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Bret C. Birdsong

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Justice Scalia's Footprints on the Public Lands

JUSTICE SCALIA'S FOOTPRINTS ON THE PUBLIC LANDS

BRET C. BIRDSONG[†]

ABSTRACT

*This article explores Justice Scalia's views of judicial review of administrative action, as revealed in his writings on public land law, as both a scholar and a Supreme Court justice. It examines and explains why Professor Scalia favored judicial review of public land administration while Justice Scalia seems to abhor it. In a sweeping law review article published in 1970, Professor Scalia argued that the doctrine of sovereign immunity historically did not apply in public lands cases. On the Court he has penned two of the most significant decisions addressing judicial review of public lands administration, each of them imposing new restrictions (or reviving old ones) on the availability of judicial redress for executive unlawfulness. In *Lujan v. National Wildlife Federation* ("Lujan I"), Justice Scalia used the law of standing, injected with separation of powers principles, to foreclose programmatic judicial review of public land classification. And last year, in *Norton v. Southern Utah Wilderness Alliance* ("SUWA"), he used traditional mandamus principles to foreclose judicial review of officials' alleged failure to achieve a plain congressional mandate to maintain the wilderness quality of public lands. Justice Scalia's imprint on public land law was foretold by his scholarly writings, including his public lands article, which place great emphasis on protecting executive discretion. He favors judicial review for the vindication of traditional private rights while disfavoring it as a means of ensuring the implementation of statutory, public values in the face of the contrary exercise of executive discretion.*

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[†] Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author wishes to thank Allison Wirth for helpful research assistance and the William S. Boyd School of Law for financial support. He is also grateful to Doug Grant, Joe Feller, Bob Keiter, John Leshy, and Jim Rasband for helpful comments.

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INTRODUCTION

It is bombastic, perhaps, but not inaccurate to say that before there was administrative law there was public land law. During the first century and a half of this nation's history, probably the federal government's most daunting administrative task was the management and administration of vast holdings of public land.¹ Then, and possibly now, the public lands are a harbinger of American administrative law.

This article will examine Justice Scalia's views of judicial review of administrative action, as revealed in his writings on public land law, as both a scholar and a Supreme Court justice. Well before he joined the Supreme Court, Scalia had established his stature as an administrative law scholar.² During a hiatus from academia in the early 1970s, he served as the chairman of the Administrative Conference of the United States.³ Upon his return to the cloistered fold, he continued as a player in Washington regulatory world as editor of the influential journal *Regulation*.⁴ In 1982, President Reagan appointed him to the D.C. Circuit court

1. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 231, 414–19, 439 (2d ed. 1985); see generally PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

2. In addition to the article explored at length in Part I of this article, to further examine Scalia's significant scholarship on administrative law see Antonin Scalia, *Vermont Yankee: The A.P.A., the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345; Antonin Scalia, *The Hearing Examiner Loan Program*, 1971 DUKE L.J. 319; Antonin Scalia, *Responsibilities of Regulatory Agencies under Environmental Laws*, 24 HOUS. L. REV. 97 (1987); *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; and Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899 (1973).

3. The Justices of the Supreme Court, [http://www.supremecourtus.gov/about/biographies current.pdf](http://www.supremecourtus.gov/about/biographies_current.pdf) (last visited Nov. 6, 2005).

4. About Regulation Magazine, <http://www.cato.org/pubs/regulation/about.html> (last visited Nov. 6, 2005).

of appeals, where his influence and expertise in administrative law grew.⁵ He has parlayed his expertise into influence on the Court as the author of several important administrative law decisions.⁶

Antonin Scalia is no tenderfoot, either, when it comes to public land law; he is a sourdough indeed.⁷ As an assistant professor at the University of Virginia, Scalia authored a sweeping article—the most substantial of his early writings—that analyzed the doctrine of sovereign immunity in public lands cases.⁸ He argued that courts had traditionally not applied sovereign immunity in public lands cases, creating a historical and categorical exception to the doctrine's insulation from judicial review of administrative action.⁹ On the Court he has penned two of the most significant decisions addressing judicial review of public lands administration, each of them imposing new restrictions (or reviving old ones) on the availability of judicial redress for executive unlawfulness. In *Lujan v. National Wildlife Federation (Lujan I)*,¹⁰ Justice Scalia used the law of standing, injected with separation of powers principles, to foreclose programmatic judicial review of public land classification.¹¹ And last year, in *Norton v. Southern Utah Wilderness Alliance (SUWA)*,¹² he used traditional mandamus principles to foreclose judicial review of officials' alleged failure to achieve a plain congressional mandate to maintain the wilderness quality of public lands.¹³

A primary goal of this article is to examine and explain why, at a level one step removed from doctrinal specifics, *Professor* Scalia favored judicial review of public land administration while *Justice* Scalia seems to abhor it. On first consideration, it might appear that Justice Scalia has had a change of heart regarding the proper role of the judiciary. But this is not necessarily so. What came between his pronouncements as a public land scholar and those as a public land justice was a transformation not just of public land law but of administrative law in general.¹⁴ A system of rules developed initially to govern administration of private rights in

5. Justices of the Supreme Court, *supra* note 3.

6. E.g., *American Trucking Ass'n v. Whitman*, 531 U.S. 457 (2001); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). See generally Bernard Schwartz, "Shooting the Piano Player"? *Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1 (1995).

7. The term "tenderfoot," as used by late-nineteenth century settlers in the American west, referred to a newly arrived emigrant, not yet hardened to the difficulties of frontier life. The term "sourdough," as used in the mining towns of Alaska and the Yukon, referred to a seasoned, experienced prospector. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2178, 2355 (Philip Babcock Gove et al. eds., 1986).

8. Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

9. Scalia, *supra* note 8, at 885.

10. 497 U.S. 871 (1990).

11. *Lujan I*, 497 U.S. at 899.

12. 124 S. Ct. 2373 (2004).

13. *SUWA*, 124 S. Ct. at 2379–80.

14. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669 (1975).

public lands evolved into a system of rules intended to ensure the adequate representation of the public interest in the administration of public law. In the public land context specifically, in the interval between Scalia's academic and judicial writings, Congress drew the curtain on the "age of disposition," during which federal policy promoted the privatization of public lands, in favor of a policy of federal retention and management of public lands for public purposes established by statute.¹⁵

Justice Scalia's apparent reformation more likely reveals a steady bearing in the changing tide of the law. That bearing is one which favors judicial review of the administration of public laws impacting traditional private rights or creating their equivalent. But the same bearing disfavors (or at least seeks to limit) judicial review of the administration of public laws that benefit individuals or groups representing some broader aspect of the public interest. Seen in this light, Justice Scalia's writings on public land law are perhaps the clearest indication of the course he would chart for the law of judicial review of administrative action.

This article will proceed in three parts. Part One will examine Professor Scalia's article on sovereign immunity in the public land cases. It traces the themes in Scalia's early thinking about public land law and judicial review. One theme is his understanding of public land cases as a distinct body of law with a tradition of nonstatutory judicial review that persevered in the face of the expanding doctrine of federal sovereign immunity. A countervailing theme, however, is his preference for protecting executive discretion from judicial interference by means of other doctrines, specifically standing and mandamus.

Part Two follows these themes through Justice Scalia's public lands jurisprudence, examining *Lujan I* and *SUWA* in detail. It shows that, while predictable, Scalia's invigoration of standing and mandamus principles in those cases represents his imposition of his own scholarly abstractions on the development of the law of judicial review—something he admonished scholars against early in his academic career.

Part Three seeks to make sense of the path Scalia has forged in the context of modern administrative law. It explores the "reformation" of public land law and administrative law during the interval between his academic and his judicial writings. It recasts Scalia's proclaimed reliance on standing and mandamus doctrine as an effort to effect a "counterreformation" of administrative law and to diminish the role of courts as vindicators of public interest values. It shows that these writings press against the tides of "reformed" administrative law by seeking to limit judicial review of administrative decisions adversely affecting public interest litigants. In this light, Scalia's footprints on the public lands are

15. GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW Part A, Ch. 2, §2:1 (2005).

properly viewed as leading to the development of different standards for the availability of judicial review for private interest litigants than for public interest litigants—a theme that Justice Scalia likely portends for administrative law in general.

I. JUSTICE SCALIA'S *CONCLUSIONS FROM THE PUBLIC-LANDS CASES*

It is surprising, given the path he has forged, that chance probably led Antonin Scalia to the public lands. In 1967, he joined the law faculty of the University of Virginia, where his senior colleague Carl McFarland chaired the Public Land Law Review Commission, a congressionally-mandated effort to suggest how the unruly field of public land law might be brought to order.¹⁶ At the time, both sovereign immunity and “non-statutory review” of federal administrative action were garnering considerable attention from administrative law scholars. Almost universally, scholars loathed sovereign immunity.¹⁷ Scalia's *Conclusions from the Public-Lands Cases*, written with the “advice and encouragement” of Professor McFarland,¹⁸ made a significant contribution to that literature, arguing that the doctrine of sovereign immunity was never properly applied in public lands cases and urging a return to the historical norm.

Scalia framed his analysis of sovereign immunity in *Conclusions from the Public-Lands Cases* with an inquiry into disparate outcomes in two then-recent cases seeking specific relief against federal officers administering the public lands.¹⁹ In *Malone v. Bowdoin*,²⁰ the plaintiffs brought an ejectment action against a Forest Service official who asserted title on behalf of the United States.²¹ The plaintiffs alleged that the putative fee title on which the Forest Service defended its possession had been granted by a person, since deceased, who had owned only a life estate, with the remainder in the plaintiffs.²² The Supreme Court held the complaint was properly dismissed on grounds that sovereign immunity barred a suit for specific relief against the Forest Service officer under the circumstances alleged.²³ In so holding, the Court applied a rule set

16. Inventory of the Papers of Carl McFarland, <http://www.law.virginia.edu/lawweb/lawweb2.nsf/0/4b6e9b7556a137cf8525675200553ab0?OpenDocument> (last visited Nov. 6, 2005).

17. Scalia wrote:

If there is one legal development (or, perhaps more accurately, nondevelopment) found in the pages of the United States reports during the present century which would cause the credulous observer to doubt the truth of [the] axiom [that scholarly criticism is a restraint against judicial arbitrariness], it is the continued good health of the doctrine of sovereign immunity.

Scalia, *supra* note 8, at 867. Scalia cited a string of commentary dating to 1884, including Kenneth Culp Davis's classic treatise, which summarily stated, “nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go.” *Id.* at 867 n.1 (citing 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 435 (1st ed. 1958)).

18. Scalia, *supra* note 8, at 867 n.*.

19. Scalia, *supra* note 8, at 872–82.

20. 369 U.S. 643 (1962).

21. *Malone*, 369 U.S. at 643.

22. *Id.*

23. *Id.* at 648.

out in *Larson v. Domestic and Foreign Commerce Corporation*²⁴ in an earlier attempt to “cut[] through the tangle of previous decisions”²⁵ and “resolve the conflict in [sovereign immunity] doctrine.”²⁶

In contrast, sovereign immunity posed no obstacle to the invocation of federal judicial power against a federal land official in *Udall v. Tallman*,²⁷ a mandamus action which sought to compel the Secretary of the Interior to issue federal oil and gas leases to applicants he had earlier denied.²⁸ Not only did the Court not base its decision on sovereign immunity, but the doctrine was not even mentioned by the Supreme Court, the court of appeals, the trial court, or any of the parties’ pleadings or briefs throughout the litigation.²⁹ Scalia’s curiosity was justly piqued. Surely a deeper blow at the United States’s sovereignty is struck by “demand[ing] [the] transfer of [a] legal interest which could be effected only by the United States” and which had been denied after extensive administrative proceedings pursuant to an act of Congress than by merely seeking to enforce a right of possession through a chain-of-title analysis that required no positive action by the government and which fell within the accepted competency of courts.³⁰

Scalia concluded that the Court’s application of sovereign immunity in *Malone* was wrong and disregard of it in *Tallman* was correct as a historical, if not doctrinal, matter.³¹ In so concluding, Scalia reviewed the history of public land litigation dating from the nineteenth century during which sovereign immunity posed no bar, closely analyzed a hand-

24. 337 U.S. 682 (1949).

25. *Malone*, 369 U.S. at 647.

26. *Larson*, 337 U.S. at 701. *Larson*’s rule, supposedly distilled from the cases in Chief Justice Vinson’s plurality opinion, was that sovereign immunity bars suits for specific relief against an officer of the sovereign actions except when the officer’s action “is not within the officer’s statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.” *Id.* at 702. *Larson* cast in doubt, but did not overrule, a celebrated case involving the widow of General Robert E. Lee, whose Arlington, Virginia, estate had been seized by federal officers for nonpayment of taxes. *United States v. Lee*, 106 U.S. 196 (1882). In *Lee*, the Court had explicitly rejected sovereign immunity as an obstacle to Mrs. Lee’s ejectment action. *Lee*, 106 U.S. at 251.

