

JUSTICE SCALIA'S ENVIRONMENTAL LEGACY: A CONTEXTUAL ANALYSIS

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The late Associate Supreme Court Justice Antonin Scalia will be remembered as a powerhouse in American law: a prolific writer, deft logician, biting humorist, and enemy of the environment.¹ Justice Scalia's opinions on environmental standing, perhaps more than any others, reflect and display all the elements of Justice Scalia's outsized reputation.² High-profile opinions on takings and police power, in particular, have bolstered Justice Scalia's reputation and fostered the narrative that he scorned environmental advocates and worked aggressively to purge the judiciary of causes like species survival, coastal protection, and preservation of federal land.³

In light of the 2016 passing of this historically important figure, now is an appropriate moment to reexamine Justice Scalia's reputation as an anti-environmentalist. Clues that Justice Scalia's environmental opinions may have been motivated by more than a simple aversion to the natural world and its champions can be detected by those who search for them.⁴

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¹ On Justice Scalia as prolific and an anti-environmentalist, *see, e.g.*, Jeremy P. Jacobs, *How Scalia Reshaped Environmental Law*, GREENWIRE, ENV'T & ENERGY PUBL'G (Feb. 15, 2016)

("Justice Antonin Scalia had a monumental impact on environmental law. Scalia, who was found dead Saturday [February 13, 2016] at a West Texas resort, wrote more than a dozen major decisions in his 30 years at the Supreme Court. His opinions sculpted fundamental aspects of environmental law, setting key precedents that continue to be loudly criticized by green groups. With his sharply worded opinions and dissents, Scalia led the court's conservative wing on limiting environmental groups' ability to bring lawsuits, standing up for property rights in the face of regulation and the scope of federal water regulation.") on Justice Scalia as a biting humorist, *see, e.g.*, Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, NEW YORKER, Mar. 28, 2005, at 50 ("Scalia has a distinctive writing style—lucid, sarcastic, peppered with hyperbolic analogies (Cossacks, Nietzsche), offhand historical references (Peace of Westphalia), belittling dismissals of the majority opinion ('ludicrous,' 'preposterous,' 'appalling'), and occasional allusions—not too specific or up to date—to popular culture. The results can be trenchant and funny.").

² *See, e.g.*, Jacobs, *supra* note 1 ("Scalia's arguably most enduring and important opinions severely limited the ability of environmental groups to bring lawsuits challenging federal regulations and other actions.").

³ *See, e.g., id.* ("Scalia was also frequently the court's biggest friend of property rights, especially in environmental cases. He penned several opinions on regulatory 'takings'—meaning instances where there was a dispute over whether the government was placing unconstitutional restrictions on the use of property. Those decisions appeared shaped by the belief that the government must compensate individuals in circumstances where zoning or environmental protections would reduce their property values.").

⁴ *See, e.g., id.* ("He was a 'judge who trusted his own intuitions,' said Todd Aagaard, vice dean and professor at Villanova University School of Law, adding that could be a compliment or a

For example, one of Justice Scalia's most significant majority opinions is best known for its delegation doctrine analysis, which may have shielded the entire range of federal environmental statutes from a wholesale constitutional attack.⁵ Another of Justice Scalia's majority decisions, written early in his Court career, forced municipal energy facilities to characterize the ash they generated as hazardous waste and dispose of it appropriately.⁶

Perhaps more significant than these apparent breaks from an anti-environmental pattern in Justice Scalia's Supreme Court track record is the fact that the Justice's opinions that have disappointed environmentalists tend to have fallen prey to Justice Scalia's jurisprudential philosophy. This philosophy—which called for a narrow definition of Article III's case or controversy requirement—translated into a vigorous guarding against overt political advocacy from the bench.⁷ From this perspective, the fact that environmental claims readily fail when viewed through Justice Scalia's analytical lens is no surprise, as environmental harms significant enough to garner Supreme Court attention are almost invariably motivated by a drive for widespread social change, enough so to defy a narrow view of what constitutes a justiciable dispute.⁸

This Article reviews Justice Scalia's most significant environmental law opinions, written for a Court majority and against an environmental interest, with the goal of identifying whether a cohesive motivating principle may be discerned in these opinions other than a bias against

critique. Aagaard cautioned against characterizing Scalia as anti-environment, saying it is easy to 'overstate' that aspect of his jurisprudence. Aagaard noted that at least two of his decisions could be considered pro-environment. But he added that Scalia was frequently 'following his nose, and often his nose did not like the environmental outcome.' Scalia was deeply interested in administrative law, which was one of the reasons he was prolific on environmental and property rights cases. But unlike other justices, he typically separated the environmental impacts at stake in the case from the legal questions presented. Scalia was a 'powerful voice for the idea that environmental issues are nothing special, as far as the law is concerned,' said Jonathan Adler, a professor at the Case Western Reserve University School of Law. 'Indeed, he was almost disdainful of the idea that there was anything special about environmental questions.'").

⁵ *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001) (upholding constitutionality of standard set forth in federal clean air statute against nondelegation doctrine challenge).

⁶ *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328 (1994) (denying application of exemption in federal waste management statute to ash produced by municipal waste-to-energy facilities).

⁷ See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (identifying judicial standing as a key means through which courts uphold the separation of powers).

⁸ See, e.g., *Massachusetts v. EPA*, 549 U.S. 447, 560 (2007) (Scalia, J., dissenting) ("This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.").

environmentalists. First, Part I of this Article sets forth, in brief form, Justice Scalia's jurisprudential construct, primarily the Justice's orthodoxy of originalism informed by a particular view of textualism, which Justice Scalia lauded as a means of guarding the sanctity of the judiciary.⁹ Next, Part II examines *Nollan v. California Coastal Commission*¹⁰ and *Lucas v. South Carolina Coastal Council*,¹¹ two of Justice Scalia's most prominent majority opinions examining state exercises of police power, motivated by environmental interests and challenged as takings.¹² Part III considers Justice Scalia's leading majority opinions addressing environmental standing,¹³ including *Lujan v. National Wildlife Federation (Lujan I)*,¹⁴ *Lujan v. Defenders of Wildlife (Lujan II)*,¹⁵ *Steel Co v. Citizens for a Better Environment*,¹⁶ *Bennett v. Spear*,¹⁷ and *Summers v. Earth Island Institute*.¹⁸ The focus of these case reviews is to determine whether the cases' results appear to have been primarily motivated by animus toward environmentalists or are better interpreted as products of Justice Scalia's adherence to a vision of the Court's function and how that function is best performed.¹⁹

This Article concludes that it is impossible to deny that Justice Scalia's opinions present statements, arguments, and conclusions indicating that the Justice possessed anti-environmentalist sentiments.²⁰ That stated, this Article acknowledges that relatively consistent, valid jurisprudential

⁹ See *infra* notes 22–62 and accompanying text.

¹⁰ 483 U.S. 825 (1987) (requiring state to justify permit condition by articulating logical nexus between imposition of public easement and legitimate state interest).

¹¹ 505 U.S. 1003 (1992) (requiring state to defend against takings claim by establishing that limitations on property rights are rooted in historical property or nuisance law).

¹² See *infra* notes 63–109 and accompanying text.

¹³ See *infra* notes 111–246 and accompanying text.

¹⁴ 497 U.S. 871 (1990) (demanding factual precision in connection between alleged injurious activity and plaintiff's injury to satisfy Constitutional standing).

¹⁵ 504 U.S. 555 (1992) (demanding factual precision in temporal element of alleged imminent injury to satisfy Constitutional standing).

¹⁶ 523 U.S. 83 (1998) (requiring that relief requested directly alleviate alleged injury to satisfy Constitutional standing).

¹⁷ 520 U.S. 154 (1997) (upholding standing for plaintiff alleging injury based on regulators' overzealous application of federal act containing citizen suit provision).

¹⁸ 555 U.S. 488 (2009) (rejecting allegation that lack of government process constituted injury for standing purposes, unless plaintiff also alleges a related, direct impact of the government action on the plaintiff's personal interest).

¹⁹ See, e.g., DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 33 (1996) (characterizing Justice Scalia's jurisprudence as motivated more by the Justice's politically conservative ideology than by a consistent commitment to judicial restraint and deference to the legislative process).

²⁰ See Jacobs, *supra* note 1 ("Over the arc of his career, however, the anti-environmental position appeared to become Scalia's default argument—a shift that is clear in later rulings that seem to contradict his earlier decisions. 'No [justice] has had more of a negative impact,' said Pat Parenteau, professor at Vermont Law School.").

underpinnings and explanations may be identified among Justice Scalia's high-profile environmental opinions, and that these legitimize and fortify the precedential value of the Justice's legacy in the areas of separation of powers and property rights.²¹

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I. THE GREAT AND NOTORIOUS JUSTICE SCALIA

People ask me, "When did you first become an originalist?" like they're saying, "When did you first start eating human flesh?"

– Justice Antonin Scalia²²

Justice Scalia was blessed with both a formidable intellect and the personality to make that intellect accessible and persuasive, if not occasionally overbearing.²³ Students of law, legal scholars, and those

²¹ See, e.g., *infra* notes 73–78, 96–102, 125–28, 151–52, 167–68, 180–82, 222–25 and accompanying text.

²² Talbot, *supra* note 1, at 42. *But cf.* Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL'Y 871, 872 (2008) ("I used to be able to say, with only mild hyperbole, that one could fire a cannon loaded with grapeshot in the faculty lounge of any major law school in the country and not strike an originalist. That is no longer possible.").

²³ See, e.g., EDWARD P. LAZARUS, *CLOSED CHAMBERS* 279 (1998) ("There was Scalia, ever witty, brilliant, and self-satisfied, leaning forward into his microphone to make mincemeat of those advocates with whom he disagreed or coming to the rescue of friendly counselIn

practicing before the Supreme Court appreciate both the deft argumentation and acid wit that characterize Justice Scalia's opinions as well as his many published articles, public addresses, exchanges during oral arguments, and media interviews.²⁴ Justice Scalia used these skills to exercise, with relative consistency, a particular brand of judicial interpretation that the Justice promoted as the only approach that achieved the true and proper role of the judiciary in the United States' Constitution-based democracy. As one Supreme Court clerk observed:

To a degree greater than any of his colleagues, Scalia could lay claim to following a clear-cut and comprehensive jurisprudence. When interpreting a statute, he was a "textualist": he looked to the "plain meaning" of the statute's words and vigorously opposed attempts to divine legislative intent from extrinsic evidence . . . By contrast, when interpreting the Constitution, Scalia was a self-described "fainthearted originalist," who . . . sought to define each provision according to the Framers' original understanding.

Although Scalia sometimes deviated from these stated principles, generally speaking they lent his opinions an unusual power and rigor, which he amplified (and made intimidating) through the cleverest and most pungent prose style on the Court. On every important case, even ones on which he ended up in the minority, the gravitational pull of Scalia's ideas was strongly felt . . .²⁵

Interestingly, in spite of Justice Scalia's powerful presence and persuasiveness, many of his most forceful legal views were delivered in dissenting or concurring opinions.²⁶ This is possibly a product of his at-

counterpart, . . . Brennan, Marshall, and Blackmun sat sphinxlike, seemingly depleted, as the legal principles they had championed . . . took a relentless beating.").

²⁴ For a discussion of Justice Scalia on the bench, see, e.g., Talbot, *supra* note 1, at 46 ("Scalia's interactions with lawyers are notoriously aggressive. He told one lawyer who was frantically riffling through papers in search of an answer to a question, 'When you find it, say 'Bingo.' . . . He bluntly dismisses arguments he doesn't like. 'Your principal position asks us to play games with the word 'facts,' he chided a lawyer this term.');" see also Alan B. Morrison, *Remembering Justice Antonin Scalia*, 101 MINN. L. REV. HEADNOTES 12, 14 (2016) (describing the current bench as comprised of eight very active questioners, with Justice Scalia "probably at the top of the list of questioners for most arguments.").

²⁵ LAZARUS, *supra* note 23, at 275–76.

²⁶ See Talbot, *supra* note 1, at 46 ("When Scalia took his place on the Court, the word was that he would be a consensus-builder. Daniel Mayers, [a] Harvard classmate, remembers telling people at the time, 'If you're worried about his political persuasion, you should *really* worry because he has such a wonderful personality—so jovial, full of good fellowship, no rough edges—that he will be very persuasive and build a following on the Court.' It didn't work out that way. Scalia's opinions have certainly won him adulation from the right . . . Yet, especially on critical matters such as abortion, his arguments have not won over the swing voters on the Court . . ."); see also Morrison, *supra* note 24, at 18 ("Early in his time on the High Court, Justice Scalia demonstrated his willingness to stand by his views, even in the face of unanimous opposition in cases of major

times insistent voice as well as his professed belief that non-majority opinions are a forum where a judge possesses the leeway to wax philosophical or even indulge in a bit of bench politicking.²⁷ Indeed, in a number of Justice Scalia's most infamous environmental opinions, including both dissents and majority opinions, the Justice appears to utilize the luxury of dicta to editorialize about arguments offered by the parties that were not material to the Court's decision.²⁸ In some instances, it almost appears as if Justice Scalia were teeing up a future opinion by discussing an issue collateral to his core argument.²⁹

Justice Scalia's uninhibited gift for irreverent humor could easily account for his reputation as an anti-environmentalist, as environmentalist court watchers in the throes of absorbing a loss before the Supreme Court might not appreciate the comic appeal of such piquant commentary about their cause delivered by the Justice who was spearheading their defeat.³⁰ The charge of anti-environmentalism would

constitutional and practical significance. I refer to his dissents in the separation of powers challenges to the independent counsel statute [*Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting)] and the federal sentencing guidelines [*Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)]. As the junior Justice in both cases, and with the outcome not in doubt, many judges would have simply gone along or written brief dissents, but that was not Justice Scalia. In both cases, he wrote impassioned dissents explaining at great length why the Constitution did not allow either scheme.”)

²⁷ For example, in upholding an affirmative-action admissions program at the University of Michigan Law School in *Grutter v. Bollinger*, the majority agreed with the school that maintaining a critical mass of minority students offered an educational benefit to all students, identified as “cross-racial understanding.” Justice Scalia disagreed:

This is not, of course, an “educational benefit” on which students will be graded on their law school transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding). For it is a lesson of life rather than law—essentially the same lesson taught to (or rather learned by, for it cannot be “taught” in the usual sense) people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens.

539 U.S. 306, 347 (2003) (Scalia, J., concurring in part, dissenting in part); see also Talbot, *supra* note 1, at 49 (“Scalia . . . distinguishes himself with the force, and sometimes the scorn, of his written opinions . . . [H]is opinions seem to be for the benefit of a future generation that may yet be saved for originalism. While his dissents often nimbly dismantle the dodgy logic of the majority opinion, they do so in a tone of such bitter disappointment that it’s hard to imagine his arguments winning over any Justice who voted against him.”).

²⁸ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565–67 (1992) (rejecting ecosystem nexus, animal nexus, and vocational nexus theories as bases for standing).

²⁹ See, e.g., *id.* at 571–78 (rejecting the procedural injury as adequate for standing purposes); see also *Lucas*, 505 U.S. at 1015 (identifying “two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint.”).

³⁰ See SCHULTZ & SMITH, *supra* note 19, at 101 (citation omitted) (“The sharp language in Justice Scalia’s opinions has contributed to one commentator’s characterization of the current Supreme Court era as the ‘season of snarling justices’ because ‘[o]pinions of [the late eighties] contain some of the most vituperative attacks on other justices in [C]ourt history.’”).

be a simpler and more satisfying retort than a dispirited admission that Justice Scalia's dedication to originalism might have steered his decisions against protecting environmental and other interests that the Justice did not recognize as adaptable to the strictures of Article III.³¹ But Justice Scalia's brand of originalism does provide a jurisprudentially legitimate basis for his conservatism generally and, more specifically, his track record of voting and writing against parties bringing environmental claims.³²

Originalism, as explained by Justice Scalia, is an approach to constitutional interpretation in which judges strive to read the language of the Constitution as it would have been understood at the time the Framers drafted it.³³ According to Justice Scalia, originalists do not perceive the Constitution as a framework for some sort of U.S. social-legal compact that evolves with the sentiments and wisdom of the population on matters like oppression, cruelty, and fair and equal treatment.³⁴ Certainly, originalists accept that the law may and even should reflect such evolutions, but originalists argue that the law best evolves through legislation that refrains from contradicting the Constitution's text or, in rare cases, through amendments to the Constitution itself. The original Constitution, under Justice Scalia's brand

³¹ For a discussion of the various influences on Justice Scalia's decision making, *see id.* at 208 ("Scalia's legal philosophy . . . is the product not simply of political or jurisprudential values, but a combination of substantive political, methodological, and interpretive values . . . [S]everal values are important to Scalia's political vision, and these values compete with one another to produce his jurisprudence.").

³² For discussion of Justice Scalia's track record in environmental cases creating a perception of the Justice as result-oriented, *see* Peter Manus, *Wild Bill Douglas's Last Stand: A Retrospective on the First Supreme Court Environmentalist*, 72 *TEMPLE L. REV.* 111, 115–31 (1999).

