ARTICLE III—CASE AND CONTROVERSY CLAUSE—IN DETERMINING AN ENVIRONMENTAL ORGANIZATION'S STANDING TO CHALLENGE GOVERNMENT ACTIONS UNDER THE LAND WITHDRAWAL REVIEW PROGRAM, THE USE OF LANDS IN THE VICINITY OF LANDS ADVERSELY AFFECTED BY ORDER OF THE BUREAU OF LAND MANAGEMENT DOES NOT CONSTITUTE DIRECT INJURY—*Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990).

V. Maria Cristiano

I. INTRODUCTION

Article III of the United States Constitution provides in part that the power of the judicial branch shall extend to all "cases and controversies," both legal and equitable, that arise under the Constitution, federal law, or treaties.[1] The United States Supreme Court has interpreted article III's "case or controversy clause" as requiring plaintiffs to demonstrate standing when their ability to obtain judicial resolution of a dispute is challenged.[2] At a minimum, the constitutional prerequisite of standing mandates that a litigant prove injury-in-fact, proximate causation, and redressability.[3] Courts, however, have taken a liberal approach to

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[1] U.S. CONST. art. III, § 2, cl. 1. In full, the "case or controversy" clause provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Minsters and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

[2] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 107 (1978) [hereinafter TRIBE]. Professor Tribe has opined that "[s]tanding differs, in theory, from all other elements of justiciability by its primary focus on the *party* seeking to get his complaint before a federal court and only secondarily 'on the *issues* he wishes to have adjudicated.'" *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968) (emphasis in original) (footnotes omitted)).

[3] *Id.* at 108. *See e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (citations omitted). *See infra* notes 38-39 and accompanying text (discussing standing requirements under the Administrative Procedures Act, 5 U.S.C. § 702 (1966)).

standing where environmental organizations seek to challenge the federal government's administrative actions.[4] The Supreme Court recently revisited the issue of standing in *Lujan v. National Wildlife Federation*[5] to determine whether an environmental organization had standing under the Administrative Procedures Act ("APA")[6] to challenge the actions of the federal government regarding the use of public lands.[7]

In 1985, the National Wildlife Federation ("NWF")[8] filed suit in the United States District Court for the District of Columbia against the United States Department of the Interior, the Secretary of the Interior,[9]

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[4] *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc. 438 U.S. 59 (1978); National Wildlife Fed'n v. Hodel, 839 F.2d. 694 (D.C. Cir. 1988); Humane Soc'y of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988); Energy Action Educ. Found. v. Andrus, 654 F.2d. 735 (D.C. Cir. 1980); Midwestern Gas Transmission Co. v. Federal Energy Regulatory Comm'n, 589 F.2d 603 (D.C. Cir. 1978); Sierra Club v. Andrus, 581 F.2d. 895 (D.C. Cir. 1978). *See also* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 504, § 22.02-8 (1976) (asserting that courts are more comfortable with protecting the environment). *But see* Note, *Meeting the Requirements for Standing: A Framework for Environmental Interest Groups*: Lujan v. National Wildlife Fed'n, 14 HAMLINE L. REV. 277 (1990).

[5] 110 S. Ct. 3177 (1990).

[6] 5 U.S.C. § 702 (1966). *See infra* notes 38-39 and accompanying text (discussing standing requirements under the APA).

[7] *Lujan*, 110 S. Ct. at 3182.

[8] The NWF is a non-profit organization with over 4.5 million members that work to protect natural resources and educate the public about the environment. Note, *Standing: Closing the Doors of Judicial Review*, 36 S.D.L. REV. 136, 138 (1991).

[9] The Secretary of the Interior at the commencement of this lawsuit, Manuel Lujan, Jr., was empowered by the Federal Land Management Policy Act ("FLMPA") to maintain a record of public lands and create strategies for their use. *Lujan*, 110 S. Ct. at 3183. *See* 43 U.S.C. §§ 1711-12 (1990). Lujan was also authorized to "make, modify, extend or revoke withdrawals." *Lujan*, 110 S. Ct. at 3183 (citing 43 U.S.C. § 1714(a) (1982)). Within fifteen years, Secretary Lujan was further required to review the existing withdrawals and determine which were or could continue to be "consistent with the statutory objectives of the programs for which the lands were dedicated." *Id.* (citing 43 U.S.C. § 1714(b) (1982)). This was an administrative action ultimately assigned to the Bureau of Land Management. *Id.* (citing 43 U.S.C. § 1714(1)(2) (1982)). Secretary Lujan was empowered by the FLMPA to (1) process proposals for the withdrawal of land to effectuate its sale, (2) to clear records where the land designated for withdrawal was "superseded by congressional action or overlap[ped] with another withdrawal designation," or (3) "to restore the land to multiple use management." *Id.* (citing 43 U.S.C. § 1701(a)(7) (1982)). Although Lujan also participated in classifying the lands, the final decisions on the classification or the procedure to be followed in making such a decision could be made by the Secretary, by the BLM, or by petition to the department. *Id.* (citing 43 C.F.R. §§ 2450, 2460 (1988)).

The FLMPA does not define "land use plans," but does provide nine criteria as

and the Director of the Bureau of Land Management ("BLM")[10] alleging that the federal government had violated various federal statutes, including the Federal Land Management Policy Act ("FLMPA"),[11] the National Environmental Protection Act

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guidelines to the Secretary's strategy:

> (1) use and observe the principles of multiple use and sustained yield . . . ;
> (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
> (3) give priority to the designation and protection of areas of critical environmental concern;
> (4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;
> (5) consider present and potential uses of the public lands;
> (6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
> (7) weigh long-term benefits to the public against short-term benefits;
> (8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and
> (9) [sic] coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located

43 U.S.C. § 1712(c) (1990).

[10] The BLM, a subdivision of the Department of the Interior, was organized to enforce certain provisions of the FLMPA, commonly known among the Department and environmentalists as the "land withdrawal review program." *Lujan*, 110 S. Ct. at 3183. The land withdrawal review program is not recognized as an administrative program because the BLM has never issued an order or regulation for its creation. *Id.* at 3189. The program was merely a name NWF coined for the BLM's continual review of withdrawal revocation applications, classifying lands as public and developing "land use plans." *Id.* Pursuant to the Secretary's authorization under 43 U.S.C. § 1714(l), the BLM reviews and recommends the withdrawal of public lands in 11 western states. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3183 (1990).

[11] The FLMPA was created to eradicate administrative problems which evolved from the enforcement of ineffective and overlapping legislation. 43 U.S.C. § 1701 (1982). The Mining Law of 1872, 30 U.S.C. § 22, and the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181, gave United States citizens the right to acquire title and rights to large portions of land owned by the federal government. *Lujan*, 110 S. Ct. at 3182. Prior to the FLMPA, withdrawals were created by presidential authority while classifications were authorized by Congress. *Id.* The Pickett Act, 43 U.S.C. § 141, empowered the Executive Branch to remove protection over private claims to public lands by reserving or classifying the lands for public purposes. *Lujan*, 110 S. Ct. at 3182. The Taylor Grazing Act of 1934, 43 U.S.C. § 315(f), and the 1964 Classification and Multiple Use Act, 43 U.S.C. §§ 1411-18, gave the Secretary of the Interior authority to classify lands for

("NEPA"),[12] and the Administrative Procedures Act ("APA"),[13] in administering certain federal lands under the "land withdrawal review program."[14] After the government raised the issue of standing, the NWF further alleged that the organization itself, as well as its members, were injured by the administrative decisions permitting certain mining activity which adversely impacted the natural beauty of the nearby lands.[15] The NWF subsequently amended its complaint to address the

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"disposal or retention by the federal government." *Lujan*, 110 S. Ct at 3182. Chaos resulted from these various Acts and the Executive Orders which accompanied them and ultimately led to reforming the system governing the disposal and retention of public lands by creating the FLMPA, an Act which favored the retention of "public lands for multiple use management." *Id.* at 3183. The FLMPA incorporated the prior legislation by allowing the Secretary to review and modify any previously existing classifications or withdrawals. *Id. See also* 43 U.S.C. §§ 1712(d), 1714(a) (1990).

[12] 42 U.S.C. § 4321 (1969). *See infra* note 69 for the text of the NEPA at issue in *Lujan*.

[13] *See* 5 U.S.C. § 706 (1966). The statute provides in part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be-
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Id. NWF alleged that the court abused its discretion in failing to consider the additional member affidavits. *Lujan*, 110 S. Ct. at 3181.

[14] Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3183-84 (1990). The NWF contended that the FLMPA was violated when petitioners failed to: (1) develop, maintain or revise land use plans pursuant to 43 U.S.C. § 1712(a) (1986); (2) consider multiple uses for land pursuant to *id.* § 1732(a); (3) recommend withdrawals to the president for eleven western states pursuant to *id.* § 1714(l); (4) provide public notice of administrative decisions pursuant to *id.* §§ 1701(a)(5), 1712(f), 1739(g); and (5) focus inordinately on exploiting and developing minerals. *Lujan*, 110 S. Ct. at 3184. Respondent NWF further alleged that petitioner Lujan's failure to submit a detailed statement regarding the environmental impact of their actions, pursuant to 42 U.S.C. § 4332(2)(C), violated the NEPA. *Lujan*, 110 S. Ct. at 3184. Furthermore, the NWF alleged the APA required administrative decisions to be set aside pursuant to 5 U.S.C. § 706 because petitioners' actions were "arbitrary, capricious, [and] an abuse of discretion." *Lujan*, 110 S. Ct. at 3184.