27. 380 U.S. 1 (1965).

28. *Udall*, 380 U.S. at 3.

29. Scalia, *supra* note 8, at 877.

30. *Id.* at 876–77. Scalia carefully analyzed and dismissed the likely explanations why sovereign immunity might not have been decisive in *Tallman*. He dispatched with possible arguments that the failure to issue the lease fell within the ultra-vires-or-otherwise-unconstitutional exceptions of *Larson*, that the Mineral Leasing Act governing the leases in *Tallman* waived sovereign immunity, and that Court’s failure to apply sovereign immunity was the result of it not having been so urged by the Solicitor General. *Id.* at 877–80. With the same pointed wit he would later famously direct at others, including his colleagues on the Court, Scalia suggested that his own sense of “surprise” that the Solicitor General failed to raise sovereign immunity might, to a skeptic of Scalia’s view, be “akin to a child’s astonishment at watching a tight-rope walker for the first time—how marvelous that he should not only walk along such a narrow wire, but carry and balance a long stick at the same time!” *Id.* at 879–80. Nonetheless, he parried the suggested infirmity by pointing out that only Congress, not inaction by a federal officer, can waive sovereign immunity and that the doctrine is jurisdictional and is properly raised sua sponte by a court. *Id.* at 880.

31. *Id.* at 909, 919.

ful of public lands cases in which the Court—erroneously, in his view—applied sovereign immunity in the early twentieth century, and argued that *Tallman*'s result was in historical repose notwithstanding its irreconcilable inconsistency with *Larson*'s putative unified theory of sovereign immunity.³² Public lands cases, according to Scalia, simply represent a historically distinct category of cases in which nonstatutory review of federal administrative action was properly available in spite of sovereign immunity.³³ Whether as oracle or prophet, Scalia concludes:

[H]owever solid and permanent that unifying theory may be, it will not be applied to the area of nonstatutory review of public-lands determinations. The accumulated mass of decisional law in this area contrary to *Larson* is too overwhelming; and in the conflict, it is the general rather than the specific, the theoretical rather than the practical, the abstract thesis rather than the historical actuality, which will yield.³⁴

There are four strains of Scalia's thinking in *Conclusions from the Public-Lands Cases* that merit further elaboration—the explicit recognition of public lands cases as an “existential” category of cases within which doctrine might acceptably develop that is inconsistent with broader theoretical justification or application; the recognition that judicial review had been and should be available in public lands cases; his favoritism for both standing and traditional mandamus standards as means to protect executive discretion from judicial encroachment; and his criticism of scholars—albeit gentle—for a tendency to impose theoretical, generalized principles on the common law rather than deriving them from it.

A. Public Lands Cases as an “Existential” Category of Law

The first important strand of Scalia's analysis of sovereign immunity and public lands cases is his emphatic claim that public lands cases are an “existential” category of cases to which the unified doctrine of sovereign immunity does not apply. After much careful analysis of how the Court applied sovereign immunity doctrine to several public lands cases in a series of missteps, mistakes, and results-orientated self-protection,³⁵ he comes to the shrugging conclusion that sovereign immunity does not apply in public lands cases simply *because* public lands

32. *Id.* at 909–20.

33. *Id.* at 909.

34. *Id.* Scalia makes clear his normative belief in this historical dialectic. The “correct” general conclusion to be drawn from his analysis of the public lands cases is that “[n]either *Larson*, nor any other theory which purports to provide a universally valid standard for the applicability of sovereign immunity to suits against federal officials, can or will be followed unless it either rejects sovereign immunity entirely or contains an exclusionary factor based plainly and simply upon historical prescription.” *Id.* at 912–13.

35. *See id.* at 886–909.

cases are a category of cases in which the doctrine does not apply.³⁶ He supports his view not by providing theoretical or doctrinal reasons why public lands cases are different from others seeking relief against federal executive officials but by pointing out that there are other "existential" categories of cases in which the same is true, namely post office cases and tax cases.³⁷ These categories are "well-defined and fully developed 'existential' categories of legal activity" outside the rubric of sovereign immunity.³⁸ In this view, public lands cases are not simply an indistinct subset of the vast population of sovereign immunity cases posing "unique or rarely recurring fact situations"; they "constitute what is probably the oldest continuous body of federal case-law relating to the validity and effect of a particular type of administrative activity."³⁹

To be sure, Scalia's recognition that public lands cases form a distinct category in which courts could justifiably depart from theoretical doctrine is based on a pragmatic appreciation of attorney and judicial practice rather than principle. Though the existence of a public lands "category" of cases justifies departure from *Larson's* supposedly unifying theory of sovereign immunity, that is solely due to the fact that "the actual development of the law has to a large extent been compartmentalized—into, for example, public-lands cases, post-office cases, and tax cases."⁴⁰ As a practical matter, lawyers and judges seek answers to legal issues in those distinct compartments of factually similar, commonly pedigreed cases.⁴¹ Scalia quips that a lawyer casually speaking with another would likely describe the case on which "he" was working as "a products liability case, an automobile accident case, or an eviction case," but probably not as a "sovereign immunity case," even though sovereign immunity might be an important contested issue.⁴² The same, he maintains, is true of a public lands case. Scalia explicitly states that "there is in *principle* nothing distinctive about the public-lands cases" in comparison to other lawsuits seeking relief against federal administrative officers.⁴³ Nonetheless, what remains important here is that Scalia's compartmentalization of public lands cases justifies, in his view, the departure from theoretical doctrine. His analysis exalts pragmatism at the expense of theory.

36. *Id.* at 909.

37. *Id.* at 913–15.

38. *Id.* at 882.

39. *Id.*

40. *Id.* at 919.

41. *See id.* at 918–19 (describing how federal appellate judges had disregarded *Larson* in public lands cases because "working always within the context of a particular set of facts, the felt the pull of factually similar precedent.").

42. *Id.* at 882.

43. *Id.* at 919.

B. The Availability of Nonstatutory Review in Public Lands Cases

Another important strand of Scalia's thinking in *Conclusions from the Public-Lands Cases* is his embrace of "nonstatutory" review as a mechanism for judicial oversight of public lands determinations by administrative officials. Nonstatutory review refers to judicial review of administrative action that is not obtained under a specific statutory provision creating a right to judicial review.⁴⁴ Before the Administrative Procedure Act⁴⁵ and other modern legislation⁴⁶ created generally applicable rights of action for injunctive and other specific relief against government officials, judicially-crafted "nonstatutory" review provided the only means to challenge federal administrative action.⁴⁷ It is generally considered to encompass actions for injunction, declaratory judgment, mandamus and other specific relief.⁴⁸ As Scalia himself described, it is:

[T]he type of review of administrative action which is available, not by virtue of those explicit review provisions contained in most modern statutes which create administrative agencies, but rather through the use of traditional common-law remedies . . . against the officer who is allegedly misapplying his statutory authority or exceeding his constitutional power.⁴⁹

As Professor Siegel has noted, today's lawyer versed in judicial review under the APA might understandably be unfamiliar with nonstatutory review.⁵⁰ Yet nonstatutory review remains important for the insight it provides on the legal theory of suing the government and, equally impor-

44. See, e.g., Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 395 (1970). In focusing on nonstatutory review and sovereign immunity, Scalia placed himself in the company of several administrative law luminaries examining the same topics. Professor Cramton's study was published in the same volume of the Michigan Law Review as Scalia's *Conclusions from the Public-Lands Cases*. See also, Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 197-256 (1965); Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

45. 5 U.S.C. §§ 701-706 (2005).

46. The Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (2005).

47. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1625 (1997). Professor Siegel recounts many of the famous cases that proceeded by means of nonstatutory review, including: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Youngstown Sheet & Tube Co. v. Sawyer* (the Steel Seizure Case), 343 U.S. 579 (1952).

48. See, Cramton, *supra* note 44, at 395 n.28.

49. Scalia, *supra* note 8, at 870.

50. Siegel, *supra* note 47, at 1625. In 1976, Congress amended the APA to waive sovereign immunity in suits seeking relief "other than money damages" against the United States and its officers. Before 1976, there had been some disagreement as to whether the APA's provision of a right to judicial review also amounted to a waiver of sovereign immunity, but the bulk of authority held that it did not. *Id.* at 1623.

tant here, the Justice Scalia's attitude regarding the role of the judiciary in providing relief against governmental wrongdoing.

Nonstatutory review, and the inapplicability of sovereign immunity it entailed, permitted an individual injured by a government official's conduct to bring an action against the official, supposedly as a private, rather than government, defendant. By ordering the official, in his individual capacity, to act or refrain from acting so as to remain within the bounds of the law, courts could thus pretend that they were affording no relief against the "immune" sovereign government. The supposition, of course, was a fiction; a suit *nominally* against an individual officer was *really* against the sovereign government. Our "government of laws, and not of men,"⁵¹ depends wholly on individual officials to act, and the very motivation of the fiction was to provide for some relief against the "*individual*" official to remedy the injustice at the hands of the sovereign—what Professor Siegel calls the "remedial imperative."⁵²

Scalia's recognition of the tradition of nonstatutory review for public lands cases is important, first, for the mere fact of it. It is a recognition by Scalia that public lands cases constitute a category of cases for which there historically existed a judicial remedy for government illegality, based, in a sense, on the remedial imperative. Though Scalia did not use the words himself, administrative determinations relating to the public lands were subject to a "presumption of reviewability."⁵³ In this light, *Conclusions from the Public-Lands Cases* is more than an academic statement—now moot because sovereign immunity has since been waived—that sovereign immunity is not a bar to judicial review of public lands cases. It is a statement that public lands administration historically has been and *ought to be* subject to judicial review.

Second, Scalia's recognition of nonstatutory review for public lands cases says something about his openness to judicial involvement in formulating judicial remedies for administrative wrongdoing. Despite its name, there is some minor disagreement among scholars whether nonstatutory review is, in fact, extra-statutory. Professor Siegel, for example, characterizes nonstatutory review as a judge-made doctrine by

51. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

52. Siegel, *supra* note 47, at 1627–28.

53. See Louis L. Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 423 (1958). Professor Jaffe coined the phrase "presumption of reviewability." *Id.* This was rooted in a post-office case, *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). In that case, the court stated: "The acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Id.* at 108 (emphasis added). Scalia, for his part, cited the same case as the earliest in a line of authority that he said establishes "post-office cases" as a separate "existential" category of cases in which private individuals could seek relief, by means of nonstatutory review and notwithstanding sovereign immunity, for officials' incorrect interpretations of the mail statutes. Scalia, *supra* note 8, at 913–14 n.215. Notably, Scalia pointed out that *American School of Magnetic Healing* "cited no judicial precedent in support of its holding except public-lands cases." *Id.*

means of which “courts could ensure the rule of law.”⁵⁴ Professor Jaffe famously reckoned that nonstatutory review was a facet of a “common law of judicial review,” and specifically noted that public lands was one of several “important areas of administration . . . in which the federal courts allow appropriate common-law proceedings to test the legality of federal actions.”⁵⁵ Scalia correctly points out that nonstatutory review actions, like all others in federal court “are, strictly speaking, statutory,” at least in the sense that federal court jurisdiction must derive from some statute.⁵⁶ In this view, “[s]o-called ‘nonstatutory review’ proceedings are, more accurately, those which are brought under the statutes of general applicability, as opposed to statutes specifically designed to enable judicial review of the actions of a particular agency or agencies.”⁵⁷ But such hair splitting amounts to no more than a semantic quibble given Scalia’s explicit embrace of Jaffe’s coining of a “common law of judicial review,”⁵⁸ and his recognition that the common law of judicial review applies not only to nonstatutory review, but also to “fill the numerous interstices which any statutory-review provision contains.”⁵⁹ Thus, Scalia acknowledges without serious criticism the judicial role in creating, or enhancing, a practice (if not a theory) of nonstatutory judicial review in public lands cases.⁶⁰

54. Siegel, *supra* note 47, at 1631.

55. Jaffe, *supra* note 53, at 411. Jaffe also included within his construction of a common law of judicial review the “whole congeries of judicial theories and practices which condition not only the use of common-law writs but the statutory provisions [for judicial review] as well.” *Id.* These included the political question doctrine, sovereign immunity, exhaustion of administrative remedies and the requirement of proper parties. *Id.*

56. Scalia, *supra* note 8, at 870 n.12. Scalia explains: “For example, a common type of nonstatutory proceeding is the suit for injunction, brought under the ‘federal question’ provision and the ‘all writs’ provision of the Judicial Code, 28 U.S.C. §§ 1331, 1651 (1962)—provisions which may support suit against an official of any federal agency or indeed against private citizens.” *Id.*

57. *Id.*

58. *Id.* at 870 (“These remedies gave rise to what Professor Jaffe has aptly called the ‘common law of judicial review.’”).