³³ *See, e.g.*, Antonin Scalia, *Is There an Unwritten Constitution?*, 12 *HARV. J.L. & PUB. POL'Y* 1, 1 (1989) ("Many, if not most, of the provisions of the Constitution do not make sense except as they are given meaning by the historical background in which they were adopted. For example, the phrase 'due process of law' would have meant something quite different to a sixteenth-century Tahitian from what it in fact meant to an eighteenth-century American. One needs to know what the word 'property' means to know what it means to be 'deprived of life, liberty, or property, without due process of law.' In this way, the unwritten Constitution encompasses a whole history of meaning in the words contained in the Constitution, without which the Constitution itself is meaningless.").

³⁴ *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849 (1989) (comparing the originalist approach to constitutional interpretation to a non-originalist approach and finding the non-originalist approach inferior); *see also* Talbot, *supra* note 1, at 42 ("The philosophy that an originalist sets himself against most firmly is that of the Supreme Court Justice William Brennan, who, in 1985, argued that 'the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems.' Scalia sees this approach as an expression of judicial arrogance that all too often leads to the 'discovery' of bogus new rights—such as the 'right to privacy' that undergirds two decisions that Scalia loathes, *Roe v. Wade* [410 U.S. 113] (1973) and *Lawrence v. Texas* [539 U.S. 558] (2003), which declared unconstitutional a law forbidding homosexual sodomy.").

of originalism, reflects its Framers' best efforts to describe a particular democratic republic, and as a completed effort, its textual meaning must be largely unaltered by time, politics, or evolution.³⁵

In his adherence to this particular brand of originalism, Justice Scalia did not argue that the text of the Constitution must be understood precisely as intended by its Framers.³⁶ When interpreting legislative language, Justice Scalia proclaimed himself a textualist, holding the view that where statutory language transmits a clear and immutable message, the Court's role is to adhere to it, regardless of the legislators' elsewhere-claimed intent.³⁷ This fealty to language produced through the political system characterized Justice Scalia's originalist approach to the Constitution as well.³⁸ In the Justice's words: "I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words."³⁹

That said, Justice Scalia acknowledged that the relatively laconic text of the Constitution is often susceptible to varied and even contrasting readings. In instances where valid conflicts arise as to the meaning of the Constitution's text, Justice Scalia insisted that ambiguity be resolved in accordance with the Framers' perspectives, such that they may be discerned, and the ensuing historical tradition of American ideas on citizens' liberties, rights, and ideals.⁴⁰ Judicial interpretation of

³⁵ See *id.* ("Originalists, [Justice Scalia has stated,] feel that judges should adhere to the precise words of the Constitution, and believe that the meaning of those words was locked into place at the time they were written. Scalia likes to say that a Constitution is about 'rigidifying things,' whereas elections introduce flexibility into the system.").

³⁶ See Justice Antonin Scalia, *Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation*, Address at the Catholic University of America (Oct. 18, 1996), available at <http://www.proconservative.net/pcvol5is225scaliatheoryconstlinterperation.shtml>.

³⁷ See, e.g., The Honorable Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1610 (2012) (arguing that judges must be governed by the language legislators enact, and not by the purposes judges believe legislators had in mind: "In a Government of Laws, one in which the people and agents of the people owe fidelity to democratically enacted texts, it would perhaps seem uncontroversial to suggest that an interpreter's job entails determining what those texts convey to a reasonable person—one conversant with our social linguistic conventions. Indeed, the same conclusion follows if one believes (as we do not) that the object of the interpretive enterprise is to determine what the lawmakers meant rather than what the words convey: one should presumably focus upon the way a reasonable lawmaker—one conversant with our social linguistic conventions—would have understood the chosen language." (citations omitted)).

³⁸ See Morrison, *supra* note 24, at 16 ("His view was that the only thing that mattered was the text of the law actually voted on by both Houses of Congress and signed into law by the President, and so for him, all legislative history was out of bounds.").

³⁹ See Talbot, *supra* note 1, at 52.

⁴⁰ See, e.g., Morrison, *supra* note 24, at 18 ("Justice Scalia's distaste for legislative history did not extend to constitutional history, as best exemplified in his detailed reliance on it in *District of*

constitutional provisions thus involves intellect and exploration, but primarily through the lens of historical goals, prejudices and priorities, and never by contemporary or personal principles.⁴¹

Under this constitutional construct, it seems obvious that the Constitution and the courts that apply it could serve as a stagnating force in a changing world.⁴² This idea might trouble other constitutional scholars, but Justice Scalia was comfortable with the fact that his originalist jurisprudence meant that the Constitution, as a source of law and legal decision-making, ignores evolving public awareness as well as societal, technological, and ecological developments.⁴³ Justice Scalia considered the legislative and executive branches—political and thus fundamentally distinct in character and function from the judicial branch—as responsible for reflecting such cultural evolutions in the law that governs the nation at any given time.⁴⁴ In essence, Justice Scalia's brand of originalism envisions the role of the Constitution, and the judiciary interpreting it, to be a somewhat rarified one, dictated by the

Columbia v. Heller [554 U.S. 570 (2008)], in sustaining a broad reading of the right to bear arms under the Second Amendment. His consideration there included English history, the colonial experience, what the states were doing at the time the amendment was enacted, and even what happened in the states after it became law.”).

⁴¹ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting):

[Q]uite simple, the issue in these cases [is] not whether the power of a woman to abort her unborn child is a “liberty” in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the “concept of existence, of meaning, of the universe, and of the mystery of human life.” Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.

See also Talbot, *supra* note 1, at 54 (“Where he once described himself as a ‘faint-hearted originalist’ and, in 1988, gave a speech called ‘Originalism: The Lesser Evil,’ he is now likely to say, when asked, for instance, how one could know precisely what a text meant two hundred years ago, that it is just ‘not that hard.’”).

⁴² See, e.g., *id.* at 42 (“Scalia has a narrow view of what judges ought to be trusted to do; since he fervently insists on these limitations, the effect is one of bellicose humility. ‘If the Constitution is an empty bottle into which we pour whatever values—the evolving standards of decency of a maturing society—why in the world would you let it be filled by judges? I don’t know what the standards of decency are out there. I’m afraid to inquire!’ . . . ‘Why you would want to leave these enormously important social questions to nine lawyers with no constraints, I cannot fathom.’”).

⁴³ *Id.* at 51 (“His vision of the judge’s role has an ecclesiastical aura of stringency and renunciation. ‘I don’t deal with policy—that’s not my business,’ he once told an audience at Brooklyn College. ‘I gave it up when I took the veil.’”).

⁴⁴ See, e.g., Scalia, *The Doctrine of Standing*, *supra* note 7 (discussing the distinct role of the judiciary and the importance that courts address social or political issues only in the context of examining a case or controversy).

text of a centuries-old document, nearly immune, at its core, to contemporary sensibilities.⁴⁵

Thus, accompanying Justice Scalia's originalist philosophy was the Justice's oft-expressed views on the need for the judiciary to rebuff broad political battles and limit itself to the resolution of discrete disputes between identified parties.⁴⁶ Justice Scalia identified a guarded interpretation of standing as essential to the protection of the judiciary from politics.⁴⁷ It is questionable whether such a perspective on the Court's role and duties is wise, practical, achievable, or was envisioned by the Framers.⁴⁸ Regardless of the sagacity of this originalist approach, multiple opinions both in the environmental field and others demonstrate Justice Scalia's principled efforts to adhere to it.⁴⁹

⁴⁵ Justice Scalia's originalist view stood in sharp contrast to the "living Constitution" perspective. See, e.g., Talbot, *supra* note 1, at 42 ("[O]riginalism used to be orthodoxy, [Justice Scalia] said. Only in recent times, he added, have judges become enamored of an approach based on—'Oh, how I hate the phrase!'—a 'living Constitution.' Scalia uttered these last words with exaggerated disdain, as if he were holding up some particularly noxious leftovers extracted from the back of the fridge.").

⁴⁶ See, e.g., Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1167 (1993) (maintaining that "in the early 1980's, Justice Scalia began his personal crusade to markedly strengthen standing's curb on an 'overjudicialized' government."); see also Scalia, *The Doctrine of Standing*, *supra* note 7, at 881 ("My thesis is that the judicial doctrine of standing is a crucial and inseparable element of [the] principle [of separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the process of self-governance." (citation omitted)).

⁴⁷ See, e.g., Scalia, *The Doctrine of Standing*, *supra* note 7, at 894 ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interests of the majority itself.").

⁴⁸ See, e.g., Jedediah Purdy, *Scalia's Contradictory Originalism*, NEW YORKER, Feb. 16, 2016, <http://www.newyorker.com/news/news-desk/scalias-contradictory-originalism> ("Scalia's originalist theory elevated an impossible ideal—that judging should be a politically neutral act—even as, in recent decades, it provided a cover for opinions that were evidently partisan."); see also Talbot, *supra* note 1, at 42 ("Originalism wasn't quite as unchallenged a doctrine as Scalia claims—even before the 'living Constitution' approach emerged.").

⁴⁹ See Talbot, *supra* note 1, at 42–43 ("Scalia said[] he was sometimes forced by the rigors of originalist methodology to make decisions that lead to consequences he finds repugnant. He noted that in 1989 he voted to strike down the conviction of a man who had burned the American flag, on the ground that the First Amendment protected such symbolic acts. 'Scalia did not like to vote that way,' he said, slipping into the third person, as he often does during comic riffs. 'He does not like sandal-wearing bearded weirdos who go around burning flags. He is a very conservative fellow.' Although originalists are not supposed to care about the outcome, an originalist's wife, evidently, might sometimes consider this a crock. Scalia went on, 'I came down to breakfast the next morning, and my wife—she's a very conservative woman—she was scrambling eggs and humming 'It's a Grand Old Flag.' That's a true story. I don't need that! A living-Constitution judge never has to suffer that way.'"); see also *id.* at 54 ("Some of Scalia's many critics like to hunt for his inconsistencies—cases where he has deviated from originalist precepts simply to come up with a result that he preferred.").

A number of Justice Scalia's opinions in landmark constitutional cases illustrate the point that the separation of court and politics was one of the Justice's primary jurisprudential goals. In *Obergefell v. Hodges*, for example, Justice Scalia penned a separate dissent—although other dissents in which the Justice joined appeared to adequately address the issue—to underscore his view that rights associated with marriage fall outside the purview of the federal Constitution.⁵⁰ Similarly, in *Planned Parenthood v. Casey*, Justice Scalia lodged a separate dissent to protest the recognition of an abortion right on the grounds that no abortion right had been recognized at the time of the Constitution's adoption, so the concept should not be read into the Constitution.⁵¹ In *District of Columbia v. Heller*, Justice Scalia wrote for the majority, concluding that the Second Amendment preserved individual citizens' right to bear arms, with the analysis based primarily on how the Framers would have intended their words to be read at the time they drafted the amendment.⁵² Multiple opinions and other writings by Justice Scalia confirm his dedication to the originalist perspective.⁵³

⁵⁰ 135 S. Ct. 2584, 2625 (2015) (Scalia, J., dissenting) (complaining that the majority overstepped the bounds of judicial power into the legislative realm when addressing same-sex marriage, and in doing so thwarted an essential divide of the Constitution, which is that only elected representatives may affect political change).

⁵¹ 505 U.S. 833, 980 (1992) (Scalia, J., dissenting) (arguing that no abortion right could emanate from the Constitution because its legal prohibition has a longstanding history in American culture); see also Talbot, *supra* note 1, at 49–50 (“Scalia believes that, because abortion was outlawed in the United States for more than a century, one cannot claim that American tradition upholds a right to it. In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* . . . Scalia's dissent was one of the most blistering opinions ever written by a Supreme Court Justice. ‘The Court's description of the place of *Roe* [v. *Wade*, 510 U.S. 113 (1973)] in the social history of the United States is unrecognizable,’ he said. He went on: . . . ‘[T]o portray *Roe* as the statesmanlike ‘settlement’ of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court, in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption rather than of any Pax *Roeana* that the Court's new majority decrees.’ In stressing the need to cling to *Roe* ‘under fire’ and in the face of ‘great opposition,’ the Court's position smacked of ‘czarist arrogance,’ Scalia railed. ‘We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change.’ He even insinuated that the majority opinion smacked of fascism, projecting nothing less than a ‘Nietzschean vision of us unelected, life-tenured judges, leading a *Volk*.’”).

⁵² 554 U.S. 570, 580–92 (2008) (reading the term “militia” and other aspects of the Second Amendment by researching the framers' understanding of such terms as well as the goals of the Amendment at the time of its drafting).

⁵³ See, e.g., Talbot, *supra* note 1, at 49 (“[Scalia] rejects the idea that the Fourteenth Amendment's protection of ‘liberty’ implies other rights, such as the right to privacy and autonomy. When the Constitution's text is ambiguous or silent on a subject, Scalia's method is to determine whether a long-standing American tradition has supported the practice under challenge. ‘For me . . . the constitutionality of the death penalty is not a difficult, soul-wrenching question,’ he wrote in his *First Things* essay. ‘It was clearly permitted when the Eighth Amendment was adopted (not

Certainly originalism is a jurisprudential theory that can be understood in apolitical terms as the disciplined perspective of a constitutional purist. That said, cases in which Justice Scalia expounded on the originalist approach with vehemence tended to be politically charged cases in which the members of the Court fell into roles, touted by Court-watchers, as politically liberal or conservative.⁵⁴ For this reason, it is difficult to resist speculating about whether Justice Scalia's arguments in the above-listed cases were truly the attestations of a jurist adhering to a principled approach to the separation of powers, and not the social leanings of a politically conservative American using a constitutional theory as a wispy smokescreen to justify his deep-seated personal desire to cling to traditional social and political structures.⁵⁵ That said, taken at face value, Justice Scalia's originalist approach did not balk at change. The Justice's worldview simply places all burden for evolution in the scope, meaning, and reach of constitutional law on the shoulders of the legislative branch.

Originalism as an interpretive approach is vulnerable to criticism by those who consider the role of the justice system or that of the Constitution to be of a more dynamic and evaluative nature than that promoted by Justice Scalia.⁵⁶ Indeed, an argument exists that the very theory of originalism is conceptually contradictory, as it presumes that the Framers either could not or refused to consider that their Constitution might remain intact through multiple generations.⁵⁷ As it is generally accepted that the Framers did, in fact, aim to create a lasting Constitution,⁵⁸ it appears that originalism aims to reflect as literally as

merely for murder, by the way, but for all felonies—including, for example, horse-thieving, as anyone can verify by watching a Western movie). And so it is clearly permitted today.”)

⁵⁴ See *id.* at 42 (“Although proponents of originalism claim that it is a politically neutral method, in Scalia’s hands it usually leads to conservative results—at least on social issues like abortion, capital punishment, and gay rights.”).

⁵⁵ See, e.g., *id.* at 50 (“Cases in which Scalia believes that elite judges or professors are trying to dismantle the moral positions of ‘the people’ bring out a particular vituperativeness, however, and leave the unavoidable impression that he is speaking not only for originalism but also for his own selective notion of the vox populi.”).

⁵⁶ See, e.g., Purdy, *supra* note 48 (“There is another way to understand the role of a top court in a constitutional democracy. The Court that decided *Brown v. Board of Education*, more than sixty years ago—which included three former senators and two former attorneys general—did not have the option of persuading itself that it stood neatly apart from politics.”).

⁵⁷ See, e.g., Bruce E. Auerbach & Michelle Reinhart, *Antonin Scalia’s Constitutional Textualism: The Problem of Justice to Posterity*, 1 INTERGENERATIONAL JUS. REV. 17 (2012) (arguing that Justice Scalia’s originalist and textualist approach to reading the Constitution is inconsistent with the writings of Jefferson and Madison).

⁵⁸ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (In analyzing the scope of the necessary and proper clause in *McCulloch v. Maryland*, the Court discussed the intended longevity of the Constitution: “This provision is made in a constitution intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers, would have been to

possible all the thoughts and intents of the Framers except the most fundamental of all—that the Constitution remain relevant.⁵⁹

Regardless of the merits or fallacies of originalism, it remains a salient jurisprudential approach to constitutional interpretation.⁶⁰ Justice Scalia claimed it as his motivating philosophy, reflective of his views on the separation of powers and, in particular, the role of the nation's high court, and the Justice fought to imprint his brand of originalism in the American jurisprudential conscience as the properly reverential approach to constitutional law.⁶¹ If examination of Justice Scalia's most influential environmental opinions indicates that they comport with the Justice's originalist philosophy, we should reconsider Justice Scalia's reputation as a simple anti-environmentalist.⁶²

II. JUSTICE SCALIA ON TAKINGS: THE *LUCAS* LEGACY

Justice Scalia wrote two majority opinions with significant precedential impact in the area of takings. These cases had a shattering effect on the insulation that state assertions of police power

change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immediate rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”).

⁵⁹ See Talbot, *supra* note 1, at 55 (“[A]s [Harvard Law School Professor Cass] Sunstein points out, the question of ‘whether the original understanding of an old text should bind current generations is not at all simple.’ He explains, ‘We can agree that the Constitution itself should be taken as binding without finding it self-evident that Americans must be bound by past understandings of votes by some segment of the citizenry over two centuries ago.’ The Constitution, it should be noted, does not stipulate the rules for its interpretation—and the idea that the framers would have welcomed scrutiny of its provisions in the light of changed circumstances is at least as plausible as the notion that the framers intended to freeze, for all time, the meaning of due process or cruel and unusual punishment. All of this calls into doubt Scalia’s certainty that he is right.”).