[15] *Lujan*, 110 S. Ct. at 3184. The NWF obtained a list from the Federal Register of 1,250 decisions handed down by the BLM since January 1, 1981, regarding the status of government lands and appended the list to the complaint to identify those lands which were adversely affected by the land withdrawal review program. *Id.* The adverse effects

issue of standing by including affidavits from its members who alleged direct personal injury.[16]

The district court granted the NWF preliminary injunctive relief prohibiting the government from exercising administrative power over other public lands.[17] On appeal, Secretary Lujan renewed his motion to dismiss the action based upon the NWF's lack of standing under the APA.[18] The United States Court of Appeals for the Fourth Circuit denied the motion to dismiss, affirmed the district court's grant of preliminary injunctive relief, and remanded the case for further proceedings.[19] On remand, however, the district court found that the NWF was unable to establish the standing requirements necessary to withstand a motion for summary judgment.[20] The court of appeals

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of these orders resulted in removing protective measures from over 180 million acres of federally-owned land in 17 states. National Wildlife Fed'n v. Burford, 878 F.2d 422, 425 (D.C. Cir. 1989), *rev'd sub. nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990). In addition, over 13 million acres of land were made available to private parties for mining. *Id.*

[16] *Lujan*, 110 S. Ct. at 3185. One member, Peterson, alleged that her "recreational use and aesthetic enjoyment of federal lands" in Wyoming were adversely affected when the BLM allowed the South Pass-Green Mountain area of Wyoming to be leased and mined for oil and gas. *Id.* at 3187. Another member, Erman, submitted an affidavit reciting similar injury occurred from mining in 5.5 million acres of land near the Colorado River in Arizona. *Id.* at 3188. Both affidavits stated that the individual injury occurred upon land that was "in the vicinity" of those lands adversely affected by the administrative decisions of the BLM. *Id.* at 3187.

[17] *Id.* at 3184.

[18] *Id. See infra* notes 38-39 and accompanying text (discussing standing requirements under the APA).

[19] *Lujan*, 110 S. Ct. at 3184. The court of appeals affirmed the district court's grant of injunctive relief and agreed that the NWF had standing to sue. *Id.* The court of appeals determined that the complaint sufficiently alleged that NWF members used the environmental resources that would be harmed by the government's actions. *Id.* Moreover, the court stated that the complaint sufficiently identified lands under administrative action because the lands identified were part of the 1,250 land status actions compiled in the Federal Register. *Id.* Furthermore, the NWF alleged that the harm to itself and its members was a result of those particular land status actions. *Id.* The Court specifically relied upon the affidavits submitted by Peterson and Erman to support the contention that the NWF used the lands under the administration of the land withdrawal review program and, thus, would be adversely affected by agency action. *Id.*

[20] *Id.* at 3184-85. The NWF submitted four additional affidavits from its members to support the issue of standing, but the affidavits were ultimately rejected by the district court as untimely. *Id.* at 3185. The Supreme Court noted that the district court's initial determination and the court of appeals' affirmance of the denial of the motion to dismiss was not controlling because the motions were governed by separate rules under the

again reversed.[21] Accordingly, the United States Supreme Court granted certiorari to determine whether the organization and its members were in fact able to establish standing to challenge the administrative decisions.[22]

This Note will first discuss the evolution of the standing requirement for challenging governmental action in environmental litigation. Next, this Note will examine the development of the law of "ripeness" in determining when governmental action may be challenged. Finally, this Note will discuss the Supreme Court's application of both standing and ripeness requirements in the *Lujan* case.

II. GENERAL REQUIREMENTS OF STANDING

A. STANDING UNDER ARTICLE III

The doctrine of standing was derived from various interpretations of article III of the United States Constitution.[23] The Supreme Court has interpreted the "case and controversy" requirement of article III as a limit upon the jurisdiction of the federal courts.[24] Moreover, standing, as an element of justiciability, serves as (1) a prohibition against advisory opinions, and (2) an assurance of separation of powers by defining the

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Federal Rules of Civil Procedure. *Id.* Furthermore, the district court found that the Peterson and Erman affidavits were inadequate to challenge the land classifications specified in the complaint as adversely affecting them, let alone all of the 1,250 individual land classifications. *Id.*

[21] *Id.* at 3185. The court of appeals reviewed the district court's decision to grant summary judgment to Lujan and determined that the trial court abused its discretion by not considering the four additional affidavits. *Id.* The Fourth Circuit also held that because the NWF had standing to challenge the individual land determinations, it also had standing to challenge all 1,250 land decisions in one action. *Id.*

[22] Lujan V. National Wildlife Fed'n, 110 S. Ct. 3177, 3178 (1990). A second issue presented for the Court's determination was whether Secretary Lujan was entitled to summary judgment under FED. R. CIV. P. 56(e). *Lujan*, 110 S. Ct. at 3186. For a discussion of the Court's decision with respect to the issuance of summary judgment, see *infra* notes 172-75 and accompanying text.

[23] *See generally* Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862 (1985) (reviewing decisions of the Burger Court relating to justiciable issues, with emphasis on "injury," asserting the rights of a third party, and representative standing). For the full text of article III, § 2, cl. 1, see *supra* note 1.

[24] *See supra* note 2 and accompanying text (discussing the interpretation of the case and controversy clause).

role of the judiciary.[25] Accordingly, the federal courts' ability to entertain lawsuits is limited to deciding questions "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[26] Consequently, article III has been construed to maintain separation of powers by ensuring that "[f]ederal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."[27]

Pursuant to article III, a controversy is non-justiciable when it involves a political question,[28] an advisory opinion,[29] a moot issue,[30] or when the plaintiff lacks standing.[31] In addition, the United States Supreme Court has provided further limitations on the article III standing requirement based on prudential concerns.[32]

To determine if standing is proper under article III, a federal court must determine whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[33] In order to avoid vague, hypothetical or abstract issues, therefore, the federal court must examine the plaintiff's basis for standing to assure that the plaintiff is the proper party for adjudicating

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[25] Flast v. Cohen, 392 U.S. 83, 88 (1968) (holding that a taxpayer has standing to challenge federal spending for parochial schools as unconstitutional under the first amendment).

[26] *Id.* at 95.

[27] *Id.* at 97. *See also* Muskrat v. United States, 219 U.S. 346 (1911) (declining to interpret the validity of an act of Congress from which did not arise from a controversy between two parties).

[28] *See* Baker v. Carr, 369 U.S. 186 (1962).

[29] *See* Muskrat v. United States, 219 U.S. 346 (1911).

[30] *See* San Mateo County v. Southern Pac. R.R. Co., 116 U.S. 138 (1885).

[31] *See* Flast v. Cohen, 392 U.S. 83, 97 (1968). *See also* Braxton County Court v. West Virginia, 208 U.S. 192 (1908).

[32] *See* Schlesinger v. Reservists Comm'n to Stop the War, 418 U.S. 208, 220 (1974) (the judiciary will not hear "generalized grievances" shared by the populace of citizens); Warth v. Seldin, 422 U.S. 490, 502 (1975) (plaintiff may not litigate a claim based upon a third party's rights); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (plaintiff's claim must fall within the zone of interests protected or regulated by the statute or constitutional provision).

[33] *Flast*, 392 U.S. at 99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

the asserted issue.[34] The Supreme Court has held that, at an "irreducible minimum," the following three-part test must be fulfilled to satisfy standing: first, the plaintiff must have suffered "injury-in-fact";[35] second, the injury must be proximately caused by the challenged action;[36] and third, the plaintiff's question must be capable of being rectified by a favorable judicial decision.[37]

B. SPECIFIC STANDING REQUIREMENTS UNDER THE APA

An individual is entitled to judicial review of federal administrative action under section 10 of the APA when he or she is "suffering legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action within the meaning of a relevant statute."[38] With respect to this section, the Supreme Court has formulated a two-part

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[34] *Id.* at 100.

[35] *See infra* notes 55-82 and accompanying text.

[36] *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978).

[37] *See* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 473 (1982). In *Valley Forge*, the Court considered whether the respondent, an organization dedicated to keeping the state and church separate, had standing to challenge the authority of the Secretary of Health, Education, and Welfare to transfer property under the Federal Property and Administrative Service Act of 1949 to a church-affiliated college. *Id.* at 470.

[38] 5 U.S.C. § 702 (1966). The statute provides in full:

> 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. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id. (emphasis added). For a general discussion of standing under the APA, see Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

inquiry to determine whether a plaintiff has established standing; namely, (1) whether the plaintiff has suffered injury-in-fact, and (2) whether the challenged action falls within the zone of interests protected under the statute.[39]

In *Data Processing Service Organizations, Inc. v. Camp*[40] the Supreme Court acknowledged standing on behalf of a business owner by applying the two-part test.[41] In *Data Processing*, the owner of a business which sold data processing services brought an action against the Comptroller of Currency and a national bank, challenging a ruling promulgated by the Comptroller of Currency which allowed national banks to provide data processing services in addition to banking services.[42] Writing for the

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[39] *See* Barlow v. Collins, 397 U.S. 159, 164 (1970) (tenant farmers had standing to challenge a regulation issued by the Secretary of Agriculture under the Soil Conservation and Domestic Allotment Act, which would only allow farmers to assign payments received under the "upland cotton program" to secure cash advances or financing to grow crops); *see also* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152-53 (1970). *See generally* TRIBE, *supra* note 2, § 3-19, at 142. Professor Tribe related the zone of interests test to one of the rules contained within the Supreme Court's prudential policies regarding third party standing. *Id.* Relying on Clarke v. Securities Industry Assoc., 479 U.S. 388 (1987), Professor Tribe stated:

> The test operates as 'a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision' and, where the plaintiff is not the subject of the challenged action, the test 'denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'

Id. (quoting *Clarke*, 479 U.S. at 399). For a discussion of the "zone of interests" aspect of the two part test, see *infra* notes 83-97 and accompanying text.

[40] 397 U.S. 150 (1970).

[41] *Id.* at 151-52. Justice Douglas, writing for the Court, relied upon the general notion of standing established in *Flast*, that standing depends on "whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 101 (1968)). The Justice acknowledged that both *Flast* and *Data Processing* had "the same Article III starting point," but that the two did not "track" one another because the former was a taxpayer suit and the latter was a competitor's suit. *Id.* at 152.

[42] *Id.* Data Processing challenged the comptroller's action as violative of the Bank Service Corporation Act and the National Bank Act. *Id.* at 157 (citing 12 U.S.C. § 24 (as amended 1988 and Supp. 1991)). *See also* Bank Services Corporations Act, 12 U.S.C. § 1861 (as amended 1982). Data Processing also brought suit against the American National Bank & Trust Company which had attempted to engage in data processing services. *Data Processing*, 397 U.S. at 151.

