'Our stance is that the enforcement of the important environmental laws such as the Endangered Species Act are issues that should be addressed on the merits, rather that being tossed out on standing.'"[183]

IV. CONCLUSION

The ownership of private property, and the rights associated therewith, has powerful roots in our nation's history, and is deeply associated with the American concept of liberty. However, because the protection and preservation of the environment is similarly held dear by Americans, the war between these competing values will no doubt continue.[184] Without equal footing on the modern day battlefield, the courts, property rights advocates faced serious hurdles to the furtherance of their cause. This resulted in a dilution of the political legitimacy of the recent application of the ESA, which in turn, caused both sides to further entrench their positions. However, the Supreme Court's decision in *Bennett* can not only be viewed as a significant political compromise, but perhaps more importantly, as a leveling of the playing field for all participants in this ongoing battle.

The *Bennett* Court did not actually decide whether the USFWS's Biological Opinion was unreasonable or incorrect, but rather, merely granted the property owners the right to have their complaints heard by a court of law. The Supreme Court correctly concluded that the zone of interests test does not apply to the citizen suit provision of the ESA. Furthermore, and perhaps more significant, the Court also concluded that commercial and economic interests fall within the "zone of interests" for purposes of claims brought under the APA. Thus, the private property rights advocates were granted standing to bring suit for *overenforcement* of environmental regulations.

As a strong, unanimous opinion, *Bennett* can be viewed in a positive light by both sides of this environmental war. For environmental groups, it can be viewed as a small victory, as it adds needed credibility and future political stability to the ESA. It is also a victory for property rights advocates, as they can now bring suit for environmental regulations that they feel are arbitrary or unfounded. However, the *Bennett* decision should not be viewed as a major victory in the battle between property owners and environmentalists, but more appropriately, as a leveling of the playing field—effectuating a necessary fairness to both sides. In any event, two decades after *Tennessee Valley Authority v. Hill*, *Bennett* represents a shift in the attitude of the Court, if not the nation, in upholding species preservation *"whatever the cost."*[185]

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182. *See, e.g.*, Smith, *supra* note 8, at 3.

183. Marianne Lavelle, *Businesses Gain Ground on Standing—Endangered Species Act Ruling Will Affect Many Suits*, NAT'L L.J., Apr. 7, 1997, at B1 (quoting Douglas Honnald, counsel to the Sierra Club Legal Defense Fund in Montana).

184. Nix, *supra* note 153, at 780.

185. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978) (emphasis added).