⁶⁰ For a discussion of originalism’s roots, see, e.g., *id.* at 42 (“As a named doctrine, originalism didn’t fully emerge until the nineteen-seventies, with the work of Robert Bork, then a Yale law professor, who wrote, ‘There is no other sense in which the Constitution can be what article VI proclaims it to be: ‘Law.’ This means, of course, that a judge, no matter on what court he sits, may never create new constitutional rights or destroy old ones.”).

⁶¹ See Purdy, *supra* note 48 (“Scalia’s originalism—the theory that judges should hold the Constitution to the ‘public meaning’ it had when it was adopted—was the most ambitious and influential judicial attempt to limit the impact of individual standards. It anchored judges’ reasoning to a narrow range of interpretive sources, restricting the scope of their anti-democratic interventions.”).

⁶² For discussion of Justice Scalia’s consistent adherence to originalism, see Talbot, *supra* note 1, at 54 (“Scalia . . . has indicated that there are a few instances where he does not toe the originalist line. Public flogging or branding would most likely not be permitted by courts today, he has written, even though both were permitted at the time that the Eighth Amendment was passed. And, he implied, this is the proper response. Here, presumably, ‘evolving values’ cannot be denied. Scalia’s over-all voting record, however, is remarkably free of contradiction.”).

presumptively enjoyed against judicial scrutiny, as Justice Scalia forced states to justify their actions impacting property interests.⁶³ In *Nollan v. California Coastal Commission*, Justice Scalia led the Court in a decision that toppled the long-held judicial recognition of an almost unassailable presumption favoring the validity of state exercises of police power.⁶⁴ Five years later, in *Lucas v. South Carolina Coastal Council*, Justice Scalia again wrote for the Court majority, creating a test under which state exercises of police power may be evaluated for their adherence to tort and property law dating from the creation of the U.S. republic.⁶⁵ Both cases represent significant losses for environmental advocates. Both are compatible with the Justice's originalist perspective.

A. Nollan: A Focus on Facts and Logic

In 1987, Justice Scalia penned *Nollan v. California Coastal Commission*, an opinion that altered the approach courts take toward state assertions of police power when challenged as takings. The opinion questioned the logic and legality of the Commission requiring a shorefront landowner to record a public easement running along the shoreline of his land as a condition for receiving permission to expand his house.⁶⁶ The Commission's justification was that the easement would reassure the public that it maintained the right to cross shorefront private land along the ocean's edge, thus serving to counter the psychological barrier that an imposing structure would present to members of the public seeking to enjoy the shoreline.⁶⁷ Justice Scalia's majority rejected the Commission's logic.⁶⁸

⁶³ For a general discussion of Justice Scalia's propensity to defend property rights, see SCHULTZ & SMITH, *supra* note 19, at 1 (noting that between 1986 and 1994, Justice Scalia voted in favor of property owners eighty-nine percent of the time).

⁶⁴ 483 U.S. 825 (1987).

⁶⁵ 505 U.S. 1003 (1992).

⁶⁶ See 483 U.S. at 837 ("Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, [the California Coastal Commission's requirement of a public easement along the shoreline] is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'").

⁶⁷ *Id.* at 838 ("The Nollans' new house, the Commission found, will interfere with 'visual access' to the beach. That in turn . . . will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a 'psychological barrier' to 'access.' The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more 'access.' These burdens on 'access' would be alleviated by a requirement that the Nollans provide 'lateral access' to the beach.").

⁶⁸ *Id.* at 838-39 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any

In *Nollan*, Justice Scalia presented a test that became widely used when courts review conditions imposed by a state agency on a property owner seeking development approvals. Justice Scalia called for regulators to present a tight logical connection between the infringement on property rights and the legitimate state interest regulators seek to protect.⁶⁹ The “essential nexus test” became part of the fabric of police power analysis, widely recognized as a preliminary step by courts faced with takings claims.⁷⁰

In 1994, the Supreme Court affirmed its adherence to the essential nexus test and explored a somewhat nuanced second element to the analysis in *Dolan v. City of Tigard*. From *Dolan*, exercises of state police power that satisfy the required essential nexus with a legitimate state interest must also show that the burden imposed on property owners bears a “rough proportionality” to the public benefit achieved.⁷¹ As a majority decision authored by then-Chief Justice Rehnquist, *Dolan* established *Nollan* as settled law for the following decade or more.⁷² In 2005, the Court’s decision in *Lingle v. Chevron*⁷³ narrowed the applicability of

‘psychological barrier’ to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans’ new house.”).

⁶⁹ *Id.* at 837 (“[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.”).

⁷⁰ See, e.g., Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVIRONS ENVTL. L. & POL’Y J. 189, 196 (2010) (“In both *Nollan* and *Dolan*, a conservative majority of the Court seemingly transformed a normative value supporting private property rights protections into utilitarian takings tests seeking to counteract what it viewed as extortionate government practices.”).

⁷¹ 512 U.S. 374 (1994) (finding that the City had exceeded its police power by conditioning its approval of a building permit on the dedication of a publicly accessible greenway and construction of a bicycle path, although both were logically related to the legitimate state concerns impacted by the planned construction); see also *id.* at 391 (“We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”).

⁷² See *id.* at 386–87 (“We addressed the essential nexus question in *Nollan* The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the ‘blockage of the view of the ocean’ caused by construction of the larger house. We agreed that the Coastal Commission’s concern with protecting visual access to the ocean constituted a legitimate public interest We resolved, however, that the Coastal Commission’s regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans’ beachfront lot The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into ‘an out-and-out plan of extortion.’” (citations omitted)).

⁷³ 544 U.S. 528, 546–48 (2005).

Nollan and *Dolan*. But even the *Lingle* decision, which attempted a wholesale cleanup of takings law precedents, preserved the *Nollan* and *Dolan* framework for “exaction” cases.⁷⁴

Putting aside its legacy as a takings precedent, the question of whether Justice Scalia’s *Nollan* opinion displays animosity to the environmentalist efforts of the California Coastal Commission should be answered in the negative. Certainly, the California Coastal Commission has been lauded for its success in coastline protection.⁷⁵ This environmentalist reputation—combined with Justice Scalia’s somewhat withering rejection of the Commission’s defense of the permit condition imposed on the Nollans’ property rights—could be evidence enough for some to brand the decision anti-environmentalist.⁷⁶ In addition, Justice Scalia’s energetic plunge into the facts and skeptical critique of the Commission’s explanation for its exaction may be criticized as selective, if not distortive.⁷⁷ That said, there is an undeniably confusing quality to the logic of the Commission’s permit condition. Even critics of *Nollan* agree that states have abused the construction permit process in order to advance state goals that, while legitimate, are remote from the project under consideration.⁷⁸ In sum, regardless of the feathers Justice Scalia

⁷⁴ *Id.* at 530; see also Mulvaney, *supra* note 70, at 213–14 (“[T]he Lingle Court took great effort in attempting to explain that the Nollan and Dolan tests survive the repudiation of the Agins test. Lingle suggested the court’s exaction decisions are not a product of Agins but rather of the aforementioned unconstitutional conditions doctrine In discussing the unconstitutional conditions doctrine, the Lingle dicta focused on the physical nature of the walking corridor and bicycle pathway in Nollan and Dolan. The court stated that Nollan and Dolan involved ‘government demands that a landowner dedicate an easement allowing public access.’ It explained how these two exaction cases ‘began with the premise that, had the government simply appropriated the easement in question, this would have been a per se physical taking.’” (citations omitted)).

⁷⁵ For a discussion of California Coastal Commission successes, see L. Blundell & M. Stump, *California Coastal Commission*, 15 CAL. REG. L. REP. 190 (1995).

⁷⁶ See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (concluding that “the condition substituted for the prohibition utterly fails to further the end advanced as the justification.”); *id.* (characterizing the permit condition as part of “an out-and-out plan of extortion”); *id.* at 838 (dismissing the Commission’s proposed test for how directly a state condition must meet a state interest because “this case does not meet even the most untailed standards.”).

⁷⁷ See Mary M. Cizerle, *Nollan v. California Coastal Commission: Unprecedented Intrusion upon a State’s Judgment of the Proper Means to Be Applied in Land Use Regulation*, 21 J. MARSHALL L. REV. 641, 652 (1988) (“[T]he Court discussed only carefully selected facts of its own choosing so that it could determine that the Commission was unfairly imposing on Nollan’s property rights. Had the Court properly considered all of the facts, it would have concluded that Nollan was singling himself out for a monetary windfall.” (citations omitted)).

⁷⁸ *Id.* at 651 (discussing *Pac. Legal Found. v. Cal. Coastal Comm’n*, 655 P. 2d 306 (Cal. 1982): “Undoubtedly, governmental agencies have overreached their police power in certain situations. In one case, for example, coastal landowners added rock below a seawall to protect their homes from high waves. They were later notified that the repairs required a permit, which the Commission would only issue if the landowners granted a lateral access easement. The condition was held invalid due to insufficient evidence that the seawall improvement adversely affected public access to or across the beach.” (citations omitted)).

may have ruffled in his writing, and regardless of his obvious preference for rigid rules over flexible guidance, the *Nollan* opinion represented more of a clarification of the police power parameters than a result-oriented departure from precedent.

Support for Justice Scalia's close analysis of a state's motive and logic when regulating property can be found in other landmark police power decisions. From the earliest days of state regulation of land use, the Supreme Court has questioned the motivations of state actors, often while simultaneously proclaiming the near unassailable autonomy of such exercises of police power. In 1886, in *Yick Wo v. Hopkins*,⁷⁹ the Court questioned the ostensible fire-prevention motivation for laundry regulation, concluding that the application of the permit system to harass almost all the Asian laundry owners in San Francisco proved the exercise of police power unconstitutional.⁸⁰ In the 1915 case *Hadacheck v. Sebastian*,⁸¹ the Court narrowly upheld the city of Los Angeles' zoning decision that shut down a brickyard, taking refuge in the fact that profitable use could be made of the clay excavated from that yard even as the Court proclaimed the police power sacrosanct and rendered unworkable if vulnerable to takings claims.⁸² In the 1922 decision *Pennsylvania Coal Co. v. Mahon*,⁸³ the Court acknowledged a tipping point where even valid exercises of police power might intrude enough upon private property rights to constitute takings requiring landowner compensation in individual cases.⁸⁴ *Nollan* followed in this tradition of

⁷⁹ 118 U.S. 356 (1886).

⁸⁰ *Id.* at 367–68 (“In [cases in which the court held exercises of police power to be constitutional] the ordinance involved was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash houses, within certain prescribed limits . . . a necessary measure of precaution in a city composed largely of wooden buildings . . . The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform . . . [I]t divides the owners or occupiers into two classes . . . merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure.”).

⁸¹ 239 U.S. 394 (1915).

⁸² *Id.* at 410 (“It is to be remembered that we are dealing with [the police power,] one of the most essential powers of government,—one that is the least limitable . . . [T]here must be progress, and if in its march private interests are in the way, they must yield to the good of the community.”); *id.* at 412 (“In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks.”).

⁸³ 260 U.S. 393 (1922).

⁸⁴ *Id.* at 413 (“As long recognized some [property] values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the

landmark Court analyses incrementally adding to the complexity and types of scrutiny under the broad rubric of takings challenges to police power-based land use regulation. From this perspective, if *Nollan* was motivated by anti-environmentalism, the evidence is not powerful.

B. Lucas: An Originalist Emphasis on Background Principles

In the 1992 decision *Lucas v. South Carolina Coastal Council*,⁸⁵ Justice Scalia wrote for the majority and concluded that a state was required to compensate a landowner under the Takings Clause for its beachfront development plan. The plan barred the development of several privately-owned shoreline parcels and, while perhaps meeting a legitimate state interest, thereby constituted a taking that required the state to compensate the landowner.⁸⁶ Justice Scalia's analysis suggested that the state's effort to bar development along the coast was a relatively recent legal development that came from a burgeoning cultural appreciation for the coastal ecosystem, and as such the burden of protecting that environmental resource rests on the government (or taxpayers) rather than shorefront landowners.⁸⁷

As a precedent, *Lucas* is significant. Justice Scalia introduced a new takings test, reasoning that environmental regulation eliminating all economic profitability of land constitutes a taking unless the state is able to establish that such regulation emanates from "background principles of the State's law of property and nuisance."⁸⁸ Having roots in such background principles would both legitimize the state action as traditional and undermine the landowner's claim that his property rights had been unexpectedly quashed. If an assertion of police power cannot be traced to historical roots in the state's common law, according to Justice Scalia's test, the state action may nevertheless pass muster as a legitimate measure protecting the public health or welfare. Such

legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.").

⁸⁵ 505 U.S. 1003 (1992).

⁸⁶ *Id.*

⁸⁷ *See id.* at 1007 (discussing the state's efforts to regulate the shoreline as having emerged in the 1970's).

⁸⁸ *Lucas*, 505 U.S. at 1029 ("Any limitation so severe [*i.e.*, regulations that prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." (footnotes omitted)).

newfound public interests warranting confiscatory assertions of police power, however, trigger the takings doctrine compensation requirement.⁸⁹

In his opinion, Justice Scalia did acknowledge that a state's police power empowers it to go so far as to destroy private property as a means of forestalling "grave threats to the lives and property of others."⁹⁰ The Justice even volunteered an example of a state action without deep historical roots—ordering the decommissioning of a nuclear power facility located on a newly discovered geological fault line—that would not constitute a taking.⁹¹ Thus, neither the level of intrusiveness nor the lack of historical precedent of a state's exercise of police power renders it a taking, so long as it abates some acute threat to public welfare. Apparently, however, Justice Scalia did not perceive the development of shoreline real estate in South Carolina to present such a threat, regardless of the fact that one of South Carolina's two stated primary motives for its beachfront development ban was the documented danger that storms present to shorefront landowners and their improvements.⁹²

If Justice Scalia had focused his analysis on this storm damage motive, the Justice might have concluded that the beachfront management regulations in question fell comfortably within the scope of familiar, traditional background principles of police power-based land use controls.⁹³ Even if the purpose of the state's action had been limited to ecosystem protection, however, South Carolina had explained to the Court that the beachfront management act at the center of the dispute simply served to update a prior coastal management statute, and that "[l]ong before the passage of the [current Beachfront Management Act],

⁸⁹ *Id.* at 1017–18 (quoting *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978)).

⁹⁰ *Id.* at 1029 n.16 (acknowledging that courts have absolved States and private parties of liability "for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." (citations omitted)).

⁹¹ *Id.* at 1029–30 ("[T]he corporate owner of a nuclear generating plant [would not be entitled to compensation] when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.").

⁹² *See id.* at 1037–38, 1040 (Blackmun, J., dissenting) (relying on lower court transcripts as well as the history and language of the Beachfront Management Act to establish the unequivocal and traditional safety-based motivation for the Act).

⁹³ The Court defined the Act's purposes solely in terms of environmental protection:

[T]he beach/dune area of South Carolina's shores is an extremely valuable public resource; . . . the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and . . . discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm.

Id. at 1022. In contrast, Justice Blackmun's dissent describes the Act as a response to repeated coastal storm threats to life and destruction of property as well as the related instability of shoreline properties. *See id.* at 1037–41 (Blackmun, J., dissenting).

this State recognized the substantial value of beaches and dunes.”⁹⁴ South Carolina had also submitted evidence documenting the environmental instability of beachfront dwellings as well as the State’s history of beach dwelling disasters.⁹⁵

The State’s persistent focus on storm damage as a motive for its action suggests that Justice Scalia’s fixed attention on the second of the two primary justifications for the regulation, that of ecosystem protection, was a conscious choice on the part of the Justice.⁹⁶ We may infer from Justice Scalia’s choice that any environmentalist impetus underlying a state’s exercise of police power renders the state’s action constitutionally invalid unless the state compensated impacted landowners, regardless of the fact that the state had also acted in the traditional interest of public safety. Thus read, the case creates a strong inference that Justice Scalia considered the environmentalist goal to taint an otherwise traditional public safety program.⁹⁷

Justice Scalia’s logic can be challenged on two fronts. First, although Justice Scalia ultimately defines a valid land regulation as one emanating from background principles of nuisance or property law, nowhere in the Justice’s opinion does he explain why the traditional public safety motive for the shorefront regulation could not qualify the state’s action as emanating from those background principles.⁹⁸ Justice Blackmun

⁹⁴ Brief for Appellant at 27, *Lucas*, 505 U.S. 1003 (No. 90-38) (citing the South Carolina Coastal Council Rules and Regulations). The State argued that the findings and policies of the 1977 Coastal Zone Management Act expressed both environmental and more directly human-focused State interests:

The legislature declared the basic state policy in the 1977 Coastal Management Act to be promotion of ‘economic and social improvement of the citizens of this state . . . with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development’

Id. at 28–29 (quoting S.C. Code § 48-39-30(B)(1) (1978)).

⁹⁵ *Id.* at 25.

⁹⁶ *Lucas*, 505 U.S. at 1010 (describing South Carolina’s Beachfront Management Act, S.C. Code Ann. § 48-39-290 (West Supp. 1990) as “designed to preserve . . . South Carolina’s beaches,” with a chief purpose of creating a “habitat for indigenous flora and fauna” (citing *Lucas*, 404 S.E.2d at 895)).