Court, Justice Douglas noted that the lower court had erred in denying standing to the business owner by relying on the "legal interests test."[43] Rejecting the lower court's holding, the Justice maintained that the second inquiry to determine standing under the two-part test is whether the right sought to be protected falls "arguably" within the zone of interests to be protected or regulated by the statute or constitutional provision at issue.[44] The Court held that the zone of interests test was satisfied because a federal statute prohibited the conduct at issue and, therefore, the petitioner was arguably within the zone of interests sought to be protected by statute.[45]

Initially acknowledging that injury-in-fact may be demonstrated by non-economic loss, as well as financial loss,[46] Justice Douglas determined that a potential for financial loss existed because the possibil-

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[43] *Data Processing*, 397 U.S. at 153. The lower court relied upon the "legal interests test" to determine standing. *Id.* Justice Douglas stated that the "legal interests test goes to the merits of the case and inquires as to whether "'the right invaded is a legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.'" *Id.* (quoting Tennessee Power Co. v. TVA, 306 U.S. 118, 137-38 (1939)). The requirement of showing an invasion of a legal right was gradually eroded by FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) and Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942) (each case involved an express right to review authorized by statute in the communications field where plaintiff was adversely affected by agency action).

[44] *Data Processing*, 397 U.S. at 153. Justice Douglas acknowledged that the Court should follow a "rule of self-restraint" with respect to the issue of standing. *Id.* at 154 (quoting Barrows v. Jackson, 346 U.S. 249, 255 (1953)). The Justice noted, however, that when a party falls within the zone of interests under statutory protection, there was a trend by the courts to expand the class of persons able to protest agency action. *Id.* The Justice further stated that "[t]he whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend." *Id.* Justice Douglas, in fact, noted that in previous decisions "no explicit statutory provision was necessary to confer standing . . . [if the party] bringing suit was within the class of persons that the statute was designed to protect." *Id.* at 155 (citing Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968)).

[45] *Id.* At the time of this controversy the statute at issue read: "No bank service corporation may engage in any activity other than the performance of bank services for banks." *Id.* (quoting the Bank Services Corporation Act of 1962, Pub. L. No. 97-320, § 709, 96 Stat. 1542 (1962) (codified as amended at 12 U.S.C. § 1864 (1982)).

[46] *Id.* at 152. Justice Douglas explained that economic and non-economic loss are two types of injuries that must be related to the interest sought to be protected within the challenged statute or constitutional provision. *Id.* at 153. In addition, the Justice stated that "[t]hat interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values." *Id.* at 154 (quoting Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965)). The Court mentioned "these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rel[ied] here." *Id.*

ity of future lost profits existed when national banks elect to compete in the data processing services market.[47] Furthermore, the Justice concluded that the requisites for injury-in-fact existed where one bank was presently performing, or in preparation of performing, data processing services for two of the plaintiff's customers.[48] Reasoning that Data Processing suffered economic injury, the Court found that injury-in-fact resulted from the Comptroller's ruling which expressly allowed national banks to provide such data processing services.[49]

Next, Justice Douglas posited that a party whose interests are protected by a federal statute and subsequently violated by agency action would be conferred standing, if not specifically by the statute itself, by the standing provisions of the APA.[50] The Justice stated that the APA confers standing to a person "aggrieved by agency action within the meaning of a relevant statute."[51] Justice Douglas noted, however, that as a final inquiry after application of the two-part test, the court must also determine whether judicial review has been precluded by statute.[52] The majority recognized that for judicial review to be precluded under the APA, a statute must either specifically withhold such review or "give clear and convincing evidence of an intent to withhold it."[53] Applying this standard, the Court held that the federal banking statutes, which Data Processing alleged were violated by the Comptroller's conduct,

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[47] *Id.* at 152.

[48] *Id.*

[49] *Id.* The Comptroller of Currency created a ruling in 1966 which stated: "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." *Id.* (quoting COMPTROLLER'S MANUAL FOR NATIONAL BANKS ¶ 3500 (October 15, 1966)).

[50] Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 153-55 (1970). *See infra* note 38 and accompanying text (discussing the standing requirements under the APA).

[51] *Data Processing*, 397 U.S. at 153 (quoting 5 U.S.C. § 702 (1964 ed., Supp. IV). *See supra* notes 38-39 and accompanying text (discussing the requirements of standing under the APA).

[52] *Data Processing*, 397 U.S. at 156. Judicial review is determined by looking at the congressional intent behind the legislation. *Id.* The APA authorizes judicial review with certain exceptions. *Id.* According to section 701(a) of the APA, judicial review is precluded where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1964 ed., Supp. IV).

[53] *Data Processing*, 397 U.S. at 156. (quoting H.R. REP. No. 1980, 79th Cong., 2d Sess., at 41 (1946)). Justice Douglas stated, "[t]here is no presumption against judicial review and in favor of administrative absolutism unless that purpose is fairly discernible in the statutory scheme." *Id.* at 157 (citations omitted).

were "relevant statutes" within the meaning of section 702 of the APA and that neither Act precluded judicial review of the Comptroller's ruling regarding permissible activities for national banks.[54]

C. INJURY-IN-FACT IN ENVIRONMENTAL LITIGATION

Two years after *Data Processing*, the Supreme Court established the requirement of "direct injury" in litigation brought for the purpose of protecting the environment.[55] In *Sierra Club v. Morton*,[56] the Court invoked the judicial review provisions of the APA in order to determine whether an environmental organization had standing to initiate a lawsuit to protect Mineral King Valley, an undeveloped recreation area, from impending plans of development by Walt Disney Enterprises to convert the Valley into a ski resort.[57] The Court refused to acknowledge standing on behalf of the Sierra Club, concluding that the organization's complaint did not allege any direct injury suffered by its individual members.[58] According to the Court, the complaint merely alleged the actions of the government were "personally displeasing or distasteful" to Sierra Club members.[59]

Writing for the majority, Justice Stewart invoked the test articulated in *Data Processing* requiring the Sierra Club to meet the injury-in-fact

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[54] *Id.* Justice Douglas acknowledged that neither the Bank Service Corporation Act nor the National Bank Act sought to protect a specific group, that their general policy was obvious, and persons whose interests were adversely effected could be easily identified. *Id.*

[55] Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

[56] *Id.* at 727.

[57] *Id.* at 729-30. Walt Disney's construction plan encompassing 80 acres of land was approved by the Forest Service in January, 1969. *Id.* at 729. The plan included a $35 million complex of motels, swimming pools, parking lots, and other buildings to accommodate 14,000 customers per day. *Id.* Additionally, the plan proposed to construct ski lifts, ski trails, and other facilities to accommodate skiers along the slopes. *Id.* Furthermore, a 20 mile highway was to be provided by California along with high-voltage power lines. *Id.*

[58] *Id.* at 740-41.

[59] *Id.* at 731. Sierra Club sued "as a membership corporation with 'a special interest in the conservation and the sound maintenance of the national parks, games refuges and forests of the country.'" *Id.* at 730. Although the district court granted Sierra Club a preliminary injunction against the Walt Disney construction, the Court of Appeals for the Ninth Circuit reversed, maintaining that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that [their] actions [were] personally displeasing or distasteful to them." *Id.* at 731 (quoting Sierra Club v. Hickel, 433 F.2d 24, 33 (9th Cir. 1970)).

and zone of interests prongs of the two-part test.[60] The Justice initially posited that destruction of the natural beauty of the land and impairment of its enjoyment in some scenarios could satisfy the first requirement of injury-in-fact.[61] Further maintaining that the size of the group sharing the injury had no bearing upon the ability of a collective group to obtain judicial review,[62] the Court then stressed that the injury must amount to more than a "cognizable interest."[63] Accordingly, Justice Stewart stated that, in order to fulfill the requirement and avoid improper litigation where changes to the environment "fall indiscriminately upon every citizen," such injury must be accredited only to those who use the lands at issue.[64]

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[60] *Id.* For a discussion of the "two prong test," see *supra* notes 38-54 and accompanying text. For a detailed analysis of the zone of interests part of the two-part test, see *infra* notes 83-97 and accompanying text.

[61] Sierra Club v. Morton, 405 U.S. 727, 733-34 (1972). *See generally* Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915 (1986) (exploring historically individual injury and individual interests in relation to standing doctrine).

[62] *Sierra Club*, 405 U.S. at 734. *See* Flast v. Cohen, 392 U.S. 83 (1968) (permitting taxpayer to challenge on Establishment and Free Exercise grounds expenditure of federal funds on school books for religious and sectarian schools). *But see* Frothingham v. Mellon, 262 U.S. 447, 487-88 (1923) (holding direct injury non-existent where the petitioner's alleged injury was "shared by millions of others" and was "minute and indeterminable").

[63] *Sierra Club*, 405 U.S. at 734-735. According to the Court, "the party seeking review [must] be himself among the injured." *Id.* at 735.

[64] *Id.* at 734-35. The Court implied that the plaintiffs could achieve standing if their complaint had been amended to allege that their personal use and enjoyment of the land was adversely affected. *Id.* at 734-41. Justice Stewart also rejected Sierra Club's argument that standing should exist so that a lawsuit could be initiated to protect the general public. *Id.* at 736-37. The Court held that an environmental organization or its members must first establish injury-in-fact before the organization could argue the public interest to support its challenge against the government's non-compliance with the statute. *Id.* The petitioner alleged that it was qualified to bring suit in a representative capacity based upon its longstanding concern and expertise. *Id.* at 736. *See also* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9 (1942), FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (economic injury may give the plaintiff standing to sue under a statute, and once standing is properly established, the plaintiff may use the public interest to argue his claim that the statute has been violated).