59. *Id.* at 870 n.13.

60. Professor Siegel has convincingly shown that the nonstatutory review, in both its inception and perseverance through numerous theoretical and practical challenges over the years, is largely a creature of judicial ingenuity, even if subject matter jurisdiction originates from a statutory grant. Siegel, *supra* note 47, at 1632. Propelled by the remedial imperative, judges first created the legal fiction that permitted nonstatutory review proceedings to avoid the problem of sovereign immunity, and then revived it when the other doctrines began to obscure the essence and motivation of the fiction and threatened to thwart the remedial imperative:

The . . . unfolding of nonstatutory review was really the great testing of the remedial imperative through the medium of judicial creativity. . . . Again and again, judges demonstrated that the remedial imperative, operating through the mechanism of nonstatutory review, overcomes the assertion of sovereign immunity. This is not to say that nonstatutory review always overcame every possible barrier to judicial relief, but it is to say that judges, faced on the one hand with the need to provide relief to injured plaintiffs, and on the other with a doctrine of sovereign immunity that never rested on a solid and commonly accepted basis, regarded the need to provide relief as more important than the claim of the government to be free from judicial process. Judges refused to leave remediless those wronged by governmental action, even though sovereign immunity prevented a straightforward suit against the government itself. The three themes noted above — a legal doctrine that separates the government officer from the government, the motivations of

Third, Scalia's discussion of the relationship between the right of review under the APA and its nonstatutory review antecedents indicates his belief in the vitality of nonstatutory review as a distinct theory of judicial review which the courts are powerless to restrict. In a separate appendix to his *Conclusion from the Public-Lands Cases* article,⁶¹ Scalia analyzed whether the provisions of the APA providing for judicial review, as originally enacted, waived sovereign immunity. He concluded that, even though the APA was "jurisdictional" in the sense that it provided for subject matter jurisdiction, it was not "jurisdictional" in the sense of waiving sovereign immunity.⁶² He cited several cases, including *Larson* and *Malone*, brought after the enactment of the APA in which the Court nonetheless held that sovereign immunity barred actions against federal officials.⁶³ As for the "many" public lands decisions which refer to the action having been brought "under the APA" without any reference to sovereign immunity, Scalia offers an explanation that is "more limited than the hypothesis that the APA constitutes a general waiver [of sovereign immunity], and which would reconcile these cases with what appears to be the overwhelming weight of judicial opinion in other fields, namely . . . that there must be acknowledged a separate rule for traditional 'nonstatutory review' cases."⁶⁴

Further, in the text of his article, Scalia characterizes the APA as a congressional "restatement of the existing law" on judicial review of administrative action.⁶⁵ The import of this view that the APA codified the existing law is that it deprives courts of the authority to diminish rights to challenge federal administrative action that courts had developed before 1946, including the right to judicial review of public lands cases. Thus, though the APA did not waive sovereign immunity, it "took

providing relief to those injured by government action and keeping government within the bounds of law, and judicial creativity in finding remedies in the absence of any statutory remedies - continually recurred.

Id. One can only surmise whether Professor Scalia would have subscribed to this analysis. I suspect that he would not have gone so far as to openly admit to such judicial activism. It is clearer that Justice Scalia today would chafe at the notion that judges should openly exercise their creativity—interstitially or not—to create or protect remedies against the government. Professor Siegel characterizes Justice Scalia as exemplary of "an unfortunate, retrograde period in which courts often seek to disclaim their role in righting governmental wrongs." *Id.* at 1705 ("The opinions of some judges, like Justice Scalia, frequently suggest that courts should be perfectly content to see a wrong go unremedied."); *id.* at 1614 ("Today, many judges - most notably Justice Scalia—apparently seek to abnegate the judicial role in creating remedies against the government."). Professor Siegel cites Scalia's opinions in *Franklin v. Massachusetts*, 505 U.S. 788, 823 (1992) (Scalia, J., concurring in part and concurring in the judgment) and *Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (Scalia, J., dissenting), but the Justice's public lands opinions would suffice to support the same conclusion. See *infra* Part II.

61. Scalia, *supra* note 8, app. at 920-24 (entitled, *Appendix: Concerning the Question Whether the Administrative Procedure Act is "Jurisdictional" in the Sense of Constituting a Waiver of Sovereign Immunity*).

62. *Id.* at 922.

63. *Id.*

64. *Id.* at 923-24.

65. Scalia, *supra* note 8, at 917.

away the Supreme Court's power to deny relief . . . through subsequent judicial revision of the principles of sovereign immunity," and possibly "prevent[ed] [them] from raising *any* new obstacles to suit in the traditional fields of nonstatutory review . . ." ⁶⁶ What the courts had granted public lands plaintiffs before the APA, they could no longer taketh away without further congressional action. ⁶⁷

C. *Alternative Means to Sovereign Immunity for Protecting Executive Discretion*

Lest the reader begin to conclude that Scalia, in his early years, sought to throw open the doors of federal courts for plaintiffs to challenge every exercise of public lands administration, there is a hitch. The most telling of the important strands of thought in Scalia's *Public-Lands* article is his view that courts should use alternative doctrines to sovereign immunity to preserve executive discretion. In particular, Scalia highlights standing and mandamus principles.

The bulk of *Conclusions from the Public-Lands Cases* traces what Scalia regarded as the Supreme Court's erroneous application of sovereign immunity in a few public lands cases during the early twentieth century. According to Scalia, the Court's error was rooted in a mistaken interpretation of the Eleventh Amendment as encompassing "domestic" as well as "foreign" sovereign immunity. ⁶⁸ The error was magnified by the Court's conflation of sovereign immunity for states, on the one hand, and the federal government, on the other. ⁶⁹ The amenability of the federal government to suit in federal court, Scalia correctly argues, is a classic case of "domestic" sovereign immunity. ⁷⁰ Finally, the wrongful application of sovereign immunity in the public lands cases, Scalia argues, was compounded by the Court's own desire to protect its docket from a feared onslaught of original jurisdiction cases. ⁷¹

But the error of the Court's way is less significant, as a reflection of Scalia's impact on public land law, than his analysis of its return to the

66. *Id.*

67. It is unclear whether Professor Scalia would also have argued that the APA's codification of the existing law of judicial review would also prevent courts from exercising creativity to enhance, rather than diminish, the right to judicial review of cases in the "traditional fields of nonstatutory review" such as public lands. His analysis could be read to assume that the APA incorporated nonstatutory review, wholly eliminating the ability of courts to change preexisting law in any way. Professor Siegel, however, has convincingly shown that the APA neither eliminated nor subsumed nonstatutory review and that nonstatutory review is available when the APA does not provide a remedy and even when the plaintiff prefers nonstatutory review to an APA remedy. Siegel, *supra* note 47, at 1665–68 (arguing that nothing in the text or in the discernible congressional intent could be read to limit or exclude nonstatutory review). If the APA codified nonstatutory review as "existing law" but did not subsume it as part of an exclusive scheme, then courts would presumably still be free to enhance the right of review through judicial revision.

68. Scalia, *supra* note 8, at 887–88.

69. *Id.* at 887.

70. *Id.* at 887–88.

71. *See id.* at 888.

true path. Shortly after first using sovereign immunity to bar a public lands case,⁷² the Court began to retreat, first in ordinary mandamus cases⁷³ and eventually in cases within the Court's original jurisdiction.⁷⁴ The Court, of course, did not always grant relief in these cases. In a number of cases in which the Court omitted to mention sovereign immunity or applied it as an alternative ground, it ruled against the plaintiff on the basis of other doctrines that serve to protect federal officers' discretion in public lands administration. These doctrines, Scalia noted, included the by-then discredited "passage-of-title" theory⁷⁵ and, more importantly, the traditional elements of mandamus relief, particularly the insistence that the writ can issue only to compel the exercise of "ministerial," as opposed to "discretionary" duties.⁷⁶

Scalia's preference for other theories to preserve executive discretion is clearest in the final flourish of his sovereign immunity analysis. Scalia cites *Morrison v. Work*⁷⁷ as the last public lands case in which the Supreme Court had sustained the defense of sovereign immunity.⁷⁸ The suit sought a mandatory injunction and other relief against various federal officials, including the Secretary of the Interior, regarding their duties under a statute governing the management and disposition of lands ceded by the Chippewa Indians of Minnesota.⁷⁹ The Court, Scalia points out, could easily have disposed of the case in one fell swoop by invoking the doctrine of sovereign immunity.⁸⁰ Indeed, that might have been the expectation, given that the suit closely resembled *Naganab*, the high water mark for sovereign immunity in public lands cases.⁸¹

But, rather than merely rely on the case's likeness to *Naganab*, Justice Brandeis parsed the case into three different categories of claims. The first set of claims alleged that the Congressional act authorizing the challenged administrative acts was unlawful for failure to obtain the consent of the Chippewas. These claims, Brandeis wrote, were barred by

72. Scalia, *supra* note 8, at 895-96 (citing *Oregon v. Hitchcock*, 202 U.S. 60, 70 (1906) (noting that sovereign immunity was an alternative ground) and *Naganab v. Hitchcock*, 202 U.S. 473, 476 (1906), (noting that it was the only ground for the decision)).

73. *Id.* at 898 (citing *Garfield v. United States, ex rel. Goldsby*, 211 U.S. 249 (1908)).

74. *Id.* at 901-02 (citing *Minnesota v. Lane*, 247 U.S. 243 (1918)).

75. The "passage-of-title" doctrine held that as long as legal title to public lands remained in the United States—even if a claimant had established an equitable right to occupancy or the issuance of a land patent—the Land Department (later the Department of the Interior) had sole jurisdiction to the exclusion of courts. See, e.g., *Brown v. Hitchcock*, 173 U.S. 473, 478 (1899). The doctrine, though never explicitly overruled, was effectively repudiated by *Land v. Hoglund*, 244 U.S. 174, 182 (1917).

76. Scalia, *supra* note 8, at 898-902.

77. 266 U.S. 481 (1925).

78. Scalia, *supra* note 8, at 903.

79. *Morrison*, 266 U.S. at 483-84.

80. Scalia, *supra* note 8, at 906.

81. *Morrison* involved the same statute as *Naganab* and, like the earlier case, was brought by a Chippewa Indian on behalf of himself and others similarly situated. See *id.*, at 903-04.

sovereign immunity.⁸² By overtly applying sovereign immunity to the claims challenging the act of Congress, Scalia notes, Brandeis grudgingly followed *Naganab*, but only on the narrowest possible grounds.⁸³ The importance of this limited application of sovereign immunity, according to Scalia, was that the doctrine would retain vitality (at least in public lands cases) only with respect to suits challenging legislative, not executive, action.⁸⁴ According to Scalia, Brandeis's disposition of the other claims in *Morrison* shows a better way to protect executive discretion.⁸⁵

A second set of claims alleged that the officials sued had misconstrued or misapplied the statute. Brandeis's analysis of these claims had two facets. The plaintiff could not maintain them because he "[wa]s not in a position to litigate in this proceeding the legality of the acts complained of," having asserted a right that "resembles the general right of every citizen to have the government administered according to law and the public moneys properly applied."⁸⁶ But Brandeis played the sovereign immunity card as well, concluding his discussion of those claims by again referring to the courts' lack of power "to interfere with the performance of the functions committed to an executive department . . . by a suit to which the United States is not, and cannot be made, a party."⁸⁷ Scalia construed Justice Brandeis's focus on the plaintiff's interest as an attempt "to convert into 'lack of standing' much of what earlier cases would have called 'sovereign immunity.'"⁸⁸ In Scalia's view, the reference to sovereign immunity was "Justice Brandeis' subtle way of implying that in the past the doctrine of sovereign immunity had often been applied to secure *ends which could be achieved more properly . . . through the recently expanded principles of standing.*"⁸⁹

82. *Morrison*, 266 U.S. at 485–86. As Scalia points out, Justice Brandeis applied a variant of sovereign immunity based on his characterization of the United States as an "indispensable party" which could not be joined as a defendant without its consent. Scalia, *supra* note 8, at 904 n.174. As Professor Siegel explains, the "indispensable parties" form of sovereign immunity stemmed from courts' loss of focus on the fiction that enabled nonstatutory review in the first place, i.e., that a suit against an officer was not really a suit against the United States. Siegel, *supra* note 47, at 1653–55.