⁹⁷ See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1438 (1993) (“What, then, is the majority’s agenda in the *Lucas* case? I believe Justice Scalia felt that the case presented a new, fundamental issue in property law, and that he had a clear message which he sought to convey: States may not regulate land use solely by requiring landowners to maintain their property in its natural state as part of a functioning ecosystem, even though those natural functions may be important to the ecosystem. In this sense, while the *Lucas* majority recognizes the emerging view of land as part of an ecosystem, rather than as purely private property, the Court seeks to limit the legal foundation for such a conception.” (citation omitted)).

⁹⁸ See *Lucas*, 505 U.S. at 1029–32 (Justice Scalia ended his opinion with a discussion of confiscatory takings: “Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of

discussed the traditional public safety motive at length in his dissent, rendering Justice Scalia's lack of attention to this point suspect.⁹⁹ Second, even accepting an environmental motivation for the state's action, Justice Scalia's majority opinion never explored the history of South Carolina coastline regulation to determine whether the beachfront management plan emanated from background principles of that state's property or nuisance laws. On this issue, again, if it were not obvious to the majority that the agrarian and maritime-dependent history of the nation made environmental regulation a prevalent element of the law's background principles, Justice Blackmun's dissent reminded the Court of this in unambiguous terms: "It is not clear from the Court's opinion where our 'historical compact' or 'citizens' understanding' comes from, but it does not appear to be history," Justice Blackmun wrote.¹⁰⁰ "[T]he Court seems to treat history as a grab bag of principles, to be adopted where they support the Court's theory, and ignored where they do not."¹⁰¹ More generally, Justice Blackmun argued that the idea that all land use regulation must arise out of centuries-old formulae for how a state protects its citizens is both intellectually stagnant and dangerous. "There is nothing magical in the reasoning of judges long dead," Justice Blackmun noted in his dissent. "They determined a harm in the same way as state judges and legislatures do today."¹⁰²

While Justice Blackmun's barely-veiled accusation of anti-environmentalism as having motivated Justice Scalia's *Lucas* majority is justified, it is nevertheless easy to discern how and why Justice Scalia commanded a majority in the case. After all, the arguments before the Court rested on the premise that the state law eliminated any and all

the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise . . . South Carolina must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing." (footnote omitted).

⁹⁹ See *id.* (Blackmun, J., dissenting) (discussing litany of documented storm, erosion, and flood-based dangers motivating the state's action, and the fact that Mr. Lucas was aware of the instability of his land).

¹⁰⁰ *Id.* at 1055–56 (Blackmun, J., dissenting).

¹⁰¹ *Id.* at 1060 (Blackmun, J., dissenting).

¹⁰² *Id.* at 1055. Blackmun went on to observe that:

[I]f the judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly 'objective' or 'value free.'

Id.

profitable uses of Lucas' two parcels.¹⁰³ Justice Blackmun shrugged past this problem, first questioning the finding that the land had been rendered valueless, and afterwards concluding that ownership of an undeveloped lot of beachfront land presented adequate opportunities for enjoyable use.¹⁰⁴ South Carolina, in its turn, pressed the fact that common law has traditionally offered great latitude and protection for states' exercises of police power, arguing that states have applied police power to deny all economic uses of land without compensation under a public good justification without triggering takings analysis.¹⁰⁵

Justice Scalia saw these arguments, premised on the presumption that coastal protection eradicated all or nearly all property rights, as obligating the Court to balance the degree of necessity underlying of the state action to protect public health and safety—a justification for the uninhibited exercise of police power—against the sanctity of the private property exploitation right, protected by the Takings Clause.¹⁰⁶ Justice Scalia pointed out that profitable exploitation is a core principle of property under the American system.¹⁰⁷ Justice Scalia noted that this premise is undisputed in the law, and that “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁰⁸ Thus, a somewhat simplistic balancing exercise pitting the long-term environmental health of the coastline, easily dismissed as speculative or unimportant by anyone without knowledge of coastal ecosystems, against the pecuniary interests of the shoreline landowner, which would be eviscerated according to the Court, led the majority to a predictable conclusion.

In the end, regardless of the Justices' views as to the advisability of Lucas's development plans or the public value of a healthy shoreline

¹⁰³ *Id.* at 1007 (presuming the properties valueless).

¹⁰⁴ *Id.* at 1036 (finding the state trial court finding that this restriction left Lucas' property valueless “implausible.”); *id.* at 1044 (arguing that Mr. Lucas “can enjoy other attributes of ownership, such as the right to exclude others.” Justice Blackmun also suggested that Mr. Lucas could “picnic, swim, camp in a tent, or live on the property in a movable trailer,” and pointed out that “State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping.” Finally, Justice Blackmun noted that Mr. Lucas “also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.”)

¹⁰⁵ See Brief for Appellant at 8, *Lucas*, 505 U.S. 1003 (No. 90-38) (arguing in favor of the state interests involved and the importance of the police power); see *id.* at 8–12.

¹⁰⁶ See *Lucas*, 505 U.S. at 1022–26.

¹⁰⁷ See, e.g., *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998) (debating the question of how to determine the meaning of the words “private property” under the Fifth Amendment takings clause).

¹⁰⁸ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

ecosystem, it is within the bounds of objective reasoning to conclude that South Carolina simply failed to convince the Court that Lucas' financial losses were sufficiently offset by either the environmental or public safety benefit he shared with the rest of the citizenry under the State's coastal preservation effort. A determination that Lucas had been enriched as a citizen even as he lost the right to construct several luxury residences on land he had purchased for that purpose would have been diametrically at odds with the private property concept.¹⁰⁹ In sum, although suspicions that Justice Scalia's *Lucas* opinion displayed anti-environmentalism are well-founded, the opinion's logic follows a defensible track through the law of police power and takings to its property-based holding.

III. JUSTICE SCALIA ON STANDING: THE CASE AGAINST CASES

Article III, § 2, of the Constitution extends the “judicial Power” of the United States only to “Cases” and “Controversies.” . . . Standing to sue is part of the common understanding of what it takes to make a justiciable case.

– Justice Antonin Scalia¹¹⁰

Justice Scalia's reputation for scorning environmentalists is stoked nowhere more fervently than through the Justice's opinions on standing.¹¹¹ Justice Scalia authored multiple opinions against recognizing standing for environmentalists, at least five of which carried majorities and have enjoyed significant precedential value. Through these cases, Justice Scalia pressed forward with a jurisprudential mission to protect the sanctity of the judiciary from politics by asserting a narrow interpretation of the Article III case or controversy concept.¹¹²

It was not coincidental that Justice Scalia's crusade to reassert the sanctity of the case or controversy concept focused so heavily on environmental cases. In a 1983 article on standing, the Justice identified a 1971 environmental case, *Calvert Cliffs Coordinating Commission v.*

¹⁰⁹ See, e.g., *Phillips*, 524 U.S. at 177 (Souter, J., dissenting) (noting that “a court seeks to place a claimant ‘in as good a position pecuniarily as if his property had not been taken.’” (citation omitted)).

¹¹⁰ *Steel Co. v. Citizens for Better Env't.*, 523 U.S. 83, 102 (1998).

¹¹¹ See Scalia, *The Doctrine of Standing*, *supra* note 7, at 881 (“My thesis is that the judicial doctrine of standing is a crucial and inseparable element of [the] principle [of separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the process of self-governance.” (citation omitted)).

¹¹² See, e.g., Nichol, *supra* note 46, at 1167 (maintaining that “in the early 1980's, Justice Scalia began his personal crusade to markedly strengthen standing's curb on an ‘overjudicialized’ government.”).

Atomic Energy Commission, as one of the primary harbingers of an era of judicial politicking spurred by statutes charging federal agencies with the duty to curb the environmental impacts of their actions.¹¹³ Justice Scalia quoted from the *Calvert Cliffs* opinion with disapproval:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the government to control, at long last, the destructive engine of material ‘progress.’ But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role.¹¹⁴

Rejecting this assertion, Justice Scalia claimed that the judicial policing of agencies distorted the assertion in *Marbury v. Madison* that the judicial role is “solely, to decide on the rights of individuals.”¹¹⁵

Adding to Justice Scalia’s particular criticism of environmental standing in his 1983 standing article was that article’s discussion of statutory standing, for which it relied on in another landmark environmental case, *Scenic Hudson Preservation Conference v. Federal Power Commission*.¹¹⁶ In that case, the circuit court discerned a statutory basis for standing for individuals with conservation interests seeking to challenge a hydroelectric project.¹¹⁷ Justice Scalia claimed that such liberalized standing breached the core constitutional requirement that plaintiffs assert a direct and personal injury.¹¹⁸ Several additional times in the standing piece, Justice Scalia relied on environmental cases as examples of the constitutional travesty resulting from broad interpretations of standing, to the point where “all who breathe [the country’s] air could sue.”¹¹⁹

Unsurprisingly, rather than scrubbing the Court of the taint of politics, Justice Scalia’s standing opinions have engendered accusations that the Justice indulged in bench activism.¹²⁰ As with Justice Scalia’s police

¹¹³ Scalia, *The Doctrine of Standing*, *supra* note 7, at 884.

¹¹⁴ *Id.* (quoting *Calvert Cliffs Coordinating Comm’n v. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971)).

¹¹⁵ *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

¹¹⁶ *Id.* at 886 (discussing *Scenic Hudson Pres. Conf. v. FPC*, 354 F.2d 608 (2d. Cir. 1965), *cert. denied*, 384 U.S. 941 (1966)).

¹¹⁷ *Scenic Hudson Preservation Conference*, 354 F.2d at 615–17.

¹¹⁸ Scalia, *The Doctrine of Standing*, *supra* note 7, at 885.

¹¹⁹ *Id.* at 890 (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 682 (1973)).

¹²⁰ See, e.g., Peter B. Edelman, *Justice Scalia’s Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1800 (1991) (“When the methodology has to give in order for the merits to go as Justice Scalia wants, it gives. There is often a tone that the process was much more important than the outcome, a sort of

power opinions, each of the Justice's high profile environmental standing opinions—the five majorities and an outspoken dissent in *Friends of the Earth v. Laidlaw*¹²¹—is vulnerable to charges of anti-environmentalism, even as each rests on relatively sound and consistent logic and a philosophy of originalism that is predominant throughout the Justice's non-environmental legal writing.¹²²

A. Lujan I: A Stand Against Programmatic Relief

In the 1990 case *Lujan v. National Wildlife Federation*,¹²³ Justice Scalia wrote for a majority of five that declined to recognize standing in an environmental organization or its plaintiff members, outdoor enthusiasts who claimed to hike on federal lands subject to a federal program aimed at releasing sites within those lands from federal protection to allowing mining operations on them.¹²⁴ The flaw in the two member plaintiffs' affidavits submitted to establish standing, according to Justice Scalia, was that they failed to describe their recreational plans with enough specificity to satisfy the injury element in that their professed plans to hike “in the vicinity” of land areas released for mining within a multi-thousand acre tract fell far short of placing a mine in the

‘gee whiz, look what I found’ quality to the outcome. We know enough now, though, to know that it is the outcome that counts for him just as it does for most of the rest of us.”)

¹²¹ 528 U.S. 167 (2000). See *infra* notes 123–232 and accompanying text.

¹²² See Scalia, *The Doctrine of Standing*, *supra* note 7, at 881 (“My thesis is that the judicial doctrine of standing is a crucial and inseparable element of [the] principle [of separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the process of self-governance.”).

¹²³ 497 U.S. 871 (1990).

¹²⁴ *Id.* at 879. More specifically, the environmentalists complained:

that the reclassification of some withdrawn lands and the return of others to the public domain would open the lands up to mining activities, thereby destroying their natural beauty. Respondent alleged that petitioners, in the course of administering the Nation's public lands, had violated the [Federal Land Policy and Management Act of 1976] by failing to “develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands”; failing to submit recommendations as to withdrawals in the 11 Western States to the President; failing to consider multiple uses for the disputed lands, focusing inordinately on such uses as mineral exploitation and development; and failing to provide public notice of decisions. Respondent also claimed that petitioners had violated [the National Environmental Policy Act], which requires federal agencies to “include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action.” Finally, respondent alleged that all of the above actions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” and should therefore be set aside pursuant to [the Administrative Procedure Act].

Id. (citations omitted).

pathway of one of the hikers.¹²⁵ Noting that a motion for summary judgment requires a court to examine the non-moving party's claimed injuries for their specificity, Justice Scalia asserted that the plaintiffs' affidavits failed due to their vague and conclusory allegations.¹²⁶ Furthermore, Justice Scalia concluded, even if an affidavit were to satisfy the specificity requirement, that plaintiff could only hope to obtain relief in connection with the pinpointed site, as the federal land protection removal program did not constitute a single federal action, but rather consisted of over one thousand individual federal removal decisions.¹²⁷

From these various determinations, a case could be made that the Justice was manipulating logic, facts, and the technicalities of standing and summary judgment to maneuver the environmentalists toward a loss.¹²⁸ Indeed, Justice Scalia appears to have invoked a "heads-I-win-tails-you-lose" scenario reminiscent of the trap the Court had denied existed in its 1972 *Sierra Club v. Morton* opinion.¹²⁹ In *Sierra Club*, while

¹²⁵ See *id.* at 889 ("At the margins there is some room for debate as to how 'specific' must be the 'specific facts' that [Federal Rule of Civil Procedure] 56(e) requires in a particular case. But where the fact in question is the one put in issue by the [Administrative Procedure Act-based] challenge here—whether one of respondent's members has been, or is threatened to be, "adversely affected or aggrieved" by Government action—Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action.").

¹²⁶ *Id.* at 888–99 ("Rule 56(e) provides that judgment 'shall be entered' against the nonmoving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.' The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. Rather, the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues."); see also *id.* at 888–89 (differentiating the case from one that considered allegations under a Fed. R. Civ. P. 12(b) motion to dismiss on the pleadings).

¹²⁷ *Id.* at 890 ("The term 'land withdrawal review program' (which as far as we know is not derived from any authoritative text) does not refer to a single [Bureau of Land Management] order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable 'agency action'—much less a 'final agency action'—than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration. As the District Court explained, the 'land withdrawal review program' extends to, currently at least, '1250 or so individual classification terminations and withdrawal revocations.'") (citations omitted).

¹²⁸ See *id.* at 902–03 (Underscoring the view that Justice Scalia presented a specificity test that might be impossible to meet, Justice Blackmun pointed out in his dissent that the agencies involved were themselves able to identify the particular federal action to which the affiants referred, and that the agency even referred to the federal land area in question in the same terms as those used in a plaintiff's affidavit).

¹²⁹ *Sierra Club v. Morton*, 405 U.S. 727, 740 n.15 (1972) ("The Government seeks to create a 'heads I win, tails you lose' situation in which either the courthouse door is barred for lack of

denying standing, the Court noted that the plaintiff had aired a concern that the Court's specificity requirement for standing purposes would narrow the issues before a court on the merits to a point where the courts would never address an environmental advocacy group's true concern, the protection of environmental resources with effective regulation. The Court assured the plaintiff that this concern was unfounded, stating in a footnote that "[t]he short answer to this contention is that the 'trap' does not exist. The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief."¹³⁰ Although the two cases are not identical, the similarities raise the question of whether Justice Scalia, in *Lujan I*, sought to assert a very similar trap to the one the *Sierra Club* majority denied it had created.

Granting these suspicions, several details of the *Lujan I* opinion belie the accusation that Justice Scalia was motivated solely by anti-environmentalism. First, the scope of a case against the government for actions that had a national impact might differ, Justice Scalia indicated, if a plaintiff who met the specificity requirement of the injury test for standing purposes could also establish that the government action allegedly threatening the plaintiff was part of a statutorily created government program of coordinated actions.¹³¹ This dicta is more an echo of the *Sierra Club* assurance than a rejection of it. In addition, Justice Scalia expressed sympathy for the *Lujan I* plaintiffs' goals even as the Justice acknowledged that, under his interpretation of the Administrative Procedure Act and the various justiciability principles at play in the case, the judiciary did little to aid them:

The case-by-case approach . . . is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. . . . Until confided to us [via legislation], however, more sweeping actions are for the other branches. (citations omitted).¹³²

assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest.").

¹³⁰ *Id.*

¹³¹ See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891–94 (1990) ("Some statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt." Ultimately observing that the environmentalists should look to the other branches for the "sweeping actions" against the federal land exploitation that they sought.).

¹³² *Id.* at 894.

The tone of this passage is not hostile. It expresses a relatively straightforward jurisprudential vision of the scope and function of judicial action as well as its segregation from political action. It was a vision that simply could not accommodate most environmental advocacy, which Justice Scalia rightly characterized as an effort that, almost by definition, seeks broad-ranging relief.¹³³

In sum, Justice Scalia's *Lujan I* opinion appears to have been animated primarily by his constitutional philosophy. The message in *Lujan I* was clear: judicial relief for public harms was to be addressed as narrowly as possible, as the public good was presumptively a political matter. As a practical translation of this message, Justice Scalia demonstrated through *Lujan I* that, in his view, an advocate's targeted scope of relief should be a key factor in choosing a judicial or political forum for advocacy. From *Lujan I* forward, so long as Justice Scalia occupied an influential position on the Court, not only did public interest-oriented plaintiffs need to describe injuries and allegations with a high degree of specificity, but in doing so they could anticipate limiting the parameters of the Court's deliberation and their potential relief.