The requirement of individual injury was sharply criticized by Justice Douglas in his dissent. *Sierra Club*, 405 U.S. at 741 (Douglas, J., dissenting). Justice Douglas advocated the need for the environment to sue as a fictional party, much like corporations and ships, because it is an "inarticulate membe[r] of the ecological group [which] cannot speak." *Id.* at 752 (Douglas, J., dissenting). *See id.* at 750 n.8 (Douglas, J., dissenting). The Justice drew this need to sue as a fictional entity not only from protection of the environment as an inanimate object, but also from protection from federal agencies

Next, Justice Stewart explained that the insufficiency of an organizational interest alone to confer standing upon "special interest groups" did not "insulate executive action from judicial review," nor did it remove environmental protection from public interests in the judicial process.[65] Rather, Justice Stewart determined that the requirement of individualized injury acts as a gauge to confer standing upon only those with a "*direct* stake in the outcome" of the litigation.[66]

One year later, in *United States v. Students Challenging Regulatory Agency Procedures* ("*SCRAP*"),[67] the Supreme Court expounded upon the holding of *Sierra Club*. In *SCRAP*, a proposal for a 2.5 percent national railway surcharge for freight trains was challenged for adversely affecting the use and enjoyment of natural lands by inhibiting efforts to recycle certain waste.[68] SCRAP's challenges to the surcharge hinged upon the fact that the Interstate Commerce Commission, responsible for

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which are notoriously under the control and manipulation of powerful interests. *Id.* at 745 (Douglas, J., dissenting).

[65] *Id.* at 739-40. The Court stated, however, that Sierra Club could assert its general public interest as an acting private attorney general. *Id.* at 737-38. *See generally* Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U.L. REV. 220 (1987) (article discussing the complexities and judicial interpretations of provisions contained within federal environmental laws which permit citizens to bring suit for the enforcement of those laws).

[66] Sierra Club v. Morton, 405 U.S. 727, 740 (1972) (emphasis added). In a strong dissent, Justice Blackmun criticized the existing procedural concepts of standing as rigid, inflexible, and inadequate to manage the new concepts and issues which accompany environmental litigation. *Id.* at 755-56 (Blackmun, J., dissenting). As an alternative to the majority's opinion, the Justice favored acknowledging standing on behalf of special interest groups which have a "provable, sincere, dedicated and established status" and are "pertinent, bona-fide and well-recognized" in the environmental area to enable them to litigate on behalf of the environment. *Id.* at 757-58 (Blackmun, J., dissenting).

[67] 412 U.S. 669 (1973). *SCRAP* has been categorized as "an all-time high in the Supreme Court's liberality on the subject of standing." K. DAVIS, *supra* note 4, § 22.02-2, at 489. SCRAP was an unincorporated association formed by law students. *SCRAP*, 412 U.S. at 678.

[68] *SCRAP*, 412 U.S. at 678. Almost all the railroad companies in the United States requested this 2.5% surcharge on freight rates to meet their "increasing costs and severely inadequate revenues." *Id.* at 674. SCRAP alleged that the surcharge would discourage recycling and encourage the use of new raw materials and, thereby, "adversely affect[] the environment by encouraging unwarranted mining, lumbering, and other extractive activities." *Id.* at 676. SCRAP further alleged that the surcharge would result in higher prices for finished products, the destruction of forests and streams, and the accretion of recyclable materials. *Id.* Specifically, SCRAP members alleged that they used the Washington, D.C. metropolitan area for its forests and streams and this area was adversely affected by the surcharge. *Id.* at 678.

the surcharge, never filed a detailed environmental impact statement pursuant to the NEPA.[69]

The Court rejected the government's argument that, under *Sierra Club* standards, the students lacked standing because their claims were vague, unsubstantiated, and insufficient.[70] In so rejecting, the Court distinguished *Sierra Club* from the instant case on the ground that SCRAP had appropriately alleged in its pleading, pursuant to section 10 of the APA,[71] the adverse impact of unrecycled goods upon the lands

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[69] *Id.* at 679. The NEPA provides in part:

> The Congress authorizes and directs that, to the fullest extent possible:
> . . . .
> (2) all agencies of the Federal Government shall—
> . . . .
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C) (1975).

[70] *SCRAP*, 412 U.S. at 684. In its complaint, SCRAP alleged:

> [Each] of its members was caused to pay more for finished products, that each of its members '[u]ses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking fishing, sightseeing, and other recreational [and] aesthetic purposes,' and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials.

Id. at 678.

[71] *See* 5 U.S.C. § 702 (1964) ("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.")

at issue which were used by the organization's members.[72]

Using *Data Processing*'s two-part test of injury-in-fact and zone of interests inquiries,[73] the Court then interpreted whether section 10 of the APA was applicable.[74] Stating that economic harm was not required as proof of injury,[75] Justice Stewart, writing for the Court, reasoned that harm to one's use and enjoyment of land or the presence of a common harm among many plaintiffs would not deprive the parties of standing.[76] Indeed, the Justice conceded that the challenged action was applicable to practically all of the railways in the United States and, thus, had the potential of adversely affecting the environment of the entire country.[77] The Court further rejected the notion that standing should be denied because many people, if not all the citizens in the

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[72] United States v. SCRAP, 412 U.S. 669, 684-85 (1973). *See supra* note 68 (describing the adverse impact of freight surcharge on recycling). *Sierra Club* was distinguishable since their organization attempted to maintain the suit as a special interest group representing the public. *SCRAP*, 412 U.S. at 685. *See supra* note 59 (describing the aims and objectives of the Sierra Club). Writing for the *SCRAP* Court, Justice Stewart stated that the requirement established in *Sierra Club*—that the party seeking judicial review claim to be among those actually injured—was the distinguishing factor between *Sierra Club* and *SCRAP*. *SCRAP*, 412 U.S. at 687. The Justice noted that in *Sierra Club*, no specific injury was alleged by those who used the Mineral King area. *Id.* (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972). In contrast, the Justice stressed that SCRAP did allege the actions of the Commission adversely affected their use of the lands at issue. *Id.* Justice Stewart also acknowledged that the nature of the injuries alleged in both *Sierra Club* and *SCRAP* were very different, but that this distinction had no bearing upon the Court's finding of injury-in-fact. *Id.* at 688.

[73] *Id.* at 686 (citing Data Processing Service Orgs. v. Camp, 397 U.S. 150, 151-52 (1970)).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 686-87. Justice Stewart explained that "aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.* (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).

[77] *Id.* at 687. According to Justice Stewart:

> Rather than a limited group of persons who used a picturesque valley in California [as compared to *Sierra Club*], all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury.

Id.

country, were injured in the same manner; the Court emphasized that to deny standing would cause the "most injurious and widespread Government actions [to] be questioned by nobody."[78]

In *SCRAP*, Justice Stewart found injury-in-fact even though the injury was "far less direct and perceptible" and even though the Court was required to follow a "more attenuated line of causation to the eventual injury."[79] Stating that the "pleadings must be something more than an ingenious academic exercise in[to] the conceivable,"[80] Justice Stewart held that, at a minimum, the plaintiff must allege that he has been or is in immediate danger of harm by an agency action, and not simply that he can "imagine circumstances in which he could be affected by the agency's action."[81] The Court specifically declined to limit standing to only persons "significantly affected by agency action," not only because such a test would be indefinable, but because it would contradict the significance of injury-in-fact.[82]

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[78] *Id.* at 687-89. The majority appeared to take a liberal approach to standing, similar to the dissent in *Sierra Club*. *See supra* notes 64 & 66 and accompanying text (discussing the dissent in *Sierra Club*).

[79] United States v. SCRAP, 412 U.S. at 669, 687-89 (1973). SCRAP asserted that their injury was proximately caused by the railroad surcharge which increased the use of non-recyclable products. *Id.* at 678. This increase was alleged to result in the increased use of natural resources for the production of nonreyclables which might be derived from lands used by SCRAP, thereby increasing the amount of garbage littered or disposed of in lands used by respondents. *Id.*

[80] *Id.*

[81] *Id.* at 688-89. Justices White, Rehnquist, and Chief Justice Burger joined in dissent against the finding of standing. *Id.* at 722 (White, J., dissenting). The dissent criticized the attenuated line of causation drawn by the majority as dimly hopeful that the necessary nexus would in some unexplained way be established at trial. *Id.* at 722-23 (White, J., dissenting). *See also* New York v. Illinois and Sanitary Dist. Chicago, 274 U.S. 488, 496 (1927) (finding no standing where New York alleged the possibility of harm may exist in the future if water from Lake Michigan was hypothetically diverted to non-existent power plants); Frothingham v. Mellon, 262 U.S. 447, 487 (1923) (finding no standing where taxpayer alleged government spending would affect his income); Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922) (finding no standing where plaintiff alleged every citizen has a right to require that government administration be lawful and that public money not be wasted).

[82] *SCRAP*, 412 U.S. at 689 n.14. The statutory requirements for standing under the APA echoes the constitutional requirements of injury-in-fact by mandating that a person "be 'adversely affected' or 'aggrieved'" by administrative action. *Id.* The Court explained that "it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a *mere interest in the problem*." *Id.* (emphasis added). *Accord* Baker v. Carr, 369 U.S. 186, 193 (1962) (holding that a $5.00 fine is sufficient injury); McGowan v. Maryland, 366 U.S. 420, 578 (1961) (holding that

D. ZONE OF INTERESTS REQUIREMENT

Almost two decades after *SCRAP*, the Court in *Clarke v. Securities Industry Association*,[83] reviewed and affirmed the zone of interests element of the two-part test set forth in *Data Processing*.[84] In *Clarke*, two savings banks, the Union Planters National Bank of Memphis and the Security Pacific National Bank of Los Angeles, applied to the Comptroller of Currency for permission to establish offices offering discount brokerage services.[85] To determine the permissibility of these offices, the Comptroller was required to ascertain whether the banks' proposed brokerage offices were impermissible "branches" as defined under the McFadden Act.[86] After determining that the brokerage offices were not in fact "branches," the Comptroller approved the applications.[87] Thereafter, the Securities Industry Association, comprised of securities brokers, underwriters and investment bankers, initiated an action challenging the Comptroller's interpretation of bank

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a controversy over the sale of notebook, floorwax, stapler, staples, and toys is not trivial).

[83] 479 U.S. 388 (1987).

[84] *Id.* at 399. *See supra* notes 38-54 and accompanying text (discussing the two-part test for standing under the APA).