83. Scalia, *supra* note 8, at 906.

84. *Id.*

85. *Id.*

86. *Morrison*, 266 U.S. at 486, 488.

87. *Id.* at 488.

88. Scalia, *supra* note 8, at 905 n.179. Scalia unsatisfactorily minimizes Brandeis's reliance on sovereign immunity, noting that Brandeis wrote that the United States could not be joined "under the circumstances here presented." *Id.* (quoting *Morrison*, 266 U.S. at 488). He fails to offer any reason why the plaintiff's lack of a sufficient interest would enhance the applicability of sovereign immunity. *Id.* Further, as Scalia admits, any lack of standing applicable to this set of claims would be equally applicable to the others. *Id.* Despite Brandeis's discussion of the plaintiff's interest in the proper administration of the trust—which, in any event, would put Indian allottees on a different footing than beneficiaries of a private trust—it cannot be said that he based his analysis on standing rather than sovereign immunity. See *id.*

89. *Id.* at 905 n.179 (citing *Massachusetts v. Mellon*, 262 U.S. 477, 488 (1923)) (emphasis added). Scalia accepts that his reading of *Morrison* and Brandeis's designs are not the only plausible ones. *Id.* What is important here is that Scalia signals his own preference for the doctrine of standing

The third set of claims sought a mandatory injunction to compel the Secretary to dispose of lands in a particular way. The plaintiff's aim was to enhance the value of the trust fund of which he and other Chippewa Indians were beneficiaries.⁹⁰ As to these claims, Justice Brandeis, without mentioning sovereign immunity, held that a mandatory injunction is an "exercise of sound judicial discretion" and was not warranted because of insufficient equity.⁹¹ Even here, Scalia emphasizes what he regards as Justice Brandeis's standing overture.⁹²

The purpose of this detail is not to saddle the reader—though it might—but to highlight Scalia's obvious admiration for what he regarded as Justice Brandeis's deft reliance on alternative theories to sovereign immunity to protect the executive from judicial "interference." Scalia regarded *Morrison* as more than an attempt to right the law by limiting the applicability of sovereign immunity to public lands cases. The opinion is better read

as an ambitious attempt to adjust the role of sovereign immunity in all its applications so that it would be relied upon, when appropriate, only to insulate the *legislative* branch from judicial interference. Under that interpretation, the protection of the *executive* branch would be achieved by other devices, such as (1) the well-established ministerial-discretionary dichotomy . . . ; (2) the principle of standing . . . perhaps expanded to cover many cases formerly disposed of on the ground of sovereign immunity; and (3) a greater emphasis upon the "discretionary" character of mandamus and injunctive relief.⁹³

In this view, sovereign immunity was superfluous because other doctrines could insulate the executive from judicial meddling.

D. Scholars, Judges, and the Common Law

Before turning to Justice Scalia's implementation of these principles in the public lands opinions he has authored, it is fitting to note his concluding comment on "the difficult role of the scholar in the common-law

to protect executive discretion against judicial intrusions—an early reflection of his view of standing as promoting separation of powers he would later more fully develop. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) [hereinafter Scalia, *Doctrine of Standing*].

90. Scalia, *supra* note 8, at 905.

91. *Morrison*, 266 U.S. at 490.

92. Scalia characterized this third holding as based, in part, on a finding that the plaintiff had an "insufficient interest." Scalia, *supra* note 8, at 905. Justice Brandeis noted that Congress had specifically provided for suits by Indians who vainly sought an allotment to which they were entitled. *Id.* But his point was not that the plaintiff was not himself a disappointed allottee. *Id.* Rather, as a matter of equity, "it is not necessary to seek redress indirectly by this proceeding." *Morrison*, 266 U.S. at 490.

93. Scalia, *supra* note 8, at 906–07. Scalia notes: "If that was the attempt, it certainly failed, for *Morrison* has disappeared into the faceless crowd of inconsistent and irreconcilable cases on sovereign immunity." *Id.*

system.”⁹⁴ If the common law system, he concludes, “is to make good the boast that its legal rules are hammered out on the anvil of reality, then the common-law scholar, unlike his civil-law counterpart, must derive his unifying principles from the case law instead of imposing them upon it.”⁹⁵ As a foil for this theme, Scalia recounts the failure of *Larson* to establish a lasting and truly universal theory of sovereign immunity—as evidenced by the continuing tradition of judicial review in public lands cases. Scholars, “approaching the problem from the top rather than the bottom, and seeking to follow out a principle rather than to adjudicate a dispute,” had missed the distinctiveness of public lands cases.⁹⁶ Rather, they had lumped them together with the undifferentiated throngs of cases “which happen to fall within the broad conceptual category” of cases against federal officers seeking specific relief.⁹⁷ In contrast, federal appellate courts adjudicating public lands cases, working from the bottom, were not “misled” by *Larson*’s putative universality.⁹⁸

Both *Larson* and *Morrison*, however, might be regarded as scholarly opinions in the sense that they approached the problem of sovereign immunity from the top-down perspective that Scalia criticizes. *Larson*—an opinion almost universally criticized by scholars, including Scalia—sought to untangle and resolve conflict in the sovereign immunity doctrine by imposing a general rule that did not accord with the cases.⁹⁹ And in *Morrison* Justice Brandeis, by Scalia’s own reckoning, ambitiously sought to adjust the law of sovereign immunity “in all its applications,” limiting its applicability to challenges to legislative action while convert-

94. *Id.* at 918.

95. *Id.*

96. *Id.* at 919.

97. *Id.*

98. *Id.* Scalia writes:

In fact, the tradition of judicial review of public-lands determinations would have continued even if the APA had not fortuitously been passed before, rather than after, *Larson*. . . . The day in which the broad abstraction of *Larson*, however frequently affirmed, can suffice, APA or not, to destroy the vitality of a long line of cases, factually cohesive among themselves and factually divergent from anything specifically considered in *Larson* itself—that day, surely, will be the morning after the twilight of the common-law. Until then, it is not the historically consistent factual treatment, but rather the abstraction, which will be twisted into compliance or, if necessary, ignored.

Id. at 918.

99. *Larson*, 337 U.S. at 705. Justice Frankfurter began his dissent in *Larson*—an exegesis of sovereign immunity case law—with the following admonition, somewhat at odds with Scalia:

Case-by-case adjudication gives to the judicial process the impact of actuality and thereby saves it from the hazards of generalizations insufficiently nourished by experience. There is, however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of ad hoc determinations making for eventual confusion and conflict. There comes a time when the general considerations underlying each specific situation must be exposed in order to bring the too unruly instances into more fruitful harmony.

Id. at 705–06 (Frankfurter, J., dissenting).

ing the law of executive sovereign immunity into a law of standing.¹⁰⁰ Scalia intended his admonition to scholars to help buffer the pragmatic development of the common law from the abstracting influence of scholars. Yet, at the climax of his analysis, he praises Justice Brandeis's judicial abstraction, his imposition of supposedly unifying principles of sovereign immunity, standing and mandamus.

II. JUSTICE SCALIA'S PUBLIC LANDS OPINIONS

As a young professor, Scalia noted: "What scholars represent as the law has a tendency to become such"¹⁰¹ No doubt, he meant this as a testament to the power the scholarly pulpit and the influence of scholarly analysis on the courts. Unlike most scholars, however, Antonin Scalia became an Associate Justice of the Supreme Court in 1986.¹⁰² Justice Scalia has participated in numerous decisions that, in some way, address the public lands. He has written the opinion for the Court in two: *Lujan v. National Wildlife Federation*¹⁰³ and *Norton v. Southern Utah Wilderness Alliance*.¹⁰⁴ In these opinions, Justice Scalia has done what appears to be a double pirouette, twice. In both cases he retreated from his respect, as a professor, for the tradition of judicial review in the existential category of public lands cases. And in both cases he did so by imposing his scholarly abstractions on the field of judicial review.

A. *Lujan v. National Wildlife Federation: Infusing Separation of Powers Principles into Standing*

1. The Opinion

In *Lujan I*, several national environmental groups brought suit under the APA against the Bureau of Land Management (BLM) and the Secretary of the Interior to challenge "rampant" illegality in the administration of the BLM's statutory land management responsibilities regarding land withdrawals.¹⁰⁵ By passage of the Federal Land Policy and Management Act (FLPMA),¹⁰⁶ Congress directed the BLM to conduct various inventory and management planning activities for the 180 million acres under its administration.¹⁰⁷ These activities include inventorying the resource and other values and classifying the lands for future uses in order to achieve "multiple use" management.¹⁰⁸ Among FLPMA's authorized management tools are the reclassification of lands which had earlier been designated for particular uses (sometimes to the exclusion of others) and

100. Scalia, *supra* note 8, at 905 n.179, 906-07.

101. Scalia, *supra* note 8, at 919.

102. Justices of the Supreme Court, *supra* note 3.

103. 497 U.S. 871 (1990) (*Lujan I*).

104. 124 S. Ct. 2373 (2004).

105. *Lujan I*, 497 U.S. at 891.

106. 43 U.S.C. §§ 1701-1734a (1982).

107. *Nat'l Wildlife Fed'n v. Burford (Burford I)*, 835 F.2d 305, 307-08 (D.C. Cir. 1987).

108. *Lujan I*, 497 U.S. at 877 (citing 43 U.S.C. § 1711(a)); 43 U.S.C. § 1712(a)).

the power to “make, modify, extend or revoke” land withdrawals.¹⁰⁹ The revocation of a withdrawal would typically have the effect of opening the lands to potential mineral development.¹¹⁰ The plaintiffs alleged that the BLM’s activities in relation to its “land withdrawal review program” violated FLPMA, the National Environmental Policy Act (NEPA), and the APA.¹¹¹

Whether because of the tradition of nonstatutory review or the APA’s 1976 amendment, sovereign immunity no longer bars such an action, and the issue before the Court was standing—or, more particularly, the prudential aspect of standing. Specifically, the issue was whether the plaintiffs were “adversely affected or aggrieved” by BLM’s actions as required by the APA’s general provision for judicial review.¹¹² In response to government motions to dismiss and for summary judgment, the National Wildlife Federation provided the affidavits of two members who attested to using lands “in the vicinity” of the Arizona Strip in northern Arizona and the South Pass-Green Mountain area of Wyoming.¹¹³ The parties agreed that the BLM had already terminated at least one land withdrawal on the Arizona Strip and another in the area referred to in the Wyoming affidavit.¹¹⁴ Writing for five members of the Court, Scalia found these affidavits insufficiently specific to withstand a motion for summary judgment.¹¹⁵

Had Scalia rested there, *Lujan I* might be regarded as little more than a guide to the technical rules of standing, or even just summary judgment.¹¹⁶ But Scalia went on to address a bigger issue—one infused

109. *Lujan I*, 497 U.S. at 877 (citing 43 U.S.C. § 1712(d) (reclassification), § 1714(a) (withdrawals)).

110. *Burford I*, 835 F.2d at 329. The term “withdrawal” is an artifact of the pre-FLPMA era in which myriad laws provided for the disposal of federal lands by transfer of title or lesser property interests to private parties. See *Lujan I*, 497 U.S. at 875. It refers to the withdrawal, or removal, of designated lands from the normal operation of these laws, which included the mineral laws. *Burford I*, 835 F.2d at 308. FLPMA, which reflected a shift in federal policy from disposal to retention of public lands, repealed most of the disposal laws, but left in place those providing for mineral development. See *Lujan I*, 497 U.S. at 877 (citing 43 U.S.C. § 1701).

111. *Lujan I*, 497 U.S. at 875.

112. *Id.* at 885. See 5 U.S.C. § 702 (2005) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

113. *Lujan I*, 497 U.S. at 880, 886.

114. *Id.* at 885–86.

115. *Id.* at 889. Scalia wrote:

[W]here the fact in question is the one put in issue by the § 702 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. It will not do to ‘presume’ the missing facts because without them the affidavits would not establish the injury that they generally allege.

Id.