B. *Lujan II: Environmentalism is Politics*

The [Lujan II] ruling remains one of the most controversial in environmental circles.

– Jeremy P. Jacobs¹³⁴

Justice Scalia was quick to seize the opportunity to reassert his separation-of-powers principles in the context of environmental litigation, penning the far more emotive *Lujan v. Defenders of Wildlife* (*Lujan II*)¹³⁵ in 1992, only two years after *Lujan I*. In *Lujan II*, Justice Scalia wrote for a six-Justice majority on most issues.¹³⁶ As in *Lujan I*, Justice Scalia's opinion served up a critique of the plaintiff

¹³³ *Id.* at 891 (granting that governmental violations of the laws protecting federal lands may be "rampant" as claimed by the plaintiffs, but nevertheless concluding that "respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made").

¹³⁴ Jacobs, *supra* note 1; *see also id.* ("His opinion in *Lujan v. Defenders of Wildlife* regularized standing doctrine and appeared to place real limits on lawsuits brought by environmental groups and others representing those that benefit from regulations," said Justin Pidot, a former Justice Department environmental attorney who is now a professor at the University of Denver Sturm College of Law.)

¹³⁵ 504 U.S. 555 (1992).

¹³⁶ *Id.* at 580 (Kennedy, J., concurring) (Justices Kennedy and Souter declined to join Justice Scalia's majority opinion's discussion on redressability).

environmentalist organization members' affidavits, which claimed that certain government actions that promised to increase the risk of environmental harms threatened to cause the affiants to suffer personal injuries.¹³⁷ At its core, Justice Scalia's opinion concluded that two individuals with established interests in observing specified endangered species in specified settings alleged insufficiently vague personal injury. The individuals claimed that a U.S. Department of the Interior ("DOI") decision to diminish its ability to protect those species increased threats to the species' survival in the settings where plaintiffs claimed they planned to observe those species.¹³⁸ The primary insufficiency in the affidavits, according to Justice Scalia's majority, was that the affiants' sworn statements of intent to observe the species in their native habitats set forth no dates on which the affiants planned to travel to those habitats; in addition, the affiants had been unable to add specificity upon questioning.¹³⁹ This deficit, according to Justice Scalia, rendered the affidavits "simply not enough" to satisfy constitutional standing.¹⁴⁰

Considered discretely, this core analysis in Justice Scalia's opinion—whether the affiants' allegations were precise enough to constitute legally cognizable injuries for standing purposes—could be argued to display anti-environmentalism and, conversely, defended as presenting sound, consistent policy on the role of the judiciary. Some evidence that Justice Scalia's analysis was hostile was the Justice's dismissive treatment of the affiants' claims of having traveled abroad to the endangered species'

¹³⁷ *Id.* at 563 ("Ms. Kelly stated that she traveled to Egypt in 1986 and 'observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly,' and that she 'will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop[ing] . . . Egypt's . . . Master Water Plan.' Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and 'observed th[e] habitat' of 'endangered species such as the Asian elephant and the leopard' at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she 'was unable to see any of the endangered species'; 'this development project,' she continued, 'will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [, which] may severely shorten the future of these species'; that threat, she concluded, harmed her because she 'intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard.'" (citations omitted)).

¹³⁸ *See id.* at 564 (determining that unspecified "some day" intentions to return to a particular habitat so as to study a species threatened by a particular government action is "simply not enough" to confer standing).

¹³⁹ *Id.* at 563–64 ("When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that 'I intend to go back to Sri Lanka,' but confessed that she had no current plans: 'I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future.'" (citation omitted)).

¹⁴⁰ *Id.* at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

habitats in the past. Labeling those statements “past exposure to illegal conduct,” Justice Scalia rejected those facts as immaterial to the affiants’ current claims.¹⁴¹ The Justice’s point is confusing at best, as the plaintiffs never claimed that anything about their past experiences had been illegal. As the dissent noted, the affiants’ claims about their past travels were offered to establish both a pattern of travel and a genuine interest in the species, thus fortifying their assertions that they planned to travel to view the species in the future and would be injured if that opportunity were jeopardized by the DOI action.¹⁴² Justice Scalia’s criticism thus comes across as argumentative or even deliberately obtuse. Coupled with the ultimate diagnosis of the affiants’ claims as the imprecise “simply not enough,” the Justice’s flippant rejection of their plans and fears almost presents as a taunt. Justice Blackmun certainly concluded that anti-environmentalism motivated the majority’s kneejerk dismissiveness.¹⁴³

Justice Scalia’s *Lujan II* opinion covered far more than the core issue of the claimed injuries’ imminence. Almost as if the plaintiffs were using the judicial forum as a means of raising consciousness of planetary interconnectedness, the *Lujan II* plaintiffs presented a series of standing theories they must have anticipated would be rejected by the Court. Two of these, the “ecosystem nexus” and “animal nexus” theories—essentially bids for judicial standing to reflect the fact that all ecological media and species are elements of a web of life such that injury to any element of the web injures all other elements—seemed designed for dismissal by a Court that had so recently defined narrowly the scope of a case or

¹⁴¹ *Id.* (“That the women ‘had visited’ the areas of the projects before the projects commenced proves nothing. As we have said in a related context, ‘Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.’” (citation omitted)).

¹⁴² *Id.* at 591–92 (Blackmun, J., dissenting) (“The Court dismisses Kelly’s and Skilbred’s general statements that they intended to revisit the project sites as ‘simply not enough.’ But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court’s contention that Kelly’s and Skilbred’s past visits ‘prov[e] nothing,’ the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Similarly, Kelly’s and Skilbred’s professional backgrounds in wildlife preservation also make it likely—at least far more likely than for the average citizen—that they would choose to visit these areas of the world where species are vanishing.” (citations omitted)).

¹⁴³ *See id.* at 595 (Blackmun, J., dissenting) (“I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong.”).

controversy.¹⁴⁴ Indeed, Justice Scalia dismissed these theories out of hand as antithetical to the judicial role.¹⁴⁵ The third theory, dubbed the “vocational nexus” theory, presented the view that persons working with endangered species in one location maintained a judicially cognizable interest in that species’ survival anywhere on earth.¹⁴⁶ This theory, which Justice Scalia dismissed as “an ingenious academic exercise in the conceivable,”¹⁴⁷ differs significantly from the other two. First, the vocational nexus theory defines the injury in traditional terms. A vocational interest, while not necessarily economic, involves the plaintiff’s livelihood, which courts readily recognize as an interest for standing purposes. In addition, the vocational nexus theory limits the potential plaintiff pool to an identifiable set of workers who may be presumed to possess both the knowledge about and genuine interest in the species so as to present focused, non-abstract, competent arguments.

Certainly Justice Blackmun, writing in dissent, discerned the traditional nature of the vocational nexus theory:

The Court says that it is “beyond all reason” that a zoo “keeper” of Asian elephants would have standing to contest his Government’s participation in the eradication of all the Asian elephants in another part of the world. I am unable to see how the distant location of the destruction *necessarily* (for purposes of ruling at summary judgment) mitigates the harm to the elephant keeper. If there is no more access to a future supply of the animal that sustains a keeper’s livelihood, surely there is harm. (citations omitted).¹⁴⁸

Justice Scalia ignored Justice Blackmun’s argument. Overall, the Justice’s rejection of the vocational nexus theory belies a disinclination to recognize any aspect of the integrated nature of environmental conditions, at least for standing analysis purposes, even where presented in a manner that would allow for discrete, controlled issues and arguments. Indeed, as if to emphasize the Court’s rejection of any environmentalist theory of injury, Justice Scalia dwelt on the vocational

¹⁴⁴ See *Lujan*, 497 U.S. 871 (1990).

¹⁴⁵ See *id.* at 565–67 (Scalia presented a cutting critique of the plaintiffs’ environmentalist theories, casting the “ecosystem nexus” theory as “inelegantly styled,” greeting the “animal nexus” theory with a derogatory “alas,” and dismissing the “vocational nexus” theory as “speculation and fantasy.”).

¹⁴⁶ *Id.* at 566 (finding “beyond all reason” the idea that a keeper of Asian elephants in the Bronx Zoo might be injured when government agents bypass procedures intended to minimize harm to those elephants in connection with an overseas project).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 594–95 (Blackmun, J., dissenting).

nexus theory more than he did on the two more abstract theories.¹⁴⁹ If a jurist less adept at argumentation had authored the opinion, the conflation of the three theories might be dismissed as an oversight about their distinctions. Justice Scalia's particular focus on the vocational nexus theory, however, indicates an appreciation of its traditional elements, and a rejection of even this rendition of an environmental standing theory. Consistent with his opinion in *Lujan I*, in *Lujan II* Justice Scalia promoted a view of the judicial role that defined court cases narrowly and their social impact as both incidental and incremental, regardless of obvious connections between the injuries alleged to the plaintiffs and broader issues.

In keeping with the thesis of rejecting theories designed to accommodate standing, Justice Scalia also took pains in *Lujan II* to question the validity of the procedural injury, which the Justice considered a generalized grievance unless the alleged offensive process is linked to a separate, direct injury to the plaintiff.¹⁵⁰ The case had been triggered by the DOI rescinding its authority to mandate a consultation about impacts of U.S. actions on endangered species when the impacts could only occur in foreign countries.¹⁵¹ Consultation, triggered under the Endangered Species Act ("ESA") by certain U.S. activities, involves the process of identifying and considering impacts on endangered species, but does not mandate particular protective measures or other substantive outcomes.¹⁵² Although Justice Scalia based the rejection of standing in *Lujan II* primarily on the temporal non-specificity of the plaintiffs' affidavits, he also asserted that the withdrawal of agency process, which

¹⁴⁹ See *Lujan*, 497 U.S. at 567 ("It goes beyond the limit . . . and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." (citations omitted)).

¹⁵⁰ See *id.* at 573–74 ("We have consistently held that a plaintiff raising only a generally available grievance about government claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

¹⁵¹ See *id.* at 558–59 (discussing a 1979 proposed regulatory revision reinterpreting the scope of the consultation provision to apply only to actions in the United States or on the high seas).

¹⁵² *Id.* at 558. Endangered Species Act section 7(a)(2) provides:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

16 U.S.C. § 1536(a)(2) (2012).

presumptively impacts all citizens equally, constituted a generalized grievance that could not serve as a basis for standing.

Justice Scalia rounded out his *Lujan II* analysis by criticizing the plaintiffs' case in terms of redressability.¹⁵³ Justice Scalia questioned whether, even if the Court were to order the DOI to reassert its prior scope of authority, the DOI could successfully exercise that authority over U.S. agents acting overseas.¹⁵⁴ Justice Scalia also questioned whether the rescission of U.S. funds toward the overseas dam projects that the plaintiffs claimed threatened endangered species would actually derail those projects.¹⁵⁵ In his dissent, Justice Blackmun disputed both those speculative comments in Justice Scalia's opinion, arguing that it was likely that agencies would follow a Supreme Court determination on the scope of the ESA consultation requirement,¹⁵⁶ and that the U.S. funding of the two overseas projects at issue was substantial.¹⁵⁷ Perhaps more than any other section of *Lujan II*, Justice Scalia's cavalier and speculative redressability section—this coming from a Justice so focused on whether the plaintiffs' injury claims contained a whiff of speculation—may be evidence of an anti-environmentalist motive underlying the opinion.

While the flaws in Justice Scalia's logic and tone in various sections of the *Lujan II* opinion are notable, the core legal argument resulting in the Justice's rejection of the plaintiffs was that they failed to establish a sense of imminence in their claims of future injury, and here, although the factual analysis may be disputed, Justice Scalia presented sound reasoning.¹⁵⁸ The judiciary's recognition of imminent injuries as

¹⁵³ See *id.* at 568 (characterizing the redressability issue as “the most obvious problem in the present case.”).

¹⁵⁴ See *id.* (questioning whether the agencies acting overseas would abide by a DOI regulation requiring consultation on the impact on such action on endangered species as “very much an open question.”).

¹⁵⁵ *Id.* at 571 (“A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. [The United States Agency for International Development (‘USAID’)], for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated.”).

¹⁵⁶ *Id.* at 596 (“I am not as willing as the plurality is to assume that agencies at least will not try to follow the law.”).

¹⁵⁷ *Id.* at 599–600 (Blackmun, J., dissenting) (“Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species. The plurality states that ‘AID, for example, has provided less than 10% of the funding for the Mahaweli project.’ The plurality neglects to mention that this ‘fraction’ amounts to \$170 million, not so paltry a sum for a country of only 16 million people with a gross national product of less than \$6 billion in 1986 when respondents filed the complaint in this action.”).

¹⁵⁸ See *id.* at 563–64; see also *id.* at 579 (Kennedy, J., concurring) (“While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a

satisfactory for standing purposes allows claimants to deflect harms, particularly those that cannot be undone or adequately remedied, while they are pending. It is an accommodation that allows the court system to administer justice by virtue of a legal fiction: a plaintiff's injury is not realized at the time of trial, yet is recognized by the court. Nevertheless, as Justice Scalia underscored, even imminent injury claims must be "concrete and particularized," not "conjectural" or "hypothetical."¹⁵⁹ Considered in this light, Justice Scalia's insistence that the imminence of the plaintiffs' injury be well-defined temporally was a matter of principled reasoning.

C. Bennett: Reading Text Textually

Unique among Justice Scalia's prominent majority opinions addressing environmental standing is the 1997 *Bennett v. Spear*.¹⁶⁰ The opinion is not remarkable in Scalia's brand of argumentation, as he was

date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, nor do the affiants claim to have visited the sites since the projects commenced." (citations omitted). *But see id.* at 582–85 (Stevens, J., concurring) (Justice Stevens presented a convincing argument, consistent with the purpose of the standing principle, that the measure of imminence should be the pending nature of the harm to the species that the plaintiffs plan to observe: "An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat. In my judgment, therefore, the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur. To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about 'the proper—and properly limited—role of the courts in a democratic society' we have long held that 'Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party.' The plaintiff must have a 'personal stake in the outcome' sufficient to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.' For that reason, '[a]bstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conductThe injury or threat of injury must be both 'real and immediate,' not 'conjectural,' or 'hypothetical.'" Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete adverse effect from the challenged action was speculative. In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only potential source of 'speculation' in this case is whether respondents' intent to study or observe the animals is genuine. In my view, Joyce Kelly and Amy Skilbred have introduced sufficient evidence to negate petitioner's contention that their claims of injury are 'speculative' or 'conjectural.'" (citations omitted)).

¹⁵⁹ *Id.* at 560 (discussing need for injury to be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" (citations omitted)).

¹⁶⁰ 520 U.S. 154 (1997).

as deft as ever at weaving complex machinations of logic that, in this case, spoke for a unanimous court. Nor is the case remarkable among Justice Scalia's high-profile environmental cases in its outcome, as the environmental cause at stake suffered a loss akin to that suffered in *Lujan II*. Instead, the unique aspect of *Bennett v. Spear* among Justice Scalia's prominent environmental opinions is that a primary focus of the analysis is a statutory citizen suit provision. This distinction is significant in that much of Justice Scalia's jurisprudence rests on the ideal of a judiciary devoid of politics, bent on following the directives of the legislative branch, literally and uninfluenced by personal social leanings or motivations. *Bennett v. Spear* became a test of the Court's ability to perform as a politically sterile arbiter with a particularly potent environmental battle before it: Oregon ranchers' water rights versus the potential extinction of an endangered fish.¹⁶¹

The Bennett plaintiffs were irrigation districts and ranch operators who challenged a U.S. Fish and Wildlife Service ("FWS") biological opinion ("BioOp") recommending a series of actions through which the Bureau of Reclamation ("the Bureau") would maintain habitat protection for designated fish species under the ESA.¹⁶² The plaintiffs, who aimed to diminish the protective measures that FWS recommended, asserted standing under the ESA citizen suit provision.¹⁶³ The aim of the ESA is to protect vulnerable species, which would lead many readers of the statute to presume that legislators intended its citizen suit provision to provide a statutory standing basis for citizens aiming to press regulators to enforce the law on behalf of such species. Justice Scalia, however, read the standing provision's "any person" as a legislative instruction authorizing suits both aiming to protect species and those alleging that

¹⁶¹ See, e.g., Nancy Langston, *In Oregon, Myth Mixes With Anger*, N.Y. TIMES, Jan. 6, 2016, at A23 ("In the late 1970s and the 1980s, many Western ranchers, miners and loggers felt increasingly threatened, partly by globalization, which created new competition, and partly by federal regulations that seemed to value wildlife more than people. What became known as the Sagebrush Rebellion gave locals a focus for their concern. Environmentalists, they argued, were conspiring to destroy America, starting with rural communities. Many ranchers bitterly complained about the federal land management agencies. They felt powerless, hemmed in by policies they had little hand in shaping. They feared that economic gains were passing them by.")

¹⁶² *Bennett*, 520 U.S. at 159 (The FWS biological opinion concluded that a long-term dam and irrigation project was likely to jeopardize two endangered species of fish, and recommended the maintenance of minimum water levels in two existing reservoirs.)