[85] *Clarke*, 479 U.S. at 390-91.

[86] *Id.* The statute defining a national bank's place of business provides:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

12 U.S.C. § 81 (1927). The statute governing the establishment of national bank branches provides:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. § 36(3)(c) (1962).

[87] Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 391-92 (1987).

branches under the McFadden Act.[88] The comptroller defended on the ground that the association lacked standing because the challenged action did not fall within the interests protected by the McFadden Act.[89]

Writing for the majority, Justice White utilized the "zone of interests" prong of the two-part test articulated in *Data Processing* to determine standing in order to ascertain whether Congress intended to create a presumption in favor of judicial review of an agency action.[90] The Justice stated that a right to review will be denied under the zone of interests test where the plaintiff is not the subject of the challenged agency action.[91] According to Justice White, standing should therefore be denied where the interests are "marginally related to or inconsistent with the purposes implicit in the statute" because it becomes impossible for the Court to assume that Congress intended to permit the litigation.[92] The Justice indicated, however, that the test is "not meant to be especially demanding" and that the plaintiff is not *required* to prove that a congressional purpose existed for his benefit.[93]

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[88] *Id.* The Comptroller approved the applications because the brokerage offices would not actually be lending money, but would have been acting as an intermediary for lenders. *Id.* Furthermore, the accounts maintained on behalf of customers were adequately different from a typical bank account receiving savings deposits. *Id.* The association argued that the ruling was impermissible because the brokerage offices were an unauthorized exercise of banking power under the McFadden Act. *Id.* at 392 (citing 12 U.S.C. § 36 (1962)).

[89] *Id.* at 393. The comptroller argued that the congressional intent behind the McFadden Act was to create an equal but competitive market between both state and national banks and not to protect dealers in securities. *Id.*

[90] *Id.* at 399. For cases examining the issue of whether judicial review is precluded, see Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984) (The presumption of judicial review is overcome "by specific language" from the statute that Congress intended to preclude judicial review.); Barlow v. Collins, 397 U.S. 159, 167 (1970) (The court should ask whether Congress intended that certain persons be responsible for challenging agency action in disregard of the law.).

[91] *Clarke*, 479 U.S. at 399.

[92] *Id.* *See* Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1461 (1988) (discussing standing to challenge administrative decisions in relation to Article III). *See also* Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 57 (1985) (taking an historical evaluation of standing doctrine according to the ideas of Johne Locke).

[93] Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400 (1987) (citing Investment Co. Inst. v. Camp, 401 U.S. 617 (1971)). The Supreme Court had previously ratified a trend toward enlarging the class of people qualified to challenge agency action. *See* Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970). To avoid disrupting

Justice White further emphasized that the ability to seek review was not predicated solely upon the zone of interests finding, but also depended upon the congressional intent with "all indicators helpful in discerning that intent [to] be weighed."[94] The Justice posited that the zone of interests requirement may be fulfilled by looking not only at the statute applicable to the challenged agency action, but to any provision enabling the Court to understand the general intent of the underlying act.[95] The majority ultimately held that, where the interest asserted by the association had a "plausible relationship to the policies underlying" the statute at issue and Congress had "arguably" legislated against that which the association sought to challenge, the zone of interests requirement would be satisfied.[96] Therefore, Justice White reasoned that the zone of interests requirement was fulfilled because the Court could draw inferences from the McFadden Act which evidenced Congress' intent to prevent banks from monopolizing credit through unlimited branching.[97]

E. STANDING TO SUE AS A THIRD PARTY

Courts will generally acknowledge third party standing after considering: (1) the relationship between the plaintiff and the third party; (2) whether the third party is able to vindicate his own rights; and (3) whether failing to acknowledge third party standing will weaken, or create the possibility of weakening, the rights of the third party.[98] Third party standing usually arises when the plaintiff alleges that the challenged conduct additionally injures a third party.[99] Moreover, third

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agency affairs by allowing everyone affected by agency action to obtain judicial review, the Court formulated the zone of interests test which required the plaintiff to be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153.

[94] *Clarke*, 479 U.S. at 400.

[95] *Id.* at 401. *See Data Processing*, 397 U.S. at 154-55 (The Court was permitted to examine any provision of the National Bank Act to understand the congressional intent.).

[96] *Clarke*, 479 U.S. at 403. *See* Investment Co. Inst. v. Camp, 401 U.S. 617, 620 (1971) (finding that the petitioner had standing to adjudicate whether national banks had a legal right to enter the petitioner's field).

[97] *Clarke*, 479 U.S. at 402.

[98] J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 2.12(f), at 140 (3d ed. 1986) (hereinafter NOWAK & ROTUNDA). *See generally* Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (agreeing with the requirements set forth in Hunt v. Apple Advertising Comm'n, 432 U.S. 333 (1977)).

[99] Clarke v. Securities Industry Ass'n, 479 U.S. 388, 403 (1987).

party standing is usually allowed where the represented party is prevented from asserting his own rights by practical obstacles, can demonstrate that he has suffered sufficient injury-in-fact, and "can reasonably be expected properly to frame the issues and present them with the necessary adversary zeal."[100] Associations are exemplary of third parties who choose not to sue on their own behalf, but as a representative of its "injured" members.[101] When an association is not actually injured, it will still have standing so long as it alleges immediate or threatened injury on behalf of its members that would be sufficient had members themselves sued.[102]

The seminal case for determining the ability of an organization to institute an action on behalf of itself or its members is *Hunt v. Washington Apple Advertising Commission*.[103] In *Hunt*, the Washington Apple Commission challenged the constitutionality of a North Carolina statute that prohibited the sale or shipment of apples into North Carolina unless the packaging bore either a United States Department of Agriculture ("USDA") grade or no grade at all.[104] At that time, the State of Washington produced and shipped nearly thirty percent of all apples grown in the United States and consequently, comprised a significant part of the state economy.[105] The Washington Apple

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[100] *See* Warth v. Seldin, 422 U.S. 490, 510 (1975) (finding litigants not subject to town's zoning regulations an improper party to challenge such regulations, especially where rights of persons actually affected were not impaired from being asserted); Eisenstadt v. Baird, 405 U.S. 438, 444 (1972) (permitting a medical professional to raise the rights of third parties as a defense to an anti-contraceptive statute); Barrows v. Jackson, 346 U.S. 249, 257 (1953) (permitting white seller to sue on behalf of African-Americans based on racially restrictive covenant).

[101] NOWAK & ROTUNDA, *supra* note 98, §2.13(f), at 147. For a general discussion of associational standing, see Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733, 735 (1988) (arguing that the current standing doctrine hinders associations, the association is the proper representative of collective interests, and relating associational standing to separation of powers doctrine).

[102] *Warth*, 422 U.S. at 511.

[103] 432 U.S. 333 (1977).

[104] *Id.* at 339. The statute referred to in the case was a part of the General Statutes of North Carolina, section 106-189.1 (1973), but was repealed on April 28, 1983 by the 1983 Session Laws, chapter 248, section 3. *See* N.C. Gen. Stat. § 106-189.1 (1973), *repealed* by 1983 N.C. Sess. Laws ch. 248, § 3.

[105] *Hunt*, 432 U.S. at 336. Because of the volume of business done in the apple industry, Washington established a strict apple inspection program run by the State Department of Agriculture which graded apples according to standards equal to or exceeding those of the United States Department of Agriculture. *Id.* The state created the Washington State Apple Advertising Commission to promote the sale of apples both

Commission challenged the constitutionality of the statute because compliance would have required the Commission to: (1) eradicate their state grade and give a damaged appearance to their packaging, (2) undergo large expenditures to modify their procedures in order to comply with the statute, and (3) cease preprinting containers with their grading system.[106]

Writing for the Court, Chief Justice Burger stated that the Commission would be a proper representative for its members so long as its claim and relief requested did "'not make the individual participation of each injured party indispensable to proper resolution of the cause.'"[107] Reasoning that the Commission's standing depended upon the type of relief requested by the plaintiff,[108] Chief Justice Burger acknowledged that an association has standing to sue "on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[109] Accordingly, the Court recognized that the Commission had standing because the potential for economic loss that would result from enforcing the statute was sufficient direct injury.[110] Chief Justice Burger noted that the central purpose of the Commission in protecting and increasing the state's apple market was to secure the state's grading

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within and outside the state, and to engage in public education and scientific research to develop and improve the uses for and production of apples. *Id.* at 336-37. The state agency was comprised of 13 apple growers and dealers who resided in the state and who were nominated and voted upon by other resident growers and dealers. *Id.* at 337.

[106] *Id.* at 338. The Commission sued on behalf of itself and the apple growers and dealers of the state. *Id.* at 339.

[107] *Id.* at 342-43 (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975)).

[108] *Id.* at 343 (citing *Warth*, 422 U.S. at 515). Chief Justice Burger maintained that standing is usually acknowledged when equitable remedies are requested because those remedies ensure that the persons actually injured will be compensated. *Id.* (citing *Warth*, 422 U.S. at 515). Unable to determine whether each member has suffered the same injury in "equal degree," the Court has been disinclined to recognize an association's standing when there is a claim for monetary damages." *Warth*, 422 U.S. at 515.

[109] Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) (citing *Warth*, 422 U.S. at 515).

[110] *Id.* at 344. The Court also recognized that (1) direct injury could be inflicted upon the Commission itself; (2) the North Carolina statute had the potential to reduce the production and sale of Washington apples which were used to assess annual contributions to the Commission; and (3) any reduction in sales could ultimately reduce the Commission's receipt of financial contributions. *Id.* at 345.

system.[111] Finally, the Chief Justice determined that the controversy could be "properly resolved in a group context" because challenging the constitutionality of the statute did not require individualized proof.[112]

III. REQUIREMENTS FOR RIPENESS

One of the other prudential policy considerations in addition to the standing doctrine is "mootness"—the notion that a case is brought too late before a court.[113] On the contrary, a case may also be brought too early and "not yet be *ripe* for adjudication."[114] The ripeness doctrine is supported by policy considerations, pragmatism, and the Court's reluctance to decide an issue that may later be subject to revision, suspension, or modification by the legislative or executive branches of government.[115]

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[111] *Id.* at 344.