116. Justice Scalia circulated his first draft opinion to the members of the Court on June 5, 1990. In response, Justice Stevens, who voted against the majority in conference and eventually

with concern for the separation of powers. The plaintiffs could not rely on additional affidavits—presumably not hampered by their nonspecificity—to establish standing because no affidavits could suffice to enable a challenge to the “so-called ‘land withdrawal review program.’”¹¹⁷ Scalia characterized the problem as one of definition, but his concern was the scope of judicial relief. The land withdrawal review program (to the extent such a program existed), he said, comprised “1250 or so individual classification terminations and withdrawal revocations”¹¹⁸ and was “not an identifiable ‘final agency action’ for purposes of the APA.”¹¹⁹ The real problem was that the plaintiffs had filed a “generic challenge to all aspects” of the program and were thus inviting the courts to correct “rampant” violations by public land administrators.¹²⁰

In language oozing with separation of powers concerns, Scalia forcefully emphasized the limited role of the judiciary in reviewing and remedying executive power. Even assuming the rampant illegality alleged, plaintiffs “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.”¹²¹ Even when ripeness and standing would otherwise permit judicial intervention with respect to some part of a program, diffuse claims of illegality that address “the flaws in the entire ‘program’ . . . cannot be laid before the courts for wholesale correction under the APA.”¹²² Though he acknowledges that Congress can provide for judicial “correction of the administrative process at a higher level of generality,” under the APA’s general right of review “more sweeping actions are for the other branches.”¹²³

joined the dissent, corresponded: “In this case I shall await further writing, particularly since, if I understand your discussion in Parts III-C and V, this really is not a standing case any more.” Memorandum from John Paul Stevens to Antonin Scalia (June 5, 1990), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 560, No. 89-640 (Library of Congress).

117. *Lujan I*, 497 U.S. at 890.

118. *Id.* (quoting the district court’s opinion, *Nat’l Fed’n of Wildlife v. Burford (Burford II)*, 699 F. Supp. 327, 332 (D.D.C. 1988)).

119. *Id.* at 890 n.2.

120. *Id.* at 890 n.2, 891.

121. *Id.* at 891.

122. *Id.* at 893.

123. *Id.* at 894. There is a hint in the papers of Justice Blackmun that Scalia began with a broader conceptual view focusing on separation of powers rather than the APA. Following the pronouncement that the plaintiffs should seek programmatic improvement “in the offices of the Department or the halls of Congress,” Scalia initially drafted the following sentence: “In this third branch of government, respondent must direct its attack against some particular ‘agency action’ that causes it harm.” 1st Draft, *Lujan v. Nat’l Wildlife Fed’n*, at 17 (June 5, 1990), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 560, No. 89-640 (Library of Congress). In the second draft, Justice Scalia subtly softened the separation of powers emphasis by changing the words, “In this third branch of government” to “Under the terms of the APA.” 2nd Draft, *Lujan v. Nat’l Wildlife Fed’n*, at 17 (June 8, 1990), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 560, No. 89-640 (Library of Congress). This slight change could be read to suggest that Scalia, though motivated by separation of powers concerns, gives expression to them through his interpretation of the APA.

As Justice Blackmun noted in his dissent, Scalia's discussion was gratuitous.¹²⁴ More important, it conflates jurisdiction and the scope of relief. Scalia's discussion converts the issue of whether a court may issue programmatic relief to whether a plaintiff has a right of action under the APA.¹²⁵ There is no basis for a rule that a court cannot entertain an action otherwise within its jurisdiction simply because it cannot issue the full scope of relief sought by the plaintiff.

As an historical aside, Justice Scalia nearly failed to garner a majority of the Court for the portion of his opinion in which he voices these separation of powers concerns. Justice O'Connor circulated to the Court a draft concurrence joining in all parts of the opinion except Part IV-A. Though she "agree[d] with the principles set forth in Part IV-A," she was "less convinced than is the plurality that no 'land withdrawal review program' exists independently of the particular classification terminations and withdrawal revocations."¹²⁶ Justice O'Connor withdrew her draft and joined Scalia's opinion "[i]n light of your changes in part IVA," which moderated (albeit subtly) the categorical denial that a "land withdrawal review program" existed.¹²⁷ It can be said that the desire to form

124. *Lujan I*, 497 U.S. at 913 (Blackmun, J., dissenting) ("Since the majority concludes in other portions of its opinion that the Federation lacks standing to challenge *any* of the land-use decisions at issue here, it is not clear to me why the Court engages in the hypothetical inquiry contained in Part IV-A.").

125. *See id.* at 914-15.

126. 1st Draft, *Lujan v. Nat'l Wildlife Fed'n*, at 1 (June 22, 1990) (O'Connor, J., concurring in part and concurring in the judgment), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 560, No. 89-640 (Library of Congress).

127. Memorandum from Sandra Day O'Connor to Antonin Scalia (June 25, 1990), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 560, No. 89-640 (Library of Congress). Justice Scalia had made two minute changes to Part IV-A in the draft he circulated to the Court on June 25, the same day that O'Connor withdrew her concurrence. The first change was the characterization that the District Court found the "land withdrawal review program" *extends to*, currently at least, [rather than "*consists, currently at least, of*"] "1250 or so individual classification terminations and withdrawal revocations." 4th Draft, *Lujan v. Nat'l Wildlife Fed'n*, at 16-17 (June 25, 1990), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 560, No. 89-640 (Library of Congress). Compare 2d Draft, *Lujan v. Nat'l Wildlife Fed'n*, at 16 (June 8, 1990), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 560, No. 89-640 (Library of Congress). The second change was the insertion of the word "principally" in the following sentence:

But it is at least entirely certain that the flaws in the entire "program"—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members.

4th Draft, at 18-19. Compare 2d Draft, at 18-19.

Moreover, in the next draft, Scalia added footnote 2 in response to Justice Blackmun's dissent. Footnote 2 addresses Justice O'Connor's concerns more fully:

Contrary to the apparent understanding of the dissent, we do not contend that no 'land withdrawal review program' exists, any more than we would contend that no weapons procurement program exists. We merely assert that it is not an identifiable 'final agency action' for purposes of the APA. If there is in fact some specific order or regulation, applying some particular measure across-the-board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review in the manner we discuss subsequently in text, it can of course be challenged under the APA by a person adversely affected—and the entire 'land withdrawal

a majority, as well as to respond to Justice Blackmun's dissent, nudged Justice Scalia to moderate his expression of the limits of judicial review of programmatic agency action.

2. The Scholarly Antecedents

That separation of powers concerns would motivate Justice Scalia's standing jurisprudence should not have surprised anyone. Discussed above is his reverence for Justice Brandeis's oblique use of standing in *Morrison v. Work*.¹²⁸ Moreover, while a sitting judge on the D.C. Circuit, Scalia published a much-discussed essay arguing that standing was an "essential element" of separation of powers.¹²⁹ Scalia noted that separation of powers principles are found within the structure of the Constitution, and he directed much of his attention to constitutional aspects of standing.¹³⁰ But he also criticized what he called "the Court's progressive elimination of the so-called 'prudential limitations' upon standing,"¹³¹ in particular, "the interpretation of the [APA] to create liberalized judicial review provisions where none existed before."¹³²

One front of attack was textual. The APA provides a right of judicial review to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by [such] action within the meaning of a relevant statute . . ."¹³³ According to Scalia, the "legal wrong" criterion referred to "a wrong already cognizable in the courts—that is, one as to which standing already existed pursuant to traditional principles."¹³⁴ By that he meant that the plaintiff had suffered some invasion of a legal right, such as "one of property, one arising out of contract, one protected against tortuous invasion, or one founded on a statute which confers a privilege."¹³⁵ The "adversely affected or aggrieved within the meaning of a relevant statute" criterion, Scalia argued, was meant only to encompass a right of review already provided by other statutes.¹³⁶ Under this view, the APA merely codified the rules for judicial review existing in 1946. The "legal wrong" criterion provided for judicial review of

review program,' insofar as the content of that particular action is concerned, would thereby be affected. But that is quite different from permitting a generic challenge to all aspects of the 'land withdrawal review program,' as though that itself constituted a final agency action.

5th Draft, *Lujan v. Nat'l Wildlife Fed'n*, at 17 n.2 (June 26, 1990), in *THE HARRY A. BLACKMUN PAPERS*, Supreme Court File, 1918-1999, Box 560, No. 89-640 (Library of Congress). See *Lujan I*, 497 U.S. at 890 n.2.

128. 266 U.S. 481 (1925). See discussion *supra* Parts I.C, I.D.

129. Scalia, *Doctrine of Standing*, *supra* note 89.

130. See *id.* at 881, 890-93.

131. *Id.* at 890.

132. *Id.* at 887.

133. 5 U.S.C. § 702.

134. Scalia, *Doctrine of Standing*, *supra* note 89, at 887.

135. *Id.* at 887 n.28 (quoting *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939)).

136. *Id.* at 887-88.

those cases for which “nontstatutory review” had been available; the “adversely affected or aggrieved by agency action” criterion provided for judicial review of cases for which “statutory” review had been available.¹³⁷ Scalia decried the broader view taken by the Court in the line of cases interpreting the “adversely affected or aggrieved” criterion to require only that the plaintiff assert a harm within the “zone of interests” Congress intended to protect in some substantive statute.¹³⁸

A second line of attack was functional. The judicial relaxation of standing rules, according to Scalia, allowed courts “to address issues that were previously considered beyond their ken,” and to “address both new and old issues promptly at the behest of almost anyone who has an interest in the outcome.”¹³⁹ The effect, to Scalia’s chagrin, was the “emergence of the courts as an equal partner with the executive and legislative branches in the formulation of public policy”¹⁴⁰ The more appropriate role for the courts—one that standing laws could work to restore—is, in Scalia’s view, “their traditional, undemocratic role of protecting individuals and minorities against impositions of the majority.”¹⁴¹ Aggrieved classes of individuals who resemble a *majority*, according to this view, must seek redress in the political branches where democratic theory holds their power should prevail.¹⁴²

Justice Scalia’s opinion in *Lujan I* is best seen as an initial attempt to enshrine this view in law. It is clear that he wished to press his textual arguments to limit APA review under the “adversely affected or aggrieved by agency action” prong but he was constrained by precedent.¹⁴³ The functional path, however, was open to him, particularly with Justice O’Connor’s joinder. Thus he was able to make a significant stride to-

137. *Id.* at 888 n.31 (citing Scalia, *supra* note 8, at 870).

138. *Id.* at 888–89 (citing *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970)).

139. *Id.* at 892–93.

140. *Id.* at 893.

141. *Id.* at 894.

142. Scalia appears to realize that democratic theory might not bear out in practice. Yet he is unmoved. In a provocative generalization that can be read to reflect animus toward the legislative zeal to protect the environment, among other things. Scalia wrote:

Does what I have said mean that, so long as no minority interests are affected, ‘important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?’ Of *course* it does—and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. . . . The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.

Id. at 897 (quoting *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971)).

143. *Lujan I*, 497 U.S. 871, 883 (1990) (“We have long since rejected [the] interpretation . . . which would have made the judicial review provision of the APA no more than a restatement of pre-existing law.”).

ward infusing standing doctrine—albeit only “prudential” standing—with separation of powers concerns. The effect, of course, was to embolden statutory standing as a means to insulate executive discretion from judicial review.

B. Norton v. Southern Utah Wilderness Alliance: Reinventing Traditional Mandamus Restrictions

1. The Opinion

If *Lujan I* provided Scalia a vehicle for enhancing standing doctrine as a means to protect executive discretion, *Norton v. Southern Utah Wilderness Alliance (SUWA)*¹⁴⁴ did the same with respect to traditional mandamus restrictions on judicial review.¹⁴⁵ As in *Lujan I*, environmental groups sued under the APA to correct allegedly illegal administration of the public lands by the BLM.¹⁴⁶ The problem this time, rather than “across the board” malfeasance challenged in *Lujan I*, was agency nonfeasance in the face of a plainly mandatory legislative command.¹⁴⁷

As already described, FLPMA—the organic statute at issue in *Lujan I*—directed the BLM to inventory and classify lands under its administration.¹⁴⁸ Among the categories of lands FLPMA required the BLM to identify was wilderness quality lands that would be suitable for protection under the Wilderness Act of 1964.¹⁴⁹ Only Congress, however, can designate lands for such wilderness protection.¹⁵⁰ Enlisting the work of the BLM in the task of determining which lands to protect, Congress directed the BLM to designate all lands with “wilderness characteristics” as “Wilderness Study Areas” and, through further study, to determine which of those would be “suitable” for designation as wilderness.¹⁵¹ Further, in order to preserve the congressional prerogative to designate wilderness in the future, FLPMA establishes a stringent management standard for all wilderness study areas: “[T]he Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.”¹⁵²

SUWA brought suit to compel the BLM to comply with its nonimpairment mandate for WSAs and other requirements.¹⁵³ It invoked the APA’s provision of a cause of action “to compel agency action unlawfully withheld or unreasonably delayed.”¹⁵⁴ It asked the Court to compel

144. 124 S. Ct. 2373 (2004).