¹⁶³ See 16 U.S.C. § 1540(g) (1994) ("[A]ny person may commence a civil suit on his own behalf . . . (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."); see also *Bennett*, 520 U.S. at 158–60 (Plaintiffs asserted "recreational, aesthetic and commercial" interests in the waters, specifying their use of the water for irrigation. (citation omitted). As Justice Scalia summarized the Complaint: "In essence, petitioners claim a competing interest in the water the Biological Opinion declares necessary for the preservation of the suckers.").

agency efforts to protect species exceeded statutory authority.¹⁶⁴ Justice Scalia acknowledged that the standing provision appeared to envision that private attorneys general would rely on it to police government agents on behalf of endangered species, but concluded “there is no textual basis for saying that [the Act’s expansive] standing requirements applies to environmentalists alone.”¹⁶⁵ Thus, in the name of textualism, Justice Scalia found standing in an environmental statute for citizens intent on combating the statute’s core basis.

In addition to interpreting the ESA citizen suit provision, *Bennett* considered the injury issue in its analysis of whether the plaintiffs satisfied constitutional standing.¹⁶⁶ The plaintiffs defined their “concrete and particularized and . . . actual or imminent [injury]” as the threat that the water available for the plaintiffs’ uses would be curtailed if the total amount of water available to Oregonians from several Klamath River reservoirs were to be diminished under the defendant agencies’ scheme to optimize the survival chances of the endangered fish.¹⁶⁷ In response, the federal agencies argued that the allegations were fatally vague on the amount of water the plaintiffs would lose and even the certainty that the individual plaintiffs would suffer any water reductions.¹⁶⁸ In short, the *Bennett* defendants presented specificity and speculation arguments closely echoing those the Court had relied upon to reject the standing claims of the plaintiffs in both *Lujan I* and *Lujan II*.

In *Bennett*, Justice Scalia did not follow the pattern of his prior two standing opinions. Instead, Justice Scalia discerned an injury-in-fact by readily accepting a presumption under which the plaintiffs would face a deprivation of water under the government plan.¹⁶⁹ If, in the BioOp’s implementation, the Bureau were to allocate water for private use on a pro rata basis, Justice Scalia reasoned, the result of these decisions might

¹⁶⁴ *Bennett*, 520 U.S. at 165 (Justifying a literal reading of the “any person” language in the ESA citizen suit provision on the fact that the statute’s focus is the environment, which he observed as “a matter in which it is common to think all persons have an interest.”).

¹⁶⁵ *Id.* at 166; *see also id.* (“It is true that the plaintiffs here are seeking to prevent application of environmental restrictions rather than to implement them. But the ‘any person’ formulation applies to all the causes of action authorized by [the Act.]”).

¹⁶⁶ *Id.* at 167–68 (government arguing that no determination had been made about whether the individual plaintiffs’ water supply would be diminished under a plan to maintain water levels).

¹⁶⁷ *Id.* at 167 (“Petitioners allege . . . that they currently receive irrigation water from Clear Lake, and that the Bureau ‘will abide by the restrictions imposed by the Biological Opinion,’” thus “substantially reducing the quantity of available irrigation water.” (citations omitted)).

¹⁶⁸ *Id.* (emphasizing the distinction between a diminution in the aggregate amount of water available for irrigation and a diminution in amounts of water available for particular users).

¹⁶⁹ *See id.* at 168 (“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice” (citation omitted)).

lessen the amount available to the plaintiffs, thus directly injuring them.¹⁷⁰ Similarly, Justice Scalia declared the traceability and redressibility elements of standing satisfied in spite of facts that did not, technically, complete the crucial connection between the plaintiffs' alleged injury and the defendant's actions. If the Bureau were to accept and implement the FWS's BioOp recommendations as written the connection would be complete, but those steps had not occurred.¹⁷¹ On these bases, Justice Scalia declared standing satisfied.

The arguments that Justice Scalia's *Bennett* opinion reveals an anti-environmentalist bias, particularly when juxtaposed with prior standing opinions where the plaintiffs were the environmentalists, are obvious. In particular, the Justice's minute critique of the *Lujan I* and *Lujan II* plaintiffs' choices of language, used to unravel their claims as inadequately specific, is difficult to reconcile with the Court's easy acceptance of the *Bennett* plaintiffs' far less subtle presumptions about upcoming implications of yet-to-be-finalized agency actions. Nevertheless, objective justifications can be identified for the apparent clash in approaches. One significant difference between the *Bennett* setting and that of *Lujan II* was that *Lujan II* was a motion for summary judgment, while *Bennett* was an appeal from a motion to dismiss. As Justice Scalia explained in refuting the *Bennett* defendants' argument that the plaintiffs' allegations were too speculative:

[W]hile a plaintiff must 'set forth' by affidavit or other evidence 'specific facts' to survive a motion for summary judgment, and must ultimately support any contested facts with evidence adduced at trial, [a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'¹⁷²

As for the seeming ease with which Justice Scalia accepted the conflation of the FWS BioOp and the Bureau's impending actions, the opinion's justification for recasting the BioOp recommendations as a

¹⁷⁰ *Id.* ("Given petitioners' allegation that the amount of available water will be reduced and that they will be adversely affected thereby, it is easy to presume specific facts under which petitioners will be injured—for example, the Bureau's distribution of the reduction pro rata among its customers.").

¹⁷¹ *Id.* at 169 ("By the Government's own account, while the Service's Biological Opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the action agency" (citation omitted)).

¹⁷² *Id.* at 168 (citations omitted).

mandate is thorough and convincing.¹⁷³ These elements of *Bennett* go far toward explaining how Justice Scalia's logic convinced all eight Justices to join the majority.

Individual arguments aside, the primary difference between *Bennett* and its predecessor environmental standing cases, as noted above, is that *Bennett* focused on a statutory standing provision that was worded as broadly as possible and contained no explicit limits on how and against whom the private attorneys general invited to police the administration of the ESA were to focus those efforts.¹⁷⁴ Whatever suspicions environmentalists may harbor that the Court's context-free reading of the provision belies a bias against their cause, the insistence on following the text of a statute literally is very much in keeping with Justice Scalia's textualist approach. In addition, the Court's decision to read the provision literally and without implied nuance has precedent in environmental law. The case of *Tennessee Valley Authority v. Hill* centered on another provision of the ESA that the Court refused to impregnate with unspoken implications, in that case to halt a government hydroelectric project that threatened an endangered fish.¹⁷⁵ Although the two cases bear only broad similarities, those who applaud *Tennessee Valley Authority* are as likely to identify as environmentalists as those who condemn *Bennett*.

¹⁷³ See *id.* at 169–71 (quotations omitted) (The discussion ends: “The Service itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions . . . Given all of this, and given petitioners’ allegation that the Bureau had, until issuance of the Biological Opinion, operated the Klamath Project in the same manner throughout the 20th century, it is not difficult to conclude that petitioners have met their burden—which is relatively modest at this stage of the litigation—of alleging that their injury is ‘fairly traceable’ to the Service’s Biological Opinion and that it will “likely” be redressed—*i.e.*, the Bureau will not impose such water level restrictions—if the Biological Opinion is set aside.”).

¹⁷⁴ See *id.* at 164–65 (characterizing the ESA citizen suit provision language as creating “an authorization of remarkable breadth when compared with the language Congress ordinarily uses” and determining that “the obvious purpose of the particular provision in question is to encourage enforcement by so-called ‘private attorneys general’—evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later.”).

¹⁷⁵ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 172–73 (1972) (“It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result. One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies ‘to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence’ of an endangered species or ‘result in the destruction or modification of habitat of such species . . .’ (emphasis added) This language admits of no exception.” (citations omitted)).

D. Steel Company: Rejecting the Informational Injury

In 1998, Justice Scalia once again wrote for the Court majority in a decision focusing on standing for environmentalists. This time, he addressed the issue of the informational injury, a claim similar to the procedural injury in that it leaves plaintiffs particularly vulnerable to rejection for alleging a generalized grievance.¹⁷⁶ *Steel Company v. Citizens for a Better Environment* arose out of a company's long-term violation of its record-keeping and reporting obligations under the Emergency Planning and Community Right-to-Know Act ("EPCRA"), which violation denied a local citizen group information about toxic substances used by the company.¹⁷⁷ In his opinion for the Court, Justice Scalia concluded that the plaintiffs lacked standing because they would receive neither enrichment nor the hazardous materials information they sought through the court action.¹⁷⁸ Under EPCRA, any penalty for the breach would go to the U.S. Treasury. As for the data the plaintiffs sought, the defendant had come into compliance with EPCRA just prior to the plaintiffs' filing their action.¹⁷⁹ EPCRA provides a compliance grace period between notice of suit and the filing date to allow the government time to determine if it will bring suit in lieu of the private action.¹⁸⁰ The timing of the Chicago Steel And Pickling Company's

¹⁷⁶ *Steel Co. v. Citizens for Better Env't.*, 523 U.S. 83 (1998); *see also id.* at 105 (Justice Scalia noted that the informational injury is unique, but deflects the question of whether a public information deficit can constitute an injury for standing purposes: "We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA—or at least being deprived of it when one has a particular plan for its use—is a concrete injury in fact that satisfies Article III. And we need not reach that question in the present case because, assuming injury in fact, the complaint fails the third test of standing, redressability." (citation omitted)).

¹⁷⁷ *See id.* at 86–87 ("Central to [EPCRA's] operation are reporting requirements compelling users of specified toxic and hazardous chemicals to file annual 'emergency and hazardous chemical inventory forms' and 'toxic chemical release forms,' which contain, *inter alia*, the name and location of the facility, the name and quantity of the chemical on hand, and, in the case of toxic chemicals, the waste-disposal method employed and the annual quantity released into each environmental medium.").

¹⁷⁸ *Id.* at 105–06; *see also id.* at 105 (The relief requested included: "(1) a declaratory judgment that petitioner violated EPCRA; (2) authorization to inspect periodically petitioner's facility and records (with costs borne by petitioner); (3) an order requiring petitioner to provide respondent copies of all compliance reports submitted to the EPA; (4) an order requiring petitioner to pay civil penalties of \$25,000 per day for each violation of [the reporting requirements]; (5) an award of all respondent's 'costs, in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees, as authorized by [EPCRA]'; and (6) any such further relief as the court deems appropriate."); *see also id.* at 106–09 (The Court rejected all of these as redressing the informational injury).

¹⁷⁹ *See id.* at 106 (denying that penalties payable to the United States Treasury would redress citizen plaintiffs); *see also id.* at 108 (denying that the injunctive relief sought by the plaintiffs could remedy the past wrongs they suffered due to defendant's noncompliance with EPCRA).

¹⁸⁰ *Id.* at 87 ("As a prerequisite to bringing such a suit, the plaintiff must, 60 days prior to filing his complaint, give notice to the Administrator of the [Environmental Protection Agency (EPA)],

compliance indicated that if the case were dismissed, a threat of future violations existed.¹⁸¹ A financial penalty, regardless of its recipient, could have diminished that threat.¹⁸² In his opinion, however, Justice Scalia rejected the threat of future noncompliance as an injury that a fine paid to the government might redress, pointing to the fact that the plaintiffs had failed to identify the threat of future noncompliance in their allegations, and on this basis concluding that the citizen group's claimed injury could not be redressed by a fine payable to a third party.¹⁸³

Justice Scalia's *Steel Company* conclusion, while technically correct, was vulnerable to accusations of anti-environmentalism. In his concurrence, Justice Stevens argued against the notion that only a penalty running to a plaintiff could satisfy the redressability element of standing, pointing out that U.S. law recognizes that any punishment, including a civil penalty running to the government, may redress injuries to private parties caused by the actions being sanctioned.¹⁸⁴ More broadly, Justice Stevens pointed out that Justice Scalia's opinion was the Court's first in which a plaintiff had failed to establish the redressability element of standing where the plaintiff had alleged a direct injury to itself.¹⁸⁵ Although Justice Stevens did not stress the fact that the injury alleged was informational, his observations intimated that the majority may have been motivated by a disinclination to recognize the informational injury.¹⁸⁶

the State in which the alleged violation occurs, and the alleged violator."); *see also id.* at 88 ("Upon receiving the notice, petitioner filed all of the overdue forms with the relevant agencies. The EPA chose not to bring an action against petitioner, and when the 60-day waiting period expired, respondent filed suit in Federal District Court.")

¹⁸¹ *See id.* at 87-88 ("[P]etitioner had failed since 1988, the first year of EPCRA's filing deadlines, to complete and to submit the requisite hazardous-chemical inventory and toxic-chemical release forms under [the Act]."); *see also id.* at 130 n.27 (Stevens, J., concurring) (discussing the fact that Steel Company repeatedly violated EPCRA for eight years).

¹⁸² *See id.* at 128 n.26 (Stevens, J., concurring) (observing that one may properly conclude that a sanction against a wrongdoer may lessen the likelihood that it will repeat its offensive conduct).

¹⁸³ *See id.* at 108 ("If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm. But there is no such allegation here—and on the facts of the case, there seems no basis for it.")

¹⁸⁴ *Id.* at 127 (Stevens, J., concurring) ("When one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated. Thus, in some cases a tort is redressed by an award of punitive damages; even when such damages are payable to the sovereign, they provide a form of redress for the individual as well.)

¹⁸⁵ *Id.* at 126; *see also id.* at 125 (pointing out that "[r]edressability," of course, does not appear anywhere in the text of the Constitution. Instead, it is a judicial creation of the past 25 years," intimating that the concept is a manipulable tool of judicial argumentation rather than part of a core jurisprudential doctrine).

¹⁸⁶ *Id.* at 126 n.22 (Stevens, J., concurring) ("Assuming that EPCRA authorizes suits for wholly past violations, then Congress has created a legal right in having EPCRA reports filed on time. Although this is not a traditional injury: '[W]e must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition . . . Congress has the power to

Even granting the legitimacy of Justice Stevens' intimation that Justice Scalia's *Steel Company* analysis was result-oriented, the accusation fails to bolster a strong case against Justice Scalia in terms of anti-environmentalism. First, Justice Scalia presented a logically sound case against the recognition of a penalty payable to the government as redressing a private plaintiff's injury, pointing out that "[b]y the mere bringing of his suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."¹⁸⁷ Although the logic is not unassailable, it is also not surprising that Justice Scalia's redressability analysis convinced a majority of the Justices.

Perhaps an even stronger defense of Justice Scalia's *Steel Company* opinion is the fact, noted above, that the defendant complied with EPCRA within the statutory grace period, thus eliminating the injury prior to the plaintiff filing its case. Although this may present as a loophole, particularly in light of the defendant's evident motive for compliance and the threat that compliance might cease with the dismissal of the court action, the Court was bound to abide by the legislative scheme—one that was created to encourage the government, and not private parties, to police the regulated community in connection with its statutory obligations aimed at providing public information. In short, Justice Scalia's likely view that the public's right to information is shared and generalized—and therefore that private party litigation is not the preferred method of preserving that right—is a legitimate perspective that appears to be borne out by the compliance scheme created by Congress in EPCRA.

Steel Company joined *Lujan I* and *Lujan II* as an example of Justice Scalia's signature laser focus on environmental plaintiffs' word choices; here, the fact that the plaintiff had defined its injury in terms of past transgressions rather than a concern over future transgressions served as the linchpin of its failure to satisfy standing.¹⁸⁸ Although Justice Scalia

define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before ' (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment))."

¹⁸⁷ *Id.* at 107; *see also id.* (The passage also states: "But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." (citations omitted)).

¹⁸⁸ *See id.* at 108; *see also id.* at 108–09 (Justice Scalia rejected the plaintiff's claim for injunctive relief on the basis that "it cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating EPCRA in the future If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that

might be accused, in all of these cases, of seizing on a seemingly minor flaw in the pleadings to oust environmentalists from the courtroom, in *Steel Company* the temporal detail was significant enough to override the accusation, not only to Justice Scalia but to the other Justices as well.¹⁸⁹ This fact is underscored by the Court's subsequent environmental standing decision in *Friends of the Earth v. Laidlaw*.¹⁹⁰ That dispute between South Carolina river recreationalists and a wastewater treatment plant arose when mercury discharges exceeding those allowed under the plant's Clean Water Act permit discouraged plaintiffs from using the receiving river.¹⁹¹ As in *Steel Company*, the *Laidlaw* plaintiffs sought civil penalties payable to the government.¹⁹² In another echo of *Steel Company*, the *Laidlaw* defendant had ceased operation by the time the case reached the Supreme Court, thus arguably eliminating the plaintiffs' injury.¹⁹³ The Court, however, did not find that these similarities warranted another dismissal.

On the issue of whether a penalty paid to the government might redress a private plaintiff's injury, Justice Ginsburg, writing for the *Laidlaw* majority, stated that "a sanction that effectively abates [allegedly injurious illegal] conduct and prevents its recurrence provides a form of redress."¹⁹⁴ On the issue of whether the cessation of the allegedly injurious activity triggers a dismissal, Justice Ginsburg's *Laidlaw* majority concluded that the defendant must satisfy a "heavy burden of

alleged harm. But there is no such allegation here—and on the facts of the case, there seems no basis for it. Nothing supports the requested injunctive relief except respondent's generalized interest in deterrence, which is insufficient for purposes of Article III." (citations omitted).