[112] *Id.* The Court's analysis centered around whether the Commission, as a public, "[non-]traditional voluntary membership organization," was a proper representative of the growers and dealers of the state. *Id.* Chief Justice Burger rejected North Carolina's argument that, since the Commission was not an organization comprised of voluntary membership, it had no members at all. *Id.* at 345. The Chief Justice reasoned that the Commission could achieve third party standing because it performed all the traditional functions of a trade association. *Id.* Chief Justice Burger explained that the growers and dealers of the state elect their colleagues to the Commission, have the opportunity to personally serve on the Commission, and provide financial assistance to the actions of the Commission—including financing litigation brought on their behalf. *Id.* at 344-45. According to the Court, "[i]n a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests." *Id.* at 345. The Court acknowledged standing by relying on the purpose of the Commission, which was to protect and promote the State's apple business, and the fact that the apple growers and dealers had the same attributes of members of any other type of trade organization. *Id.* Justice Burger also rejected the argument that the Commission lacked standing because "membership" was mandatory by analogizing this compulsory membership to unions and bar associations for which the Court had previously acknowledged standing to sue as a representative of its members. *Id.*

[113] *See supra* text accompanying note 30 (discussing non-justiciability of an issue due to mootness).

[114] NOWAK & ROTUNDA, *supra* note 98, § 2.12(d), at 68 (emphasis added).

[115] *Id.* at 68-69. One policy consideration is that a court needs a "concrete record" to fully educate it about the actual procedures of enforcement of a statute and other relevant circumstances. *Id.* at 68. Furthermore, concrete rather than abstract questions aid the court in interpreting the minimal constitutional issues. *Id.* In a practical sense, "if the Court waits for an actual controversy, the whole constitutional problem may just be eliminated by later development." *Id.* at 69. Lastly, the separation of powers

In *Abbott Laboratories v. Gardner*,[116] the Supreme Court examined the issue of whether judicial review of certain administrative actions were within the zone of interest ambit of the APA, but also—and more importantly—whether a controversy was "ripe" for a judicial decision.[117] In 1962, Congress amended the Federal Food, Drug and Cosmetic Act ("FFDCA")[118] to require prescription drug manufacturers to conspicuously display the "established name" of their product in a typesize at least half the size of that used for the "proprietary name or designation for [the] drug."[119] Drug manufacturers and an association representing ninety percent of all persons supplying prescription drugs in the United States sued the Food

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doctrine requires that the judiciary not interfere with other branches of the government or act as an administrative agency. *Id.*

[116] 387 U.S. 136 (1967).

[117] *Id.* at 148.

[118] 21 U.S.C. § 301 (1938). The purpose behind the amendment was to educate consumers with respect to the availability of generic drugs that are identical in their effectiveness to the brand name prescriptions. *Abbott*, 387 U.S. at 137-38. After the amendment was effectuated, the Commissioner of Food and Drugs issued a regulation which required the established name of a drug to accompany a proprietary name every time the trade name appeared in print. *Id.* at 138-39. The regulation provided:

> If the label or labeling of a prescription drug bears a proprietary name or designation for the drug or any ingredient thereof, the established name, if such there be, corresponding to such proprietary name or designation, shall accompany each appearance of such proprietary name or designation.

21 C.F.R. § 1.104(g)(1) (1962).

[119] *Abbott*, 387 U.S. at 137-38. A "proprietary name" is usually the trade name used to market the drug. *Id.* at 138. The "established name" of a drug is a term defined by statute as:

> (A) the applicable official name designated pursuant to section 358 of this title, or (B) if there is no such name and such drug, or such ingredient, is an article recognized in an official compendium, then the official title thereof in such compendium, or (C) if neither clause (A) nor clause (B) of this paragraph applies, then the common or usual name, if any, of such drug or of such ingredient: *Provided further*, That where clause (B) of this paragraph applies to an article recognized in the United State Pharmacopoeia and in the Homeopathic Pharmacopoeia under different official titles, the official title used in the United States Pharmacopoeia shall apply unless it is labeled and offered for sale as a homeopathic drug, in which case the official title used in the Homeopathic Pharmacopoeia shall apply.

21 U.S.C. § 352 (e)(2) (1970) (emphasis added).

and Drug Commission, claiming that the regulation was an improper use of the Commissioner's authority.[120]

In deciding the issue of standing, the Court initially considered whether, under the APA, Congress intended the FFDCA to forbid the review of regulations prior to their enforcement.[121] Relying on *Clarke v. Securities Industry Association*,[122] the Court concluded that the APA did not preclude judicial review of the regulation prior to its enforcement.[123] Although there were certain provisions within the

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[120] *Abbott*, 387 U.S. at 139. The petitioner complained that the promulgation of a regulation requiring the established name of a drug to appear with a trade name every time that trade name was printed on a label, advertisement or any other material relating to prescriptive drugs, was beyond the Commissioner's authority. *Id.*

[121] *Id.* at 139-40.

[122] 479 U.S. 388 (1987). *See supra* notes 83-97 and accompanying text (discussing the facts and holding in *Clarke*).

[123] Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967). The Court reached its decision by relying on sections 701, 702, and 704 of the APA. *Id.* at 140. *See supra* note 38 for the text of 5 U.S.C. § 702 (1966). Section 701 articulated when judicial review is precluded and provides: "(a) [Judicial review] applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701. Section 704 specified when agency action is deemed to be final and reviewable:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704 (1966). Relying upon the intent of Congress, the Court looked at the FFDCA as a whole and rejected the idea that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Abbott*, 387 U.S. at 140 (quoting with approval JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336-59, 357 (1965)). Examining the legislative history of the review provisions of the General Administrative Provisions of the FFDCA, the Court found that they were designed to provide additional channels of relief and not for the purpose of limiting opportunities for review. *Id.*

FFDCA which limited the ability to obtain review,[124] the Court relied upon the "saving clause" of section 371(f) and interpreted it to provide additional avenues for review when the enumerated procedures proved inadequate.[125]

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[124] *Id.* The FFDCA required a party to exhaust their administrative procedural remedies *before* obtaining access to judicial review. 21 U.S.C. § 371 (1960). The procedures to be followed in the administrative process are governed by section 371, which provides in pertinent part:

> (e)(1) Any action for the issuance, amendment, or repeal of any regulation under section 341, 343(j), 344(a), 346, 351(b), or 352(d) or (h) of this title shall be begun by a proposal made (A) by the Secretary on his own initiative, or (B) by petition of any interested person, showing reasonable grounds therefor, filed with the Secretary . . . .
> (e)(2) On or before the thirtieth day after the date on which an order entered under paragraph (1) of this subsection is made public, any person who will be adversely affected by such order if placed in effect may file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections . . . .
> (e)(3) As soon as practicable after such request for a public hearing, the Secretary, after due notice, shall hold such a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. At the hearing, any interested party may be heard in person or by representative. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public . . . .

21 U.S.C. § 371 (1960).

[125] *Abbott*, 387 U.S. at 144-46. The ability to obtain judicial review of administrative action under the FFDCA is provided as follows:

> (f)(1) In a case of actual controversy as to the validity of any order under [the procedures for establishment] section, any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order. . . .
> . . . .
> (f)(6) The remedies provided for in [the review of order] subsection shall be in addition to and not in substitution for any other remedies provided by law.

21 U.S.C. § 371 (1960).

The Court rejected the government's argument that the "saving clause" should be

Writing for the Court, Justice Harlan assessed the ripeness of the controversy to enable the Court to consider whether a declaratory decree or injunctive relief was warranted.[126] Justice Harlan proffered the following factors underlying the ripeness doctrine: (1) to avoid "premature adjudication"; (2) to prevent the judiciary from deciding abstract questions over administrative policies; and (3) to prevent the judiciary from interfering with agency decisions that have not been formalized and the "tangible" effects of which have not yet been felt by the party challenging the action.[127] Based upon these considerations, the Court formulated a two-part inquiry for evaluating ripeness: first, whether the challenge is suitable for a judicial decision, and second, whether hardship will be imposed upon the plaintiff by withholding judicial review.[128]

Applying the two-part test, Justice Harlan concluded that the drug manufacturers were entitled to judicial review of the Commissioner's conduct.[129] The Justice further determined that the Commissioner's action was a "final agency action" under the APA, as well as under the common law,[130] because it was formally promulgated, was made

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used only to review the regulations enumerated in section 371(e). *Abbott*, 387 U.S. at 144-45. The Court stated that the government's reasoning was illogical because a right to declaratory or injunctive relief may not be granted without first exhausting the remedies provided by the "special-review provisions" and, unless the saving clause was offered as an alternative remedy to the exhausted administrative procedural remedies, the clause would be worthless. *Id.* at 146.

[126] *Id.* at 148.

[127] *Id.* at 148-49.

[128] *Id.* at 149.

[129] *Id.* Justice Harlan posited that the challenged action was suitable for judicial review because it involved a purely legal question; namely, whether the Commissioner properly interpreted the statute as requiring the established name of a prescription to appear every time the proprietary name was used. *Id.*

[130] *Id.* Agency action includes any "rule" or action defined in 5 U.S.C. § 551 (1976), which provides in pertinent part:

> [R]ule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

effective immediately upon publication, and appeared to receive authorization directly from the statute.[131] Moreover, the regulation was deemed final because it possessed the status of a law, whereby a violation was made punishable by the imposition of criminal and civil penalties.[132] Concluding that the Commissioner's regulation was a final agency action, the Court proffered the following considerations for affording judicial review to challenge that action: (1) where the regulation is directed specifically at the parties bringing the litigation and, thus, requires significant changes in everyday business practices to conform; and (2) failure to comply with the Commissioner's rule clearly exposes the parties to strong sanctions.[133]

In an opinion handed down on the same day as *Abbott*, the Supreme Court, in *Toilet Goods Association, Inc. v. Gardner* (*"Toilet Goods I"*),[134] applied the two-part *Abbott* standard to a regulation promulgated under the Color Additive Amendments[135] of the

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5 U.S.C. § 551(4) (1976). Agency action is also defined as "the whole or a 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) (1976).