145. See *SUWA*, 124 S. Ct. at 2380.

146. *Id.* at 2377–78.

147. *Lujan I*, 497 U.S. at 890 n.2. Cf. *SUWA*, 124 S. Ct. at 2380.

148. *SUWA*, 124 S. Ct. at 2376.

149. *Id.*

150. 43 U.S.C. § 1782(b) (2005).

151. 43 U.S.C. § 1782(a).

152. 43 U.S.C. § 1782(c).

153. *SUWA*, 124 S. Ct. at 2377–78.

154. *Id.*; 5 U.S.C. § 706(1) (2005).

the BLM to comply with the nonimpairment mandate, to implement provisions in its land management plans relating to off-road vehicle (ORV) use, and to prepare a supplemental EIS to analyze the effects of ORVs where usage had surpassed what was contemplated by the applicable land use plans.¹⁵⁵

Writing for a unanimous Court, Scalia rejected the claims. As he had infused the APA's right of review of final agency action with separation of powers principles in *Lujan I*, Scalia applied traditional mandamus principles to limit the reach of the APA's right to review agency inaction. The first prong of his analysis concludes that only "discrete" agency action is reviewable under the APA.¹⁵⁶ Though the APA includes "failure to act" in its definition of "agency action,"¹⁵⁷ the result is achieved by the construction of "failure to act" as the mirror image of the explicit exemplars of affirmative agency action, which Scalia reads as "circumscribed, discrete agency actions."¹⁵⁸ Thus, the "failure to act" is reviewable only if it is "a failure to take one of the agency actions (including their equivalents) earlier defined."¹⁵⁹

Moreover, according to *SUWA*, even where the agency action at issue is discrete, the APA empowers a court to compel it only if it is "legally required."¹⁶⁰ The limitation derives from Scalia's view that the APA "carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally the writ of mandamus under the All Writs Act."¹⁶¹ Thus, not only must the action sought to be compelled be a "specific, unequivocal command,"¹⁶² but it also must be one "about which [an official] has no discretion whatever."¹⁶³ Courts may compel "ministerial" duties if they are sufficiently clear, but not "discretionary" ones no matter how clear.

The extent to which Scalia's view rigidly and formally separates the judicial and executive roles, particularly in the area of public land law, is evident from his treatment of the specific mandates at issue in *SUWA*. FLPMA's statutory nonimpairment standard is "mandatory as to the object to be achieved," but courts may not remedy its violation, in the face

155. *SUWA*, 124 S. Ct. at 2378.

156. *Id.* at 2379.

157. The APA provides: "'Agency action' includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (2005).

158. *SUWA*, 124 S. Ct. at 2378.

159. *Id.* at 2379.

160. *Id.*

161. *Id.* (citing 28 U.S.C. § 1651(a) (2005)).

162. *Id.* (citing *Interstate Commerce Comm'n. v. N.Y., New Haven & Hartford R.R.*, 287 U.S. 178, 204 (1932)).

163. *Id.* (citing *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 46 (1888) (quoting *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838))).

of agency nonfeasance, because the statute leaves the BLM “a great deal of discretion in deciding how to achieve it.”¹⁶⁴ Scalia meets the claim that ORVs should be eliminated entirely in WSAs by finding no clear legal mandate to do so.¹⁶⁵ To meet the argument that that FLPMA mandates *some* kind of regulation, even if not total exclusion, Scalia falls back on the rigidly constructed “discrete agency action” prong.¹⁶⁶ He rejects the notion that a court, upon finding that wilderness values are being impaired, should order the BLM to do *something*, even if leaving to the agency just what to do (presumably, for later review by the court).¹⁶⁷ Rather, he concludes that “[g]eneral deficiencies in compliance . . . lack the specificity requisite for agency action.”¹⁶⁸

By this reckoning, the discretion *how* to achieve the object (i.e., nonimpairment) becomes discretion *not* to achieve it—at least, so far as a court is concerned:

If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.¹⁶⁹

Implicit in this view is that the evil of judicial oversight of executive discretion outweighs the evil of Congress’s delegate, the administrative officer, failing to act toward accomplishing an admittedly mandatory objective. The hyperbolic concern for executive discretion permits the executive to subvert Congress’s clear intent to maintain wilderness-quality lands unimpaired in order to ensure the possibility of their permanent protection.

Scalia’s treatment of the plaintiffs’ claims based on BLM’s own land use plans show that, in his zeal to protect executive discretion from judicial oversight, he would even shield it from the binding exercise of executive discretion itself. FLPMA employs the two-tiered management structure common to all federal land; it directs BLM to prepare comprehensive land and resources management plans and to implement them largely through later, individualized management decisions.¹⁷⁰ Such individual decisions must be made “in accordance with,” and “conform to,” the terms of the land use plan.¹⁷¹ The plaintiffs sought to enforce

164. *Id.* at 2380.

165. *Id.*

166. *Id.* at 2381.

167. *Id.* at 2380–82.

168. *Id.* at 2381.

169. *Id.*

170. 43 U.S.C. § 1712(a), (e) (2005).

171. *SUWA*, 124 U.S. at 2381; 43 U.S.C. § 1732(a) (2005); 43 C.F.R. § 1610.5-3(a) (2005).

ostensible commitments in a BLM plan to monitor ORV use and ban it if warranted.¹⁷² Rather than find this commitment too discretionary or unclear to be enforced—as he did FLPMA’s nonimpairment mandate—Scalia reasoned that the commitment was nonbinding because “a land use plan is generally a statement of priorities” which “guides and constrains actions, but does not (at least in the usual case) prescribe them.”¹⁷³ According to Scalia’s somewhat circular reasoning, judicial enforcement of such an executive statement of priorities “would lead to pervasive interference with BLM’s own ordering of priorities”¹⁷⁴ because all executive commitments are subject to competing budgetary demands and appropriation of funds.¹⁷⁵

In sum, by relying on the traditional elements of mandamus as a limit to the right to judicial review of agency nonfeasance under the APA, *SUWA* adds a new face to Scalia’s construction of the APA as protecting executive discretion, particularly from judicial oversight. Indeed, Scalia views his interpretation as closing the backdoor to the kind of “broad, programmatic challenge” he stopped at the front in *Lujan I*. The *Lujan I* plaintiffs, he reasoned, would not have succeeded had they cast the BLM’s conduct of the “land withdrawal review program” as a “failure to revise land use plans in proper fashion” or “failure to consider multiple use.”¹⁷⁶ Like the rule of statutory standing in *Lujan I*, the mandamus-based view of the APA’s right of review to compel agency action serves “to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.”¹⁷⁷

2. The Anomalous Disappearance of the Equity Tradition in Mandatory Relief

Justice Scalia’s reinvigoration of mandamus principles as limits on the APA cause of action to challenge agency inaction may have been

172. *SUWA*, 124 S. Ct. at 2382.

173. *Id.* at 2383. *SUWA* does not render nugatory FLPMA’s provision that management must be “in accordance with” and “conform to” land use plans, but it comes close. Scalia admits that final agency actions implementing a plan may be set aside as “arbitrary and capricious” under the APA, 5 U.S.C. § 706(2) if they are inconsistent with a plan. *Id.* at 2380 n.2, 2382. He further acknowledges courts may compel action promised in a land use plans if the plan merely reiterates “duties the agency is already obligated to perform.” *Id.* at 2384. By this, he must mean only nondiscretionary, ministerial duties imposed by statute, for he stops short of endorsing a view that agency-promulgated commitments may be enforced under § 706(1); see *id.* at 2384 (“Of course an action called for in a plan may be compelled when the plan merely reiterates duties the agency is already obligated to perform, or perhaps when language in the plan itself creates a commitment binding on the agency.”) (emphasis added); “We express no view as to whether a court could, under § 706(1), enforce a duty to monitor ORV use imposed by a BLM regulation.” *Id.* at 2384 n.5.

174. *Id.* at 2384.

175. *Id.* at 2383.

176. *Id.* at 2380.

177. *Id.* at 2381.

foretold by his scholarly analysis of Justice Brandeis's opinion in *Morrison v. Work*. The so-called "well established ministerial-discretionary dichotomy" is now an essential part of the analysis whether agency inaction is subject to review under § 706(1).¹⁷⁸ But, as "well established" as Scalia regards it, the universal application of the ministerial-discretion distinction to limit the availability of mandatory relief—the basis on which he denied judicial review in *SUWA*—is an historical anomaly, and an unworkable one to boot.¹⁷⁹ Although his attack on sovereign immunity was part of a chorus of administrative law scholars in the 1960s and 1970s, his reliance then and now on the "ministerial-discretionary dichotomy" is discordant and historically wrong. It reflects the unfortunate swallowing of the equitable remedy of the mandatory injunction by the hypertechnical law governing traditional writs of mandamus.

Like the doctrine of sovereign immunity, the common law of mandatory relief against government officials had become woefully muddled by the mid-twentieth century. Scholarly criticism of legal developments in this area¹⁸⁰—like that of sovereign immunity—led to statutory reform¹⁸¹ and might understandably be overlooked by those who do not bear history in mind. A review of that history and the scholarly criticism shows the error of Scalia's reliance on the traditional law of mandamus.

The writ of mandamus, an ancient legal remedy, is one form of mandatory relief.¹⁸² According to scholarly critics, notably Professors Davis and Byse, American mandamus law suffered from several crippling technicalities. First, Supreme Court precedent held that courts of the District of Columbia had jurisdiction to issue a writ,¹⁸³ but federal

178. Scalia, *supra* note 8, at 907.

179. Justice Scalia is a student of historical anomalies in the law. In a 1985 lecture to the Supreme Court Historical Society, he unraveled two anomalous developments in administrative law. See Antonin Scalia, *Historical Anomalies in Administrative Law*, SUP. CT. Y.B., 1985, at 103, available at http://www.supremecourthistory.org/04_library/subs_volumes/04_c19_i.html. One anomaly, discussed *supra* in Part I, was the creation of the doctrine of federal sovereign immunity by means of its equation with state sovereign immunity. *Id.* at 104–06. Scalia expressed regret about the result of that anomaly, namely, that it amounted to "an irrational impediment to judicial review," though he hastened to add that his objection was to the irrationality, not the impediment. *Id.* at 106.

180. E.g., Kenneth Culp Davis, *Mandatory Relief from Administrative Action in the Federal Courts*, 22 U. CHI. L. REV. 585 (1955); Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

181. Mandamus and Venue Act of 1962, Pub. L. No. 87-748, § 2, 76 Stat. 744 (1962) (codified at 28 U.S.C. §§ 1361, 1391(e)(2005)).

182. Its history in the United States is no less venerable than *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which *Marbury* sought a writ of mandamus for *Madison* to deliver his commission as a justice of the peace. The technicalities that eventually confounded the whole of mandamus law were evident in that seminal case. Though Justice Marshall found that the delivery of the commission was a ministerial, rather than executive, duty which could be a proper subject of the writ, *Madison's* petition ultimately failed because it invoked the Court's original, rather than appellate, jurisdiction.

183. *Kendall v. United States*, 37 U.S. 524, 616–17 (1838).

district courts outside the District of Columbia did not.¹⁸⁴ As a result, courts issued a series of conflicting opinions about when mandamus relief was available to compel a federal officer (often a resident of the District of Columbia, but sometimes not) to perform a mandatory duty, rendering the strategy of pursuing the writ to correct government unlawfulness an uncertain one at best.¹⁸⁵

A second confounding technicality, according to the mandamus scholarship—and a more important one for purposes here—was that the traditional writ of mandamus could compel ministerial, but not discretionary, duties. The core problem with the ministerial-discretionary distinction is that it is so fraught with definitional difficulties as to be essentially unworkable; applying the distinction requires the judge to categorize the duty as one type or the other when, in many instances, the distinction often is unclear or inapt.¹⁸⁶ As Byse and Fiocca noted, “the dichotomy is largely illusory because there are few federal administrative determinations that do not involve an element of discretion and few that are wholly discretionary.”¹⁸⁷ For example, some duties, like FLPMA’s nonimpairment duty, involve a categorical imperative to achieve an objective but also afford discretion as to the exact means to achieve it.¹⁸⁸ Other statutory duties become “clear” or “ministerial” only after an act of interpretation that itself involves the exercise of judgment and discretion.¹⁸⁹ In such cases, orthodox application of the distinction—i.e., one that finds no mandamus jurisdiction whenever the duty involves a scintilla of discretion—would lead courts to deny relief even when the result would contravene plain statutory purposes.¹⁹⁰ Thus, the ministerial-discretionary distinction encourages courts “to avoid the difficult task of determining the scope of the delegated power or discretion. . . . [r]ather than study[] the applicable statute, its legislative history, administrative practice under the statute, and utiliz[e] all other relevant aids to determine the scope of the discretion.”¹⁹¹ The unfortunate result is the unjust denial of judicial review of some administrative actions that are plainly outside the permissible scope of discretion.