¹⁸⁹ See *id.* at 110 (O'Connor, J., concurring) ("As the Court notes, had respondent alleged a continuing or imminent violation . . . the requested injunctive relief may well have redressed the asserted injury." (citation omitted)); see *id.* at 112, 132 (Stevens, J., concurring) ("EPCRA, properly construed, does not confer jurisdiction over citizen suits for wholly past violations . . ." and "[a]lthough the language of the citizen-suit provision is ambiguous, other sections of EPCRA indicate that Congress did not intend to confer jurisdiction over citizen suits for wholly past violations.").

¹⁹⁰ 528 U.S. 167 (2000).

¹⁹¹ See *id.* at 176 ("[D]espite experimenting with several technological fixes, Laidlaw consistently failed to meet the permit's stringent 1.3 ppb (parts per billion) daily average limit on mercury discharges. The District Court later found that Laidlaw had violated the mercury limits on 489 occasions between 1987 and 1995." (citation omitted)).

¹⁹² See *id.* at 179 (citing *Steel Company* as the precedent that had guided the Court of Appeals to dismiss *Laidlaw* because civil penalties payable to the government would not redress any injury the plaintiff had suffered).

¹⁹³ *Id.* ("According to Laidlaw, after the Court of Appeals issued its decision but before this Court granted certiorari, the entire incinerator facility in Roebuck was permanently closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased.").

¹⁹⁴ *Id.* at 185–86; see also *id.* at 186 (Justice Ginsburg explains further: "To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.").

persua[ding]” the court that the challenged conduct cannot reasonably be expected to start up again”¹⁹⁵ Aware that these statements might appear to contradict Justice Scalia’s majority in *Steel Company*, Justice Ginsburg differentiated the cases from one another by pointing out that the *Steel Company* violations had occurred in the past and they had been corrected prior to the filing of that suit, while the Laidlaw plant closure, and thus the cessation of its discharge violations, occurred subsequent to that suit’s commencement.¹⁹⁶ Justice Ginsburg then explained that this temporal distinction was more than a technicality, writing that “[w]e specifically noted in [*Steel Company*] that there was no allegation in the complaint of any continuing or imminent violation” while “the civil penalties sought by [the *Laidlaw* plaintiffs] carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [the alleged] injuries”¹⁹⁷ Thus, the *Laidlaw* majority underscored its acceptance of the validity of Justice Scalia’s reasoning in *Steel Company*, even as it limited *Steel Company* to the precise facts that Justice Scalia had taken pains to emphasize.¹⁹⁸

In Justice Scalia’s *Laidlaw* dissent, the Justice did not express gratitude for the respect the majority accorded his *Steel Company* opinion. To the contrary, Justice Scalia condemned the majority’s finding that the plaintiffs had satisfied standing as “a sham” and “cavalier.”¹⁹⁹ Unlike the majority, Justice Scalia found dispositive the fact that the lower court had determined that Laidlaw’s illegal discharges had not, in fact, polluted the river in excess of receiving water standards established by EPA.²⁰⁰ Justice

¹⁹⁵ *Id.* at 189; *see also id.* at 193 (Justice Ginsburg addressed the recurrence issue in the context of a discussion of whether Laidlaw’s cessation of its discharges constituted grounds to dismiss the case for mootness. The Court rejected the mootness claim.).

¹⁹⁶ *Id.* at 187 (“*Steel Co.* established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit.”).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 188 (“*Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.”).

¹⁹⁹ *Id.* at 201–02 (Scalia, J., dissenting) (“Inexplicably, the Court is untroubled by [the lower court finding that the river was not polluted], but proceeds to find injury in fact in the most casual fashion, as though it is merely confirming a careful analysis made below. Although we have previously refused to find standing based on the ‘conclusory allegations of an affidavit,’ the Court is content to do just that today. By accepting plaintiffs’ vague, contradictory, and unsubstantiated allegations of ‘concern’ about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham. The Court’s treatment of the redressability requirement . . . is equally cavalier.” (citations omitted)).

²⁰⁰ *Id.* at 198 (Scalia, J., dissenting) (asserting that the plaintiffs affidavits were not only vague, but “undermined by the District Court’s express finding that Laidlaw’s discharges caused no demonstrable harm to the environment.”).

Scalia argued that where a plaintiff's injury claim emanated from alleged environmental harm, facts disproving the environmental harm should also disprove the plaintiff's alleged injury.²⁰¹ The majority, rejecting this argument, concluded that environmental plaintiffs need not prove an environmental injury for standing purposes, but need allege only injuries to themselves, which include a defensible belief that defendant's statutory violations had rendered their enjoyment of the environment unsafe.²⁰² To Justice Scalia's apparent amazement, the majority found "nothing 'improbable'" about the plaintiffs' allegation that Laidlaw's excessive mercury discharges had forced them to forego any recreational use of the receiving waters, thus subjecting them to recreational, economic and aesthetic injuries.²⁰³

In his *Laidlaw* dissent, Justice Scalia warned that the Court "has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests."²⁰⁴ Justice Scalia warned sternly that "the new standing law that the Court makes . . . has grave implications for democratic governance."²⁰⁵ Justice Ginsburg, in turn, chided Justice Scalia that:

[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with a [Clean Water Act] permit.²⁰⁶

Much as with Justice Blackmun's *Lujan II* dissent, one may discern a hint that Justice Ginsburg considered Justice Scalia to harbor anti-environmentalist sentiments.

²⁰¹ *Id.* at 199 (Scalia, J., dissenting) ("In the normal course, . . . a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs. While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury. Ongoing "concerns" about the environment are not enough, for "[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.") (citations omitted)).

²⁰² *Id.* at 183 ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (citation omitted)).

²⁰³ *Id.* at 184 ("Unlike the dissent, we see nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." (citation omitted)).

²⁰⁴ *Id.* at 208–09 (focusing on the question of whether private litigation against a polluter has a deterrent effect and thus provides a form of relief for the plaintiffs).

²⁰⁵ *Id.* at 202.

²⁰⁶ *Id.* at 181.

That said, there is logic to Justice Scalia's *Laidlaw* dissent that is consistent with the logic of the Justice's *Steel Company* majority opinion. Where the government regulates behavior, setting standards and patterns of oversight and sanctions, Justice Scalia argued in both opinions, the courts should presume to refrain from entering the field.²⁰⁷ In *Steel Company*, private litigation arose when regulators declined to sanction a manufacturer for neglecting its hazardous materials reporting duties. Similarly, the private plaintiffs brought the *Laidlaw* action after regulators had reached an agreement with Laidlaw about bringing its discharges into compliance with its Clean Water Act permit.²⁰⁸ If Justice Scalia's opposition to allowing private parties to arbitrate these situations in the courts was that the Justice had little faith that such complex problems involving public health, industry-government relations, and environmental science could translate into binary courtroom disputes—and evidence exists that this was Justice Scalia's position—it was certainly a defensible viewpoint.²⁰⁹

Justice Scalia's *Laidlaw* dissent culminates with a declaration against private litigation addressing public causes:

By permitting citizens to pursue civil penalties payable to the Federal Treasury, the [Clean Water] Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA. Where, as is often the case, the plaintiff is a national association, it has significant discretion in choosing enforcement targets. Once the association is aware of a reported

²⁰⁷ *Id.* at 198 (Scalia, J., dissenting) (accusing the majority of “proceed[ing] to marry private wrong with public remedy in a union that violates traditional principles of federal standing—thereby permitting law enforcement to be placed in the hands of private individuals.”).

²⁰⁸ *Id.* at 177 (noting that the state environmental agency and Laidlaw had reached a settlement requiring Laidlaw to pay a civil penalty and make “every effort” to come into compliance with its Clean Water Act permit discharge limitations). Undermining this argument is the fact that the federal government joined the plaintiff in opposing Laidlaw's motion to dismiss the case on the grounds that the state was handling the matter, and the district court agreed that the state environmental agency had failed to pursue the matter diligently. *Id.*

²⁰⁹ *Id.* at 174–75 (discussing the Clean Water Act citizen suit provision, which authorizes “a person or persons having an interest which is or may be adversely affected” to file suit against a party in violation of its discharge permit (citation omitted)); see Clean Water Act § 505(a), 33 U.S.C. §§ 1365(a), (g) (2012). The Act provides that the would-be plaintiff must provide notice to EPA, the appropriate State, and the alleged violator before initiating suit, allowing these parties a sixty-days period to come into compliance or otherwise handle the matter so as to obviate the need for private litigation. *Id.* § 1365(b)(1)(A)); see also *id.* at 197 (Kennedy, J., concurring) (“Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.”).

violation, it need not look long for an injured member, at least under the theory of injury the Court applies today. And once the target is chosen, the suit goes forward without meaningful public control. The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing. Thus is a public fine diverted to a private interest.²¹⁰ (footnote omitted).

Although the environmental references are attributable to the fact that the passage appears in an environmental case, a fair reading of the quoted paragraph is that Justice Scalia's general concerns about private attorneys general were particularly acute in the context of environmental claims.

E. Summers: Affirming Arguments Against Standing

Further support for the view that Justice Scalia was engaged in a long-term campaign to narrowly construe citizen standing was his 2009 majority opinion in *Summers v. Earth Island Institute*.²¹¹ In *Summers*, while addressing a factual situation reminiscent of *Lujan I*, Justice Scalia reasserted the geographical specificity requirement addressed in that case, while also reprising two of the Justice's *Lujan II* arguments against standing.²¹² The case arose out of a disagreement over the validity of U.S. Forest Service regulations exempting certain government sales of salvage timber from the notice, comment, and appeal process generally triggered by such sales.²¹³ The government's rationale for exempting smaller salvage timber sales from the administrative process was that the sales presented no significant threat of a detrimental environmental impact

²¹⁰ *Id.* at 209–10.

²¹¹ 555 U.S. 488 (2009).

²¹² See *Lujan II* discussion, *supra* notes 132–59 and accompanying text (discussing imminence and procedural injury passages).

²¹³ *Summers*, 555 U.S. at 490–91 (noting that the Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381, tit. III, § 322, 106 Stat. 1419 (1992), note following 16 U.S.C. § 1612, requires the Forest Service to “establish a notice, comment, and appeal process for ‘proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974.’”) (citations omitted). The regulations allowing that certain Forest Service activities may be categorically excluded from the public process are codified at 36 C.F.R. § 215.4(a), 215.12(f) (2004). The new regulations under dispute identifying particular fire-rehabilitation and salvage-timber sale activities as categorically excused from public process are set forth at National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814, 33,824 (June 5, 2003) (Forest Service Handbook 1909.15, ch. 30, § 31.2(11)); and National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598, 44,607 (July 29, 2003) (Forest Service Handbook 1909.15, ch. 30, § 31.2(13)).

warranting their individualized study, and therefore they qualified to be categorically excluded from individualized environmental impact review. The dispute presented the Court with an opportunity to address whether members of the public could meet the injury requirement of standing through a claim of having been denied administrative process by an agency.

Consistent with his *Lujan II* dicta, Justice Scalia rejected the idea that the procedural injury claimed by the plaintiff—the lost opportunity to participate in a notice and comment process in connection with individual salvage timber sales—qualified as an injury for standing purposes.²¹⁴ Although cognizable by a court, Justice Scalia explained, a procedural injury failed to create a case or controversy without an associated non-procedural injury, such as a date-specific plan to hike a particular tract of federal land currently slated to serve as the location of a salvage timber sale that had been exempted from notice and comment under the new Forest Service regulations.²¹⁵ In short, Justice Scalia did not consider a procedural injury to aid in establishing an injury-in-fact; the canceled administrative process plaintiff alleged would have allowed him an opportunity to ward off injury went instead to the redressability element.²¹⁶

Insofar as the affiant's claimed personal injury, Justice Scalia found it lacking in the same ways the Court found the injury claims lacking in both *Lujan I* and *Lujan II*. Here, the hiker's affidavit named twenty sites in the Allegheny National Forest where he hiked and where the Forest Service planned salvage timber sales, now to take place without prior administrative process.²¹⁷ As in *Lujan I*, Justice Scalia considered the breadth of acreage subject to the new policy to work against the affiant's ability to present a precise claim.²¹⁸ As in *Lujan II*, Justice Scalia

²¹⁴ *Summers*, at 493–94 (“The regulations under challenge here neither require nor forbid any action on the part of respondents. The standards and procedures that they prescribe for Forest Service appeals govern only the conduct of Forest Service officials engaged in project planning. ‘[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.’” (citation omitted)).

²¹⁵ *Id.* (“Here, respondents can demonstrate standing only if application of the regulations by the Government will affect *them* in the manner described above.”).

²¹⁶ *Id.* at 497 (“It makes no difference that the procedural right has been accorded by Congress. That can loosen the strictures of the redressability prong of our standing inquiry . . . Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.” (citation omitted)).

²¹⁷ *Id.* at 495 (“[Plaintiff] Bensman’s affidavit further asserts that he has visited many National Forests and plans to visit several unnamed National Forests in the future.”).

²¹⁸ *Id.* (“The National Forests occupy more than 190 million acres, an area larger than Texas. There may be a chance, but is hardly a likelihood, that Bensman’s wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations.” (citation omitted)).

considered the affidavit's failure to identify an upcoming hiking plan at an impacted site rendered the temporal element too vague to pass constitutional muster.²¹⁹ The affiant's language choice played a role in his failure to establish standing. In this case, Justice Scalia identified the affiant's statement that he "want[s] to" visit sites in the Allegheny in the future as a "some day" intention akin to the imprecise travel plans rejected in *Lujan II*.²²⁰

Justice Breyer dissented in *Summers*, echoing Justice Blackmun's *Lujan II* dissent by pointedly disagreeing with the level of specificity required by the majority to establish imminence.²²¹ Arguing that the proper focus of an imminence analysis should be whether continued injury was a realistic possibility, particularly where the plaintiff alleges that its injury consists of a series of past and future actions, Justice Breyer suggested that the Court utilize a "realistic threat" of imminent injury standard—this language coming from a precedent pre-dating Justice Scalia's elevation to the Court—rather than adhering to the stern "concrete and particularized" injury benchmark regularized in precedents written by Justice Scalia.²²² In the context of the case before the Court, Justice Breyer argued that standing should be recognized in an environmental organization when it establishes that its members have visited and will undoubtedly continue to visit locations subject to an announced agency policy that threatens to diminish environmental protection of those areas and thus will inevitably impact the recreational activities of organization members.²²³ In short, Justice Breyer argued for

²¹⁹ *Id.* ("Respondents describe [Bensman's affidavit] as a mere failure to 'provide the name of each timber sale that affected [Bensman's] interests.' It is much more (or much less) than that. It is a failure to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman's to enjoy the National Forests." (citations omitted)).

²²⁰ *Id.* at 496 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

²²¹ *Id.* at 507–08 (Breyer, J. dissenting) ("The Bensman affidavit does not say *which particular* sites will be affected by future Forest Service projects, but the Service itself has conceded that it will conduct thousands of exempted projects in the future. Why is more specificity needed to show a 'realistic' threat that a project will impact land Bensman uses? To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive. The law of standing does not require the latter kind of specificity.").

²²² *Id.* at 505 ("[W]here, as here, a plaintiff has *already* been subject to the injury it wishes to challenge, the Court has asked whether there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff. That is what the Court said in *Los Angeles v. Lyons*, 461 U.S. 95 (1983), a case involving a plaintiff's attempt to enjoin police use of chokeholds. The Court wrote that the plaintiff, who had been subject to the unlawful chokehold in the past, would have had standing had he shown 'a *realistic threat*' that reoccurrence of the challenged activity would cause him harm 'in the reasonably near future.'").

²²³ *Id.* at 504 ("[The majority] properly agrees that the 'organizations' here can 'assert the standing of their members' . . . The majority assumes, as do I, that these unlawful Forest Service procedures will lead to substantive actions, namely the sales of salvage timber on burned lands, that

a more favorable Court policy on organizational standing and, generally, private attorneys general.

Much of Justice Scalia's majority opinion directly responds to Justice Breyer's dissent, rejecting the "realistic threat" standard as making a mockery of standing precedents and also calling for judges to render judgments on statistical probabilities beyond their expertise.²²⁴ Indeed, Justice Scalia cast his familiar invocations of concreteness, particularization and imminence—quoting liberally from the Justice's own prior opinions—as the protectors of the judicial branch.²²⁵

It is likely impossible for most environmental advocates to consider Justice Scalia's formulation of standing more convincing than Justice Breyer's. First, Justice Scalia wrote *Summers* as if beholden to precedents, but much of the precedential language dictating the Justice's analysis was dicta, and most of it written by Justice Scalia himself. Any Court follower who considered *Lujan I* and *Lujan II* exercises in "gotcha" word play in which the majority seized on any imprecision in an affidavit to oust the public interest plaintiff from the court will recognize the majority approach in *Summers* as equally if not more result-oriented than its predecessors. In addition, Justice Scalia's basis for rejecting Justice Breyer's "realistic threat" formulation—that the phrase appeared in a case where the Court rejected standing in connection with a plea for injunctive relief—in no way undermined the Court's discussion of the

might not take place if the proper procedures were followed. But the majority then finds that the plaintiffs have not sufficiently demonstrated that these salvage-timber sales cause plaintiffs an actual injury, that is, harm to the recreational, esthetic, or other environmental interests of organization members. To put the matter in terms of [a hypothetical statute discussed earlier in the dissent], the majority holds that the plaintiff organizations, while showing that they have members who have used salvage-timber sale parcels in the past (*i.e.*, parcels that the Service does not subject to the notice, comment, and appeal procedures required by law), have failed to show that they have members likely to use such parcels in the future." (citations omitted)).