[131] Abbott Laboratories v. Gardner, 387 U.S. 136, 151 (1967). Justice Harlan noted that compliance with the regulation would be extremely costly for manufacturers, and that non-compliance would place the respondents at the risk of being prosecuted both civilly and criminally. *Id.* at 153.

[132] *Id.* at 151-52.

[133] *Id.* at 154. Justice Harlan opined that financial loss alone is insufficient to permit judicial review of administrative actions. *Id.* at 153. For cases interpreting pre-enforcement review, see Frozen Food Express v. United States, 351 U.S. 40, 44 (1956) (affording judicial review to an ICC order which exempted certain agricultural commodities from supervision even though the ICC's only authority was to provide notice of the Commission's interpretation of the Act and would be effective only if action was taken against a certain transporter of these goods); United States v. Storer Broadcasting Co., 351 U.S. 192, 197 (1956) (A particular FCC regulation was deemed final where the Commission refused to issue a license to anyone already with five licenses because "[t]he process of rulemaking was complete."); Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407, 416-17 (1942) (an FCC attempt to regulate contracts between broadcasters and local stations by the refusal to license stations engaged in certain contracts was deemed a final agency action even though no license had been denied or revoked, because the regulations had the power of law before and after their punishments could be invoked).

[134] 387 U.S. 158 (1967).

[135] 21 U.S.C. §§ 321-376 (1972). This statute increased the Commissioner's power to control the ingredients adding color to food, drugs and cosmetics. *Toilet Goods I*, 387 U.S. at 161. The pertinent subsections of the statute provided:

> [S]eparately listing color additives for use in or on food, color additives for use

FFDCA.[136] In *Toilet Goods I*, the Commissioner of the Food and Drug Administration ("FDA"), after notifying the public and considering comments from interested parties, passed a regulation which permitted immediate suspension of certification service to persons who refused to admit FDA employees to their manufacturing facilities to examine production lines and formulae.[137] The Toilet Goods Association, an organization comprised of companies whose total sales constituted ninety percent of America's annual cosmetic sales, along with thirty-nine individuals who produced and distributed cosmetics, challenged the Commissioner's ruling as an impermissible exercise of his authority.[138]

> in or on drugs or devices, and color additives for use in or on cosmetics, if and to the extent that such additives are suitable and safe for any such use when employed in accordance with such regulations.
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> . . . .
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> The Secretary shall further, by regulation, provide (1) for the certification, with safe diluents or without diluents, of batches of color additives listed pursuant to subsection (b) and conforming to the requirements for such additives established by regulations under such subsection and this subsection, and (2) for exemption from the requirement of certification in the case of any such additive or any listing or use thereof, for which he finds such requirement not to be necessary in the interest of the protection of the public health; Provided, That, with respect to any use in or on food for which a listed color additive is deemed to be safe by reason of the proviso to paragraph (4) of subsection (b), the requirement of certification shall be deemed not to be necessary in the interest of public health protection.

21 U.S.C. §§ 376(b)(1)-(c) (1972).

[136] *Toilet Goods I*, 387 U.S. at 161. For the text of the FFDCA, see *supra* note 118.

[137] *Toilet Goods I*, 387 U.S. at 161. The Commissioner promulgated a regulation which provided in part:

> (a) When it appears to the Commissioner that a person has:
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> . . . .
>
> (4) Refused to permit duly authorized employees of the Food and Drug Administration free access to all manufacturing facilities, processes, and formulae involved in the manufacture of color additives and intermediates from which such color additives are derived; he may immediately suspend certification service to such person and may continue such suspension until adequate corrective action has been taken.

Id. (citing Toilet Goods Association, Inc. v. Celebrezze, 235 F. Supp. 648, 650 (S.D.N.Y. 1964) (quoting 21 C.F.R. § 8.28 (1963))).

[138] *Id.* at 159. The organization based its argument upon the many years that the FDA desired free access to this information which was met consistently, unless prescription drugs were involved, by congressional denial. *Id.* at 159-62.

The Court held that the regulation was reviewable by the judiciary prior to its enforcement, but that the controversy was not yet ripe for adjudication.[139]

Justice Harlan, writing for a plurality, applied the two-part test enunciated in *Abbott* to determine whether the challenged administrative action was ripe for review.[140] The Justice explained that the Court must "first determine whether the issues tendered are appropriate for judicial resolution, and second assess the hardship to the parties if judicial relief is denied at that stage."[141] The Justice conceded that the regulation appeared to be a "final agency action" under the APA because it was formally promulgated after notice and consideration of comments submitted by interested parties.[142] Citing prior cases which did not require proof of attempted enforcement or the depletion of administrative remedies, Justice Harlan further recognized that the association's claim was purely a legal one.[143] The Justice concluded, however, that the factors supporting judicial resolution were outweighed by other determining factors.[144]

The first of these "other determining factors" was the discretionary application of the regulation beyond the scope of the FDA's congressionally delegated authority.[145] Because the Commissioner "*may* under certain circumstances order inspection of certain facilities and data [and] certification of additives *may* be refused to those who decline to permit a duly authorized inspection,"[146] Justice Harlan determined that the Court was ignorant as to how and when inspections would be directed or justified by the Commissioner.[147] The Court recognized that the Commissioner had the power to create regulations for "the efficient enforcement" of the FFDCA pursuant to section 371(a)

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[139] *Id.* at 160-61.

[140] *Id.* at 162.

[141] *Id.* *See supra* note 115 (discussing the elements of ripeness).

[142] Toilet Goods I, 387 U.S. 158, 162 (1967).

[143] *Id.* at 163. *See* Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925) (holding that suit to restrain future enforcement of an unconstitutional statute is viable if the injury threatened by its enforcement is present and real before the statute is placed in effect); Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562 (1919) (hearing a challenge alleging that an ICC order exceeded the Commission's statutory power even in the absence of an attempt to obtain redress through the administrative process).

[144] *Toilet Goods I*, 387 U.S. at 163.

[145] *Id.*

[146] *Id.*

[147] *Id.*

if the Act, taken as a whole, justified the regulation.[148]

The Justice further analyzed "the degree and nature of the regulation's present effect on those seeking relief."[149] Unlike the situation in *Abbott*, Justice Harlan asserted that the impact of the regulation did not immediately effect the primary conduct of the association.[150] The Court recognized that the inspections authorized by the Commissioner were to be conducted at the discretion of the FDA and that the regulation did not provide for "adverse consequences" from refusing the inspection.[151] Contrary to the Court's analysis in *Abbott* where non-compliance with the regulation would lead to the seizure of goods, fines, loss of goodwill and criminal penalties, the *Toilet Goods I* Court acknowledged that failure to comply would only lead to suspending the non-complying party's certificate for engaging in certain services.[152] Justice Harlan thus held that the regulation was not ripe for review because the suspensions were easily appealable through administrative procedures and that the FDA's decision, if unsatisfactory to the association, was available for judicial review.[153]

In an opinion issued the same day as *Abbot* and *Toilet Goods I*, the Court in *Gardner v. Toilet Goods Association, Inc.* (*"Toilet Goods II"*)[154] evaluated regulations issued by the Secretary of Health, Education and Welfare and the Commissioner of FDA under the Color Additive

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[148] *Id.* Justice Harlan, quoting the statute, stated that "'[t]he authority to promulgate regulations for the efficient enforcement of this chapter, except as otherwise provided in this section, is vested in the Secretary.'" *Id.* (quoting 21 U.S.C. § 371(a) (1960)). The Justice stated that such a determination could be made after examining: (1) the purposes of the statute; (2) the problems met by the FDA in attempting to enforce the Act; (3) the requirement for supervision to achieve the purposes of the Act; and (4) safety measures taken to protect licensed trade secrets. *Id.* at 163-64.

[149] *Id.* at 164.

[150] *Id. See* Gardner v. Toilet Goods Ass'n ("Toilet Goods II"), 387 U.S. 167 (1967); Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407, 416-17 (1942). *See also supra* notes 129-50 and accompanying text (describing considerations for pre-enforcement review); FCC v. American Broadcasting Co., 347 U.S. 284 (1954).

[151] Toilet Goods I, 387 U.S. 158, 164-65 (1967).

[152] *Id.*

[153] *Id.* The Justice opined that this type of review would be adequate to examine the regulation in a realistic setting. *Id.* Justice Harlan based his conclusions on the limited adverse consequences faced by the association if the regulation were enforced, and the fact that the administrative process provided a more practical evaluation of the factual basis supporting the Commissioner's regulation. *Id.* at 166.

[154] 387 U.S. 167 (1967).

Amendments of 1960.[155] The Association challenged the Commissioner's authority to issue certain regulations which significantly expanded the number of products required to conform to the Act's "premarketing clearance procedure."[156] Justice Harlan, again writing for the Court, found Toilet Goods' challenge to these particular regulations ripe for judicial review under the standards set forth in *Abbott*.[157]

Finding that the elements of ripeness were satisfied, the Court determined that the regulation was self-executing, that it had an immediate and significant impact upon Toilet Goods, and that noncompliance would result in substantial penalties such as criminal

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[155] *Id.* at 168. *See* 21 U.S.C. §§ 321-76 (1972). One regulation required every color additive to be approved according to conditions mandating its use, and for "batches" to be certified unless the regulation provided an exemption. *Toilet Goods II*, 387 U.S. at 168-69. The Commissioner also promulgated regulations which expanded the scope of the statute by bringing all diluent substances used primarily to color the body within the purview of color additives. *Id.* at 169. The Commissioner further removed a statutory exemption for hair dyes, which previously recognized a cautionary label requiring a patch test as an adequate safeguard. *Id.* at 170.

[156] *Toilet Goods II*, 387 U.S. at 169.