184. *M’Intyre v. Wood*, 5 U.S. 504, 505 (1813).

185. *Davis*, *supra* note 180, at 585.

186. *See* Byse, *supra* note 180, at 1509; Byse & Fiocca, *supra* note 180, at 333.

187. Byse & Fiocca, *supra* note 180, at 333.

188. *SUWA*, 124 S. Ct. at 2380.

189. *See* *Davis*, *supra* note 180, at 598–99; Jaffe, *supra* note 53, at 426–27.

190. Both Professors Davis and Jaffe argued that the Supreme Court did not so rigidly apply the ministerial-discretionary distinction. In *Roberts v. United States*, 176 U.S. 221 (1900), for example, the Court allowed mandamus review notwithstanding a question of statutory interpretation, leading Jaffe to conclude that “the alleged discretion of the officer . . . will not protect him from mandamus if the court is convinced that his ruling was erroneous as a matter of law.” Jaffe, *supra* note 53, at 427. Davis went even further, concluding that the Court overruled the ministerial-discretionary distinction, *sub silentio*, by affording relief in *Robertson v. Chambers*, 341 U.S. 37 (1951), a case brought “in the nature of mandamus” under the APA which involved “a difficult problem of statutory interpretation of the kind that is about as far removed from the ‘ministerial’ as any discretionary function may be.” *Davis*, *supra* note 180, at 606.

191. Byse & Fiocca, *supra* note 180, at 334.

Another problem with the ministerial-discretionary distinction, as Professor Davis argued, is that it is founded on an anachronistic understanding of judicial review—one that views the choice as between *de novo* judicial review and none at all.¹⁹² Such a distinction made some sense in the most traditional, formal view of the writ, which was conceived as an action by the sovereign, through a “relator,”¹⁹³ against its officer to compel a duty the officer is legally obligated to perform. Judicial compulsion of merely ministerial duties, about whose existence there was no interpretive discretion, could not infringe on the discretion of the sovereign. But, as Professor Davis argued, in the modern context the distinction needlessly conflates the distinct and separate issues of whether judicial review is available as a threshold matter and the scope of review when it is.¹⁹⁴ In the modern administrative state, where there are a range of available scopes of judicial review, including the “arbitrary and capricious” standard, the discretion of the sovereign can be protected by applying a deferential scope of review.¹⁹⁵

The alternative approach to mandatory relief was the mandatory injunction, which developed in the equity tradition. Unlike the writ of mandamus, the mandatory injunction was not hampered by unworkable and, in some cases, unjust technicalities. Rather, it was the affirmative manifestation of the traditional writ of injunction, which Story summarized in 1836 as “a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ.”¹⁹⁶ Under the principles of equity, courts could issue mandatory injunctions when “from the standpoint of doing justice it was proper in the circumstances.”¹⁹⁷ Among the benefits of the equity tradition of mandatory relief, according to Professor Davis, were its focus on the substantive merits of claims “without interruption from procedural discord” and the fact that equity “does not make availability or scope of review dependent upon an undesirable and unworkable distinction between ministerial and discretionary action.”¹⁹⁸

Despite its superiority as a form of mandatory relief from administrative unlawfulness, the tradition of the mandatory injunction had fallen into disuse long before *SUWA*. But the application of writ of mandamus technicalities to all actions seeking mandatory relief against the government is largely the result of a historical accident that has never been

192. Davis, *supra* note 180, at 601.

193. A “relator” is: “An informer. The person upon whose complaint, or at whose instance certain [traditional] writs [were] issued . . .” BLACKS LAW DICTIONARY 1289 (6th ed. 1990).

194. *Id.* at 597.

195. *See id.* at 601 (“Today we know that our choice is not limited to *de novo* review or no review.”).

196. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 861, at 154 (Cambridge Press 1836), *quoted in* Davis, *supra* note 180, at 589.

197. Davis, *supra* note 180, at 591.

198. *Id.* at 608–09.

properly rectified. Professor Davis traces the initial fading of the mandatory injunction tradition to the 1934 case of *Miguel v. McCarl*.¹⁹⁹ In that case, although the plaintiff sought a mandatory injunction rather than a writ of mandamus, the Court, without explanation or discussion equated the forms of relief and applied mandamus technicalities.²⁰⁰ Professors Byse and Fiocca urged that the Mandamus and Venue Act of 1962 be interpreted to eliminate the ministerial-discretionary distinction but foresaw that a late-hour amendment to the legislation would allow its continued vitality,²⁰¹ particularly if “a busy judge [was] . . . misled by a superficial reading of quotations . . . from some of the older Supreme Court opinions in mandamus cases.”²⁰² They also argued that, even if the ministerial-discretionary distinction were not entirely purged, it could accommodate equitable principles if judges applied it to curtail administrative action beyond the permissible range of discretion, even if the official action involved some level of discretion.²⁰³

Despite its disuse, the equitable approach to mandatory relief has never been expressly rejected by the Supreme Court as a mode of judicial review of federal administrative action. Until *SUWA*, the Court had been silent as to the exact nature of actions for mandatory relief under the APA. Professor Davis believed in 1955 that the Supreme Court was heading toward an interpretation of the APA that would finally jettison mandamus technicalities in favor of the equity tradition of mandatory injunctions. He urged the Supreme Court to “explain that the Administrative Procedure Act has abolished mandamus intricacies, that equity tradition prevails, and that in the future nothing will hinge on the unworkable and harmful distinction between ministerial and discretionary

199. 291 U.S. 442 (1934); see Davis, *supra* note 180, at 597.

200. *Miguel*, 291 U.S. at 452 (stating “[t]he mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations,” citing *Warner Valley Stock Co. v. Smith*, 165 U.S. 28, 31, 33 (1897)).

201. 28 U.S.C. § 1361 provides: “The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” Professor Byse, an architect of the 1962 legislation, argued forcefully that equity, rather than traditional mandamus, principles should thenceforth govern mandatory relief against government officials. Byse & Fiocca, *supra* note 180, at 331–36. Nonetheless, he foresaw that the insertion of the words “in the nature of mandamus”—at the insistence of the Justice Department late in the legislative process—could lead a resurgence of the ministerial-discretionary distinction and other mandamus technicalities. *Id.* at 353–54.

202. Byse & Fiocca, *supra* note 180, at 353.

203. See *id.* at 334–35. Byse & Fiocca preferred the mode of analysis sketched by Chief Justice Taft in *Work v. United States ex rel. Rives*, 267 U.S. 175, 177–78 (1925):

Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has . . . [The] extent [of the officer’s discretion] and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the congressional purpose.

Id. at 335.

action.”²⁰⁴ The 1951 decision in *Robertson v. Chambers*,²⁰⁵ which arose under the APA, had been “completely inconsistent with the mandamus tradition and . . . [could] best be explained on the ground that all the intricacies of mandamus are superseded by the APA—or by a mixture of the APA and common sense.”²⁰⁶ Yet, with citations to a few older Supreme Court opinions in mandamus cases,²⁰⁷ Justice Scalia has done the opposite. He has ensured the perpetuation of the anomaly and the ultimate ascendance of the harmful and unwise ministerial-discretionary distinction.

III. FOOTSTEPS AND REFORMATIONS

Justice Scalia’s footprints on the public lands led in 1970 to the door of the federal courthouse. Today they lead away from it. The discussion thus far has focused on the push and pull of doctrine on Scalia’s compass. But there is another view of the landscape on which he has tread. That view is framed by the identities of the participants in the administrative process and the ends toward which they invoke the third branch. Bowdoin and Tallman, whose cases first piqued Scalia’s interest in sovereign immunity and the public lands, called upon the courts to vindicate traditional private property rights or their statutorily-created equivalent.²⁰⁸ The National Wildlife Federation and the Southern Utah Wilderness Alliance, whose cases he turned away from the courthouse door, asked the courts to vindicate statutorily-enshrined public values.²⁰⁹

At the time Scalia wrote *Conclusions from the Public-Lands Cases*, the presence of groups like NWF and SUWA as plaintiffs in lawsuits seeking to affect national or regional policy was a nascent phenomenon.²¹⁰ Within a few years, however, Professor Richard Stewart recognized that administrative law was in the midst of a “reformation.”²¹¹ That reformation sought to place the public beneficiaries of administrative action on a more equal footing with traditional, private interests, both within the administrative process and in judicial review.²¹² Its broad contours, the reformation would be consistent with providing judi-

204. Davis, *supra* note 180, at 607–08.

205. 341 U.S. 37 (1951).

206. Davis, *supra* note 180, at 605.

207. See *SUWA*, 124 S. Ct. at 2379 (citing *ICC v. New York, N.H. & H.R. Co.*, 287 U.S. 178, 204 (1932), *ICC v. United States ex rel. Humbolt S. S. Co.*, 224 U.S. 474 (1912), and *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 46 (1888) (quoting *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838))).

208. See *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Udall v. Tallman*, 380 U.S. 1 (1965).

209. See *Lujan v. Nat’l Wildlife Fed’n (Lujan I)*, 497 U.S. 871 (1990); *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373, 2373–2385 (2004).

210. The Sierra Club filed its famous suit seeking to stop the development of a Disney ski area in Mineral King Valley, California, in June 1969. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (establishing that aesthetic injury is a sufficient basis for standing in environmental cases); see Oliver A. Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867, 909-21 (2002).

211. Stewart, *supra* note 14.

212. *Id.* at 1712, 1716.

cial review for Bowdoin, Tallman, NWF and SUWA alike. Justice Scalia's denial of judicial review in *Lujan I* and *SUWA* cuts across this grain.²¹³

A. *The Judicial Reformation of Administrative Law*

Professor Stewart described a reformation driven by a need to buttress the eroding theoretical foundations of administrative law. What Stewart called the "traditional" model of administrative law developed in the context of emerging regulatory agencies in the late nineteenth century. Agencies like the Interstate Commerce Commission, for the first time, exercised administrative control over private business conduct.²¹⁴ As Stewart described, the doctrines of the traditional model sought to "reconcile the new assertions of governmental power with a long-standing solicitude for private liberties by means of controls that served both to limit and to legitimate such power."²¹⁵ In the aggregate, the doctrines Stewart associated with the traditional model viewed the regulatory agency as "a mere transmission belt for implementing legislative directives in particular cases."²¹⁶ The traditional model thus legitimated "intrusions into private liberties by agency officials not subject to electoral control by ensuring that such intrusions [were] commanded by a legitimate source of authority – the legislature."²¹⁷ The courts' role in such a model is one of formal containment of agencies within congressional directives in order to protect private autonomy.

With the vast expansion of agency powers during the New Deal, the faults with the traditional model became clear. The traditional model worked to legitimize administrative power as long as Congress provided directives were narrowly drawn, but it failed to justify the exercise of power under schemes that broadly delegated discretion.²¹⁸ Expertise became the new legitimizing tenet. The agency's role was thus reconceived as that of a "manager or planner with an ascertainable goal," and discretion was seen as necessary to their successful discharge of their broad and ambitious responsibilities.²¹⁹ The judicial role under the "expertise" model became one of imposing procedural safeguards and applying procedurally-oriented scope of review doctrines to ensure agency fidelity to congressional goals.²²⁰

213. See Richard J. Lazarus, *The Nature of Environmental Law and the U.S. Supreme Court*, 35 ENVTL. L. REP. NEWS & ANALYSIS 10503, 10515 (August 2005).

214. See Stewart, *supra* note 14, at 1671.

215. *Id.* at 1671–72.

216. *Id.* at 1675.

217. *Id.*

218. *Id.* at 1676–77.

219. *Id.* at 1678.

220. See *id.* at 1679–81 (describing the emergence of the requirements of substantial evidence to support agency factfinding, reasoned consistency in decisionmaking, and clear statement of legislative intent to regulate fundamental individual liberties).