²²⁴ *Id.* at 497–98 ("The dissent proposes a hitherto unheard-of test for organizational standing: whether, accepting the organization's self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm.").

²²⁵ *See id.* at 499 ("[I]t is well established that the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties And, because to establish standing plaintiffs must show that they 'use the area affected by the challenged activity and not an area roughly in the vicinity of' a project site, how is the court to assure itself that some of these members plan to make use of the specific sites upon which projects may take place? While it is certainly possible—perhaps even likely—that one individual will meet all of these criteria, that speculation does not suffice. 'Standing,' we have said, 'is not 'an ingenious academic exercise in the conceivable' . . . [but] requires . . . a factual showing of perceptible harm.'").

standing doctrine in that case.²²⁶ Echoing the Justice's dismissal of the *Lujan II* plaintiffs' statements of past activities as immaterial rather than offered to establish a pattern of behavior, Justice Scalia's dismissal of the discussion of standing from *Los Angeles v. Lyons* almost suggests that the Justice was exercising a purposeful or even taunting obtuseness.²²⁷ Justice Breyer concluded his dissent with a convincing plea for the Court to allow common sense into its standing deliberations: "Many years ago the Ninth Circuit warned that a court should not 'be blind to what must be necessarily known to every intelligent person.' Applying that standard, I would find standing here."²²⁸

Somewhat diluting the overbearing tone and logic that detractors may claim permeates Justice Scalia's *Summers* decision, the Justice peppered the opinion with a number of objective acknowledgments about standing for environmental advocates. For example, Justice Scalia agreed with Justice Breyer that organizational standing could be established—it was the specificity of injury to the organization or its members that differentiated the two views of the grievances an organization could bring to a court.²²⁹ Justice Scalia also expressly acknowledged the constitutionality of aesthetic and recreational injury.²³⁰ These are key elements of environmental standing. In addition, Justice Scalia referenced a claim by a plaintiff organization member in connection with the Burnt Ridge Project, a particular salvage timber sale subject to the new exclusion from public participation.²³¹ Although this affidavit was no

²²⁶ See *id.* at 499–500 ("The dissent would have us replace the requirement of 'imminent' harm, which it acknowledges our cases establish, with the requirement of 'a realistic threat' that reoccurrence of the challenged activity would cause [the plaintiff] harm 'in the reasonably near future.' That language is taken, of course, from an opinion that did *not* find standing, so the seeming expansiveness of the test made not a bit of difference.").

²²⁷ See *Los Angeles v. Lyons*, 461 U.S. 95 (1983); see also *Summers*, 555 U.S. at 495 (Justice Scalia repeated his dismissal of past behavior as immaterial. Scalia rejected as immaterial affiant's statement that he "had suffered injury in the past from development on Forest Service land" because "it relates to past injury rather than imminent future injury that is sought to be enjoined.").

²²⁸ *Summers*, 555 U.S. at 510 (citing to *In re Wo Lee*, 26 F. 471, 475 (1886) (observing that San Francisco agency holding arbitrary power over laundry establishments should be recognized by the judiciary to have exercised the power improperly where all and only Chinese laundry operators were denied licenses to continue operating laundries)).

²²⁹ *Id.* at 494 ("It is common ground that the respondent organizations can assert the standing of their members. To establish the concrete and particularized injury that standing requires, respondents point to their members' recreational interests in the national forests.").

²³⁰ *Id.* ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice." (citation omitted)).

²³¹ *Id.* ("Affidavits submitted to the District Court alleged that organization member Ara Marderosian had repeatedly visited the Burnt Ridge site, that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the Burnt Ridge Project went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment.").

longer useful to the plaintiff due to the parties having settled the Burnt Ridge claim, Justice Scalia indicated—although somewhat obliquely—that the affidavit of this hiker would have been sufficient to satisfy constitutional standing.²³² In short, in *Summers* Justice Scalia proved himself capable of conceiving of an environmental organization establishing standing through a precise and detailed member affidavit.

F. Flast: Justice Scalia's Ultimate Target

Environmentalists are unlikely to be convinced that Justice Scalia maintained a neutral approach to environmental claims by some tepid signals in various standing opinions that the Justice was less than unreservedly opposed to environmental plaintiffs, or by the assertion that the Justice was motivated by a passion for the separation of powers. The persistence with which Justice Scalia argued against environmentalist positions, both in standing cases and in other legal settings, renders the anti-environment impression nearly indelible. That stated, through Justice Scalia's career, one of the Justice's ultimate targets in the standing arena has been *Flast v. Cohen*, in which the Court recognized an injury adequate for standing purposes in a federal taxpayer aiming to challenge the use of federal funds to support schools with religious affiliation.²³³ A narrow statement of the rule emerging from *Flast* is that a taxpayer may achieve standing if claiming that a statute-based federal expenditure breaches a constitutional protection against government expenditures, such as that contained in the Free Exercise Clause.²³⁴ In so deciding, the *Flast* majority observed that the core question of standing was whether the plaintiff had a personal stake in the outcome that related to its assertion of legal wrongdoing.²³⁵ Based on this, the Court observed that

²³² *Id.* (“The Government concedes [that Ara Marderosian’s affidavit] was sufficient to establish Article III standing with respect to Burnt Ridge.”). Although Justice Scalia did not quite state that he found the Marderosian affidavit sufficient, Justice Breyer accepted Justice Scalia’s discussion of that affidavit as an endorsement of its validity. *Id.* at 507 (Breyer, J., dissenting) (“The affidavit of a member of Sequoia ForestKeeper, Ara Marderosian, . . . specifies that Marderosian had visited the Burnt Ridge Project site in the past and intended to return. The majority concedes that this is sufficient to show that Marderosian had standing to challenge the Burnt Ridge Project.”).

²³³ *Flast v. Cohen*, 392 U. S. 83 (1968).

²³⁴ *Id.* at 102 (“First, the taxpayer must establish a logical link between [his federal taxpayer] status and the type of legislative enactment attacked . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.”).

²³⁵ *Id.* at 100–01 (“The question whether a particular person is a proper party to maintain [a judicial] action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that

Article III presented “no absolute bar” to taxpayer standing where the claimed injury emanated from allegedly unconstitutional action under the taxing power.²³⁶ Justice Scalia considered the decision a serious threat to the separation of powers, stating that “[n]ever before had an improper expenditure of federal funds been held to ‘injure’ a federal taxpayer in such fashion as to confer standing to sue. And the reason, I would assert, is that never before had the doctrine of standing been severed from the principles of separation of powers.”²³⁷

The Justice devoted a section of a 1983 article on separation of powers to a discussion of how the *Flast* court, by misidentifying the primary goal of standing analysis, inappropriately disarmed the standing concept as a protector of the separation of powers.²³⁸ And Justice Scalia did not forget his aversion to the majority opinion when he joined the Court. In 2007, the Justice penned a concurrence in *Hein v. Freedom From Religion Foundation, Inc.*²³⁹ urging the Court to overrule *Flast*.²⁴⁰ In *Hein*, the Court considered whether the taxpayer standing authorized in *Flast* included challenges to discretionary spending authorized under executive order rather than legislation.²⁴¹ Dissatisfied with the majority’s narrow reading of *Flast*, Justice Scalia presented an extensive argument that the Court should do away with the precedent entirely, launching the case with the Justice’s signature ultimatum-style directness:

[W]e must surrender to logic and choose sides: Either [*Flast*] should be applied to (at a minimum) *all* challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting

the emphasis in standing problems is on whether the party invoking federal court jurisdiction has ‘a personal stake in the outcome of the controversy,’ and whether the dispute touches upon ‘the legal relations of parties having adverse legal interests.’” (citations omitted)).

²³⁶ *Id.* at 101 (“A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.”).

²³⁷ Scalia, *The Doctrine of Standing*, *supra* note 7, at 891.

²³⁸ *See id.* at 890–92 (arguing that the *Flast* analysis of the relationship between standing and separation of powers was flawed on several levels).

²³⁹ 551 U.S. 587 (2007).

²⁴⁰ *Id.* at 618 (2007) (Scalia, J., concurring).

²⁴¹ *See id.* at 605 (“The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action.” (footnote omitted)).

the taxing and spending power, or *Flast* should be repudiated. For me, the choice is easy. *Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing.²⁴²

Flast, Justice Scalia concluded, allowed generalized grievances to infiltrate the courts.²⁴³

In 2011, Justice Scalia again published a concurrence calling for the Court to overrule *Flast*. In *Arizona Christian School Tuition Organization v. Winn*,²⁴⁴ the Court followed the *Hein* approach, this time narrowly construing the taxpayer standing allowed in *Flast* by concluding that a tax credit does not constitute an expenditure of tax dollars.²⁴⁵ Justice Scalia, concurring only in the judgment, published a curt statement calling for the demise of *Flast*: “*Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established. I would repudiate that misguided decision and enforce the Constitution.”²⁴⁶ In *Arizona Christian*, as in earlier opinions and other discussions of taxpayer standing, the Justice’s unrestrained animus toward *Flast* underscores that Justice Scalia’s motivation in setting high hurdles for environmental plaintiffs, although perhaps multifaceted, was certainly consistent with a deep-seated reverence for a separation of powers structure in which the judiciary impacts politics and social change incrementally.

IV. CONCLUSION

There was no one more forceful than Justice Scalia; a very powerful voice is now missing from the bench.

– Richard Lazarus²⁴⁷

²⁴² *Id.* at 618.

²⁴³ *See id.* at 636 (“[O]nce a proper understanding of the relationship of standing to the separation of powers is brought to bear, Psychic Injury, even as limited in *Flast*, is revealed for what it is: a contradiction of the basic propositions that the function of the judicial power ‘is, solely, to decide on the rights of individuals,’ and that generalized grievances affecting the public at large have their remedy in the political process.” (citations omitted)).

²⁴⁴ 563 U.S. 125 (2011) (denying taxpayer standing in a suit challenging state tax credits for parochial school tuition).

²⁴⁵ *Id.* at 142 (“The distinction between governmental expenditures and tax credits refutes respondents’ assertion of standing.”).

²⁴⁶ *Id.* at 146–47 (Scalia, J., concurring).

²⁴⁷ Elizabeth Shogren, *Scalia was Supreme Court’s Leader on Limiting Environmental Rules: A Conservative Legal Foundation Fears its Winning Streak may be Over*, HIGH COUNTRY NEWS (Feb. 18, 2016), <http://www.hcn.org/articles/justice-scalia-was-the-supreme-courts-most->

Justice Scalia had a jurisprudential agenda.²⁴⁸ At its core was the Justice's conviction that the judiciary must strive to maintain a uniquely apolitical position vis-a-vis the other federal branches of government, and that a key element of this effort involved vigorous attention to issues of justiciability.²⁴⁹ The battles Justice Scalia fought over environmental standing, picayune and frivolous as they might have appeared, were part of the Justice's conscious response to a Supreme Court that he perceived as prone to indulge itself in political activism.²⁵⁰ Justice Scalia's concerns over bench activism were not limited to the environmental field, so it is erroneous to identify anti-environmentalism as the motivation behind the Justice's hostility toward environmentalist plaintiffs.

Environmentalism is a cause that has enjoyed tremendous strides in social awareness and political enlightenment during Justice Scalia's tenure on the Court. Environmentalism is also a movement that is unavoidably broad in its impacts and political implications. As such, it is a movement with injuries that are presumptively shared by entire populations and even multiple generations. In these ways, environmentalism is uniquely vulnerable to the efforts of a Justice whose primary jurisprudential mission was guarding against politicization of the Court. The famous environmentalist Rachel Carson wrote in *Silent Spring* that "[i]f the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poison distributed either by private individuals or by public officials, it is surely only because our forefathers . . . could conceive of no such problem."²⁵¹ Justice Scalia would have likely agreed, and would have considered the observation a firm endorsement of the Justice's environmental opinions.

powerful-voice-for-property-rights-and-limiting-federal-environmental-rules (quoting Harvard Law Professor Richard Lazarus).

²⁴⁸ See Morrison, *supra* note 24, at 15 ("In many cases, you knew where Justice Scalia was likely to come out . . .").

²⁴⁹ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 560 (2007) (Scalia, J., dissenting) ("The Court's alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation. This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.")

²⁵⁰ See, e.g., Morrison, *supra* note 24, at 20–21 ("In *Obergefell* [*v. Hodges*, 135 S. Ct. 2584, (2015), Justice Scalia] decried that the majority 'says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.' [*Obergefell*, at 2627] He viewed the decision as 'tak[ing] from the People a question properly left to them' and 'unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court,' from which he concluded that 'we move one step closer to being reminded of our [the People's] impotence.' [*Id.* at 2631].").

²⁵¹ RACHEL CARSON, *SILENT SPRING* 12–13 (1962).

Justice Scalia's takings jurisprudence appears to have emerged from the Justice's dedication to originalism and textualism. As with his approach to justiciability issues, Justice Scalia appears to have perceived these two tenets of constitutional interpretation as a means through which to guard against political and social activism infiltrating the judicial process. The Justice's application of originalism in the environmental context translated into a deep suspicion of governmental efforts to protect our planet's media by limiting property rights. Property, in American culture and history, is presumptively a source of profit through exploitation. The political branches could alter that, Justice Scalia believed, but the principle remained intact so long as the Constitution protected against takings in its original form.

An ironic element of Justice Scalia's proclaimed effort to fumigate the Court of politics is that so many of the Justice's opinions read as emotional and result-oriented, if not blatantly politically-motivated.²⁵² There is no denying that, during Justice Scalia's tenure on the Court, the Justice steered the so-called conservative Justices in an effort to eradicate environmentalist claims against both private and government bodies and to uphold the claims of property owners against government efforts to protect the environment. Labeling these collective efforts anti-environmentalism is fair—the track record speaks for itself.²⁵³ But Justice Scalia's environmental opinions do form a defensible jurisprudence. There is an unassailable logic to the Justice's effort to assert a limiting meaning to Article III's "Case" or "Controversy" language, and an

²⁵² See Purdy, *supra* note 48 (arguing that Justice Scalia's originalism could not escape Court politics: "Scalia's later career showed that as originalism gained in influence, it became susceptible to many uses, not all of them conservative. In *District of Columbia v. Heller*, in 2008, Scalia and John Paul Stevens led the Court's factions in a 5-4 split over the Second Amendment. Both Justices wrote elaborate historical interpretations of the original meaning of 'the right of the people to keep and bear arms.' Scalia's historical monograph attracted five conservative votes, Stevens's four liberal ones. An observer could fairly wonder what had happened to the vaunted constraints of history.").

²⁵³ See, e.g., Patricia Wald, *Environmental Postcards from the Edge: The Year That Was and the Year That Might Be*, 26 ENVTL. L. REP. (ENVTL. L. INST.) 10,182, 10,186 (1996) ("I ask you: Is this work for sophisticated adult jurists? There was a real dispute here [over the fate of an Asian elephant supposedly protected under the Endangered Species Act] . . . The descent in Talmudic refinements about whether one must be a student of the animal in that particular environment to bring suit, and whether the disputed permit covered the transport away from the zoo as well as to the animal exhibition would strike an ordinary as the essence of caprice. More than most subjects of lawsuits, the use of our natural resources is a communitarian matter. Why then must a genuine dispute over an acknowledged injury to the environment stemming from a violation of law be judgeable only when one individual can show a minutely particularized use of the resource that is threatened, down to the last square inch of hiked soil, or the date of the next planned visit to the zoo?").

equally sound credibility to the originalist and textualist approach Justice Scalia promoted.²⁵⁴

In closing, it bears repeating that Justice Scalia leaves a lasting, memorable jurisprudential legacy in his wake. As one scholar noted:

[M]ourners and admirers from across the political spectrum have praised not only his personal warmth and charm but also his influence on the law. They say that his intellectual gifts, his dedication to an originalist theory of constitutional interpretation, and his insistence that the Supreme Court should be apart from and above politics did much to redefine both the Constitution and the Court.²⁵⁵

Over time, the Justices and lower court judges may hem in Justice Scalia's primary environmental opinions, in part due to the Justice's own emphasis on particular facts, and in part due to the fact that most judges are far less dedicated to originalism than was Justice Scalia. In this way, the legal world may watch the precedential value of Justice Scalia's environmental opinions whittled down over time. Environmentalists will cheer, but will likely remain vigilant to the lessons that Justice Scalia taught us about the specificity necessary to establish injury and the logical cohesion that must support land use controls. Likewise it is unlikely that the Court will ignore the jurisprudential warnings Justice Scalia laced through his opinions about the role of the judiciary and the imperialist threat presented by Court activism. Justice Scalia has left a significant legacy in the environmental field, one that has sharpened the claims of litigants and the justifications for regulatory protections.

²⁵⁴ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("One of those landmarks [of the judicial sphere], setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—'serv[ing] to identify those disputes which are appropriately resolved through the judicial process,'—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.>").

²⁵⁵ Purdy, *supra* note 48.