As surely as the traditional model teetered, so did the expertise model. Faith that agency expertise would yield decisions in the public interest soon withered. As Stewart explains, “[t]o the extent that belief in an objective “public interest” remains, the agencies are accused of subverting it in favor of the private interests of regulated and client firms.”²²¹ In this view, agency decisions could be explained as a product not of expertise, but of an “essentially legislative process of adjusting the competing claims of various private interests affected by agency policy.”²²² The victors of this “essentially legislative” game, predictably, were organized, well-funded interests—such as the regulated or client industries—and their policy victories came “at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists, and the poor.”²²³ The result was systematic agency bias in favor of regulated entities.²²⁴

The “reformation” of administrative law, as described by Stewart, was a judicially-driven effort to ground the legitimacy of the “essentially legislative” administrative state in the capability of its procedural law to afford adequate representation for all affected interests.²²⁵ Rules governing judicial review contributed significantly to agency bias. Because only entities subject to sanction by the agency traditionally had the power to invoke formal procedures or seek judicial review, “these groups [were] ensured a forum in which they can force the agency to respond to their views.”²²⁶ To counter this structural imbalance,

courts have changed the focus of judicial review (in the process expanding and transforming traditional procedural devices) so that its dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation

221. *Id.* at 1682–83. Stewart further explains:

[W]e have come not only to question the agencies’ ability to protect the “public interest,” but to doubt the very existence of an ascertainable “national welfare” as a meaningful guide to administrative decision. Exposure on the one hand to the complexities of a managed economy in a welfare state, and on the other to the corrosive seduction of welfare economics and pluralist political analysis, has sapped faith in the existence of an objective basis for social choice.

Id. at 1683.

222. *Id.* at 1683.

223. *Id.* at 1684–85.

224. Stewart goads the public choice critics as speaking with a “dogmatic tone that reflects settled opinion,” but he does not quarrel fundamentally with their conclusion. *Id.* at 1684. He offers, however, a more nuanced version of the reasons for unbalanced agency responsiveness to regulated industries than simple agency capture. Contributing to the problem, he argued, were the inherently weak position of agency regulators whose power is “essentially negative”; the entry-limiting aspects of an entrenched regulatory system; the comparatively scarce resources of regulatory agencies compared with regulated industries; and agencies’ dependence on information controlled by regulated entities and other organized groups. *Id.* at 1685–86.

225. *Id.* at 1683.

226. *Id.* at 1713.

for all affected interests in the exercise of the legislative power delegated to agencies.²²⁷

In short, the reformation sought to legitimize administrative law by placing the beneficiaries of administrative action, such as consumers of products and users of the environment, on an equal footing with the regulated industries, such as manufacturers and polluters. If all interest groups were adequately represented in the administrative process, the exercise of agency authority would be supported by democratic theory. The judicial reformation thus expanded the rights of regulatory beneficiaries in agency proceedings by expanding notions of due process and the protections of formal procedures.²²⁸ On the judicial front, the reformation established “an increasingly strong presumption of judicial review of agency action (or inaction)” and enlarged “the class of interests entitled to obtain judicial review of agency action.”²²⁹

Professor Stewart, to be sure, was a skeptic of the reformation. His fundamental critique of the “interest representation” model was that it could not restore the shaken legitimacy of administrative law because the judicial reforms would not actually ensure adequate representation of all relevant interests.²³⁰ But notwithstanding its theoretical flaws and ramifications, the reformation has certainly been a success from a pragmatic, instrumental perspective. That is to say, it has spawned a generation of administrative and judicial litigation by public beneficiaries of statutory programs—as private attorneys general—that has forced agencies to be accountable to a broader set of affected interests.²³¹ Even if this development falls short of Stewart’s theoretical goals, as Professor Shapiro notes, “pragmatism . . . does not permit the perfect to become the enemy of the good.”²³²

227. *Id.* at 1712. Stewart also described the reformation as follows:

[A]dministrative law is no longer limited to the protection of a small class of private liberty and property interests against unauthorized governmental intrusions, but has assumed far more ambitious responsibilities. During the process of expansion the operation of the traditional model has itself been transformed thereby creating a possible solution to the problem of imbalance in representation in the exercise of agency discretion.

Id. at 1716.

228. *Id.* at 1716.

229. *Id.*

230. See *id.* at 1763; see Sidney Shapiro, *Pragmatic Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP: THE REFORMATION OF AMERICAN ADMINISTRATIVE LAW, Art. 1 at 10–18 (2005), <http://www.bepress.com/ils/iss6/art1> (summarizing what he terms the “counterreformation” spawned by Stewart’s critique) [hereinafter Shapiro, *Pragmatic Admin. Law*]; see also Sidney A. Shapiro, *Administrative Law after the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689 (2000) [hereinafter Shapiro, *Counter-Reformation*].

231. Shapiro, *Pragmatic Admin. Law*, *supra* note 229, at 6–7 (listing recent environmental cases); Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 392 (2004).

232. Shapiro, *Pragmatic Admin. Law*, *supra* note 229, at 7.

B. The Nonreformation of Scalia

Justice Scalia is Catholic,²³³ but he might well invoke a phrase from a famous Shaker song: "To turn, turn will be our delight 'Till by turning, turning we come round right."²³⁴ There is no inconsistency in his opening the courthouse to public lands plaintiffs in 1970 and shutting it to public lands plaintiffs in the 1990s and beyond. His view of the judicial role is consistent through the decades. He views courts as a proper venue for vindicating private rights against intrusion by governmental authority and an improper venue for the vindication of public values against governmental neglect or mismanagement.

As discussed already,²³⁵ Scalia's belief in the limited function of courts is grounded in the assumption that the democratic process functions to effectuate the will of the majority through the political branches and that courts are needed only to protect minority rights against intrusion by the majoritarian exercise of governmental authority.²³⁶ Traditional private rights and their equivalents are, by virtue of their private nature, minority rights. The kinds of public values that drive many environmental plaintiffs and other private attorneys general to seek judicial review, by Scalia's reckoning, are expressions of a majoritarian politics, and the failure of agencies to realize them a majoritarian harm.²³⁷ But even Scalia recognized that democracy does not always run true to the premises on which it is based; he admits that "[i]t may well be . . . that democracy simply does not permit the *genuine* desires of the people to be given effect."²³⁸

Given his reliance on democratic theory and the separation of powers, it is debatable whether Scalia's view of the judicial role—as it has played out in *Lujan I* and *SUWA*—is motivated by the desire to counter-reform administrative law. But his interpretation of standing and mandamus principles plainly has that effect.²³⁹ Scalia himself recognized that his reconception of standing would always afford judicial review for "an individual who is the very *object* of a law's requirement or prohibition."²⁴⁰ And he contrasted that with the "increasingly frequent administrative law cases in which the plaintiff is complaining of an agency's

233. See George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990) (analyzing how Justice Scalia's Catholicism affects his jurisprudence).

234. Edward D. Andrews, *Simple Gifts*, in *THE GIFT TO BE SIMPLE: SONGS, DANCES AND RITUALS OF THE AMERICAN SHAKERS* 136 (1962).

235. See *supra* Part II.A.2.

236. Scalia, *Doctrine of Standing*, *supra* note 89, at 896 ("It is hard to believe that the democratic process, if it works at all, could not and should not [be] relied on to protect the interests of [an] almost all-inclusive group.")

237. See *id.* at 894.

238. *Id.* at 897.

239. See Shapiro, *Counter-Reformation*, *supra* note 229, at 719 ("Thus, the effect, if not the intent, is to roll back standing doctrine to its status before the reformation, when regulatory beneficiaries generally were not able to sue.")

240. Scalia, *Doctrine of Standing*, *supra* note 89, at 894.

unlawful *failure* to impose a requirement or prohibition on *someone else*.²⁴¹ The majoritarian harm in the latter case, in his view, deserves no vindication in the courts. Bowdoin and Tallman, asserting that interference with their private property rights, may obtain review, while NWF and SUWA must rely on the political branches, not the courts, to correct the BLM's failure to effectuate public values.

C. The Congressional "Reformation" of Public Land Law

It is tempting to think of public land law as a shining example of the reformation of administrative law. In the days before FLPMA and similar laws mandating the retention and management of public lands, the typical plaintiff in a public lands case resembled the *object* of government regulation, whose private autonomy the traditional model of administrative law sought to protect. The reason for that is that the disposition of the public domain was a dominant goal of public land policy, and Congress sought to accomplish that goal by privatizing public natural resources.²⁴² In many instances, fee title in public land was transferred to private parties under the terms of statutory grants. In other instances, less-than-fee private interests in public lands were authorized by statute. The administration of public land statutes by the Secretary of the Interior and the General Land Office involved the exercise of authority over private claimants to ensure that the transfer or creation of property interests conformed with statutory terms. In seeking judicial intervention, disappointed or frustrated claimants thus asserted what looked like traditional private property rights.

By the same token, many of today's public lands plaintiffs resemble the traditional regulatory beneficiary whose interests are affected by the agency regulation (or deregulation) of others. They seek judicial review under the APA based on harm to interests within the zone of protection of FLPMA and other modern public land management statutes that embody a range of values, including protection and preservation of public natural resources. The realization of the conservation-oriented values they assert, of course, depends on the limitation of the extractive use of public land which, in turn, depends on the exercise of agency discretion to that end. The emergence of these non-extractive values in public land law coincided with an increase in public participation rights and opportunities at the agency level and more effective use of the APA's judicial review provisions by public interest groups.

But there is a key difference between the reformation of public land law in the 1960s and 1970s and the broader reformation of administrative law which Professor Stewart analyzed. Stewart's reformation, as de-

241. *Id.*

242. *E.g.*, Mining Act of 1872, 30 U.S.C. §§ 21-23, 26, 28; Homestead Act of 1862, 12 Stat. 392 (1862) (repealed 1976).

scribed above, was a judicially-driven effort to counteract undue influence over agency discretion by regulated industries. Such influence was the cause of agency failure to effectuate congressional goals, and the very legitimacy of administrative law depended on redressing systemic agency bias. The reformation of public land law, by contrast, was congressionally-driven. It reflected a new ordering of public values in public land management. The reordering was away from the public value of natural resources development, effectuated by creation of private interests in public land, toward a set of public values of conservation that were not reducible to traditional private interests or their equivalent. In this perspective, the new public interest plaintiff is not in a meaningfully different position than the traditional "private rights" plaintiff asserting injury to statutorily-created property interests.

D. The Public Lands and the Counterreformation of Administrative Law

What, then, to make of Scalia's use of standing and mandamus doctrine to curtail judicial review rights of environmental advocates in the public land cases? One conclusion would be that, if Scalia wanted to lead a counterreformation of administrative law, public land law should not be the place to start. That is because there is no valid traditional model to which to roll back in the context of public land law. The notion that the traditional public lands plaintiff for whom Scalia brushed aside the doctrine of sovereign immunity was asserting a private interest that is the proper subject of judicial intervention is illusory. The private interest in such a case is only a proxy for the public interest in promoting natural resources development through disposing of the public lands. There is no valid basis for providing such proxy rights any greater judicial protection than modern environmental interests.

Another conclusion, however, is that the public lands provide something of a safe haven from which to launch a counter reformation of administrative law. First, public lands management involves vast discretion and among the broadest permissible legislative delegations of power.²⁴³ The discretion is often the result of intentionally broad statutory standards, such as multiple use.²⁴⁴ Sometimes, as in *SUWA*, it is a product of the many different ways a mandatory statutory standard might be achieved.²⁴⁵ Second, as the constellation of public values in public land management grew, so did the complexity of administrative process through which those values are to be realized. Public land agencies now must uniformly engage in comprehensive land use planning such as that

243. Sandra B. Zellmer, *The Devil, the Details and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1021-47 (2000) (discussing the delegation doctrine and the public lands).

244. 16 U.S.C. § 531; see George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 ECOLOGY L.Q. 602, 610 (1999).

245. See *SUWA*, 124 S. Ct. at 2381 (2004).

mandated by FLPMA. And most decisions made in plans are not self-effectuating but rather must be implemented through future, specific decisions. The “considerable legal distance” between the exercise of discretion at the planning stage and the implementation of policy on the ground conveniently provides cover for judicial efforts to buttress doctrines that protect executive discretion from judicial oversight.²⁴⁶

CONCLUSION

Which brings us back to the distinctiveness of the public land law and its pedigree as an original field of American administrative law. In *Conclusions from the Public-Lands Cases*, Professor Scalia recognized that public land law was at once distinctive and broadly prophetic. Its distinctiveness enabled the development of a doctrine, the inapplicability of sovereign immunity, on a different path than administrative law generally. Its pedigree foretold the eventual application of the rule against sovereign immunity to challenges to administrative action, even if by means of legislative action. There is probably no better indication of the prophetic value of a law professor’s ideas than whether that professor becomes a Justice on the Supreme Court. True to prophecy, in the public land cases, standing and the traditional ministerial-discretionary dichotomy have emerged from Justice Scalia’s pen as potent doctrines to protect executive discretion. As a practical matter, Scalia has effectuated a sort of counterreformation of judicial review in public land cases. Whether this, too, is a prophecy for administrative law, we can only wait to see.

246. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 730 (1998).