[157] *Id.* at 170. Justice Fortas, joined by Justice Clark and Chief Justice Warren concurred in part and dissented in part. *Id.* at 174 (Fortas, J., dissenting). The Justices disagreed with the Court's intervention in the administrative process in such a "gross, shotgun fashion." *Id.* at 175 (Fortas, J., dissenting). The dissent opined that the purpose of the statute and the requirements for its productive administration must be given deference, and, therefore, a court should not judicially resolve questions unless they are "concrete, specific questions in a particularized setting rather than a general controversy divorced from particular facts." *Id.* at 176 (Fortas, J., dissenting). Justice Fortas distinguished the dissent's position from that of the majority with regard to when the jurisdiction of the federal courts may be invoked. *Id.* The Justice disagreed with permitting judicial review based upon the absence of a congressional prohibition and because the controversy was ripe. *Id.* at 177 (Fortas, J., dissenting). Justice Fortas asserted that this approach gave federal judges an unauthorized power to tamper with the regulatory process on the basis of "abstractions and generalities," and unlawfully expanded the power of the courts to intercept administrative actions by providing a threshold for obtaining an injunction, rather than following the method provided by law. *Id.* The Justice supported this contention by rejecting the holding in *Abbott* regarding the saving clause and stated that that clause should be applied only to those regulations enumerated in 21 U.S.C. § 371(f) (1972). *Toilet Goods II*, 387 U.S. at 180 (Fortas, J., dissenting). Furthermore, the dissent expostulated that the notion of separation of powers requires a court to avoid granting equitable or discretionary remedies unless the statutory remedy is insufficient and the controversy is ripe for judicial review. *Id.* at 185-86. (Fortas, J., dissenting). The dissent stressed the necessity of avoiding judgements on legislative policy based upon consumer protection rationales. *Id.* at 186-87. (Fortas, J., dissenting).

sanctions, the seizure of goods and the loss of goodwill.[158] The *Toilet Goods II* Court also concluded that substantial financial loss would result to Toilet Goods if they were forced to comply with the regulation.[159]

IV. THE STANDING AND RIPENESS DOCTRINES APPLIED TO *LUJAN* UNDER THE APA

A. JUSTICE SCALIA'S RESTRICTIVE VIEW OF ENVIRONMENTAL STANDING

Writing for a sharply divided Court,[160] Justice Scalia began his analysis by articulating the standing requirements under the APA; specifically, that plaintiffs must (1) identify an agency action that has affected them in some way, and (2) demonstrate that they have suffered a legal wrong or have been adversely influenced or aggrieved by the challenged action within the purview of a relevant statute.[161] To satisfy the first requirement, Justice Scalia stated that agency action must be a "whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[162] The Justice determined that the Bureau of Land Management's ("BLM") orders reclassifying certain public lands fulfilled the "agency action" requirement.[163] The Justice then divided the second standing requirement into two categories: first, to be adversely affected or

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[158] *Toilet Goods II*, 387 U.S. at 171-72. The dissent rejected the majority's contention that the regulation was self-enforcing because legal action for failure to submit a color additive to the Agency for review could only be made in an independent suit by the Agency if the Attorney General agreed with the Agency's recommendation for the suit. *Id.* at 196 (Fortas, J., dissenting).

[159] *Id.* at 173. One company alleged that certain diluents it produced now fell within the ambit of the statute and compliance with the regulation would require the application of physical and chemical tests resulting in an expense of approximately $49 million. *Id.*

[160] Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990). Writing for the five-to-four majority, Justice Scalia was joined by Chief Justice Rehnquist, and Justices White, O'Connor and Kennedy. *Id.* at 3177. Justice Blackmun authored a dissent, and was joined by Justices Brennan, Marshall and Stevens. *Id.* at 3195 (Blackmun, J., dissenting).

[161] *Id.* at 3185. *See supra* note 38-39 for the standing requirements under the APA pursuant to 5 U.S.C. § 702 (1966).

[162] *Lujan*, 110 S. Ct. at 3185. *See supra* note 130 (defining "agency" within the text of 5 U.S.C. § 551). In addition to meeting the definition of agency action, the Justice indicated that an agency action must be "final" when review is pursued under the general review provisions of the APA and not under a specific statute. *Lujan*, 110 S. Ct. at 3185.

[163] *Id.* at 3187.

aggrieved, the members or the association must have suffered an injury;[164] and second, for the challenged action to fall within the meaning of a relevant statute, the injury complained of must fall "within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[165]

Addressing the requirement of injury, the Court focused upon the NWF members' affidavits to determine whether those members initially had standing, individually, to challenge the actions of the BLM.[166] Justice Scalia concluded that the affidavits submitted by individual NWF members, alleging the impairment of their recreational use and aesthetic enjoyment of the lands at issue, were sufficient to fulfill the requirement of injury.[167] Reasoning that the "recreational use and enjoyment" of the lands were the types of interests the FLMPA and NEPA were designed to protect, Justice Scalia also concluded that the zone of interests prong of the two-prong test was in fact met by the individual members.[168]

The Court declined, however, to find actual injury on behalf of the individual members of the NWF.[169] Instead, the majority agreed with

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[164] *Id.* at 3186.

[165] *Id.* According to Justice Scalia, the statute must have been enacted to protect the interest of the complainant. *Id. See also* Clarke v. Securities Ind. Assoc., 479 U.S. 388, 396-97 (1987).

[166] Lujan v. National Wildlife Fed'n, 110 S.Ct. 3177, 3187 (1990).

[167] *Id.* Finding that the interests alleged to be injured were sufficiently related to the purposes behind the NWF's creation, the Court conferred third party standing upon the association as a representative of its members. *Id. See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 344-45 (1977) (holding that a state agency had standing in a representative capacity to challenge a North Carolina statute that affected the interests of the agency's members, the apple growers and dealers of the state of Washington). For a full discussion of *Hunt*, *see supra* notes 103-12 and accompanying text. *See also* Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CALIF. L. REV. 1061, 1096 (1988) (discussing the difficulty third parties encounter in challenging agency action, with emphasis on actions involving the Internal Revenue Service).

[168] *Lujan*, 110 S. Ct. at 3187. Justice Scalia stated:

> We have no doubt that "recreational use and aesthetic enjoyment" are among the *sorts* of interest those statutes were specifically designed to protect. The only issue, then, is whether the facts alleged in the affidavits showed that those interests of *Peterson and Erman* were actually affected.

Id. (emphasis in original).

[169] *Id.* at 3187-88.

the findings of the district court, that the allegations made in the members' affidavits failed to prove actual injury because they ambiguously claimed to use land in the *vicinity* of those lands actually affected.[170] As a result of this ambiguity, the Court affirmed the district court's granting of summary judgment in favor of the government.[171]

In upholding the summary judgment decree, the Justice opined that the Court may not presume facts which do not exist in the pleadings since those facts are necessary to establish the injury alleged.[172] Rejecting both the NWF's and the Fourth Circuit's reliance upon the Court's reasoning in *SCRAP*,[173] Justice Scalia distinguished the case *sub judice* from *SCRAP* where the Court reviewed the granting of a motion to dismiss under Rule 12(b),[174] rather than a motion for

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[170] *Id.*

[171] *Id.* at 3188-89. Justice Scalia noted that under FED. R. CIV. P. 56(e), the Court is not required to assume that general allegations support the facts necessary to support the complaint, but that the motion for summary judgment will be denied if the facts alleged by one party contradict the facts alleged by the other. Lujan v. National Wildlife Fed'n, 110 S.Ct. 3177, 3188 (1990). *See* Celotex Corp. v. Catrett, 447 U.S. 317, 322 (1986) (holding a motion for summary judgment must be granted if the non-moving party, after sufficient time for discovery, is unable to establish an essential element of his case). FED. R. CIV. P. 56(e) requires that summary judgment be granted after sufficient time has lapsed for discovery and the other party fails to adequately prove an element essential to their case for which they bear the burden of proof. *Id.* Justice Scalia interpreted section 702 of the APA as placing the burden upon the party seeking judicial review to allege specific facts which satisfy the terms of Rule 56(e). *Lujan*, 110 S. Ct. at 3186-87.

[172] *Lujan*, 110 S. Ct. at 3189. The affidavits which claimed use of land in the vicinity of land under the BLM order were deemed by the Justice to be a "general allegation" and not specific enough to support the allegations contained within the complaint. *Id.* at 3188.

[173] United States v. SCRAP, 412 U.S. 669 (1973). For a full discussion of *SCRAP*, see *supra* notes 67-82 and accompanying text.

[174] FED. R. CIV. P. 12(b). The rule applicable to a motion to dismiss provides in full:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not

summary judgment under Rule 56(e).[175]

In addition to denying the NWF members individual relief, the majority also rejected the four additional affidavits introduced at trial as insufficient to challenge the "land withdrawal review program" or the 1,250 administrative decisions in a single lawsuit.[176] The majority held that neither agency action,[177] nor final agency action,[178] was present because the program was not a BLM order or regulation, but "simply the name by which petitioners occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal

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> excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FED. R. CIV. P. 12(b). The Notes of the Advisory Committee on the Federal Rules 1946 Amendments state in part:

> [Where] there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it.

Id. at 48-49.

[175] FED. R. CIV. P. 56(e) (1991). The rule with respect to summary judgment states in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Id. The notes of the Advisory Committee on the Federal Rules 1963 amendment commented that the purpose of the summary judgment rule is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." FED. R. CIV. P. 56(e) advisory committee's note. This rule acknowledges the need for summary judgment when the allegations of the plaintiff's pleadings are "overwhelmingly contradicted" by the adversary's evidence. *Id.* The Committee advised that summary judgment must be denied if the movant is unable to establish that a "genuine issue" is absent, and even if contradictory evidence is not presented by the adversary. *Id.*

[176] Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3189 (1990).

[177] *See supra* note 38 for the text of 5 U.S.C. § 702.

[178] *See supra* note 123 for the text of 5 U.S.C. § 704.

revocation applications and the classifications of public lands and developing land use plans as required by the FLMPA."[179] Justice Scalia next stated that the land withdrawal review program was actually a compilation of the 1,250 *individual* BLM orders which terminated existing classifications or revoked withdrawals.[180] The Justice opined that the land withdrawal review program would not meet the standards of agency action or final agency action under the APA unless the BLM issued an order or regulation which affected or encompassed all the individual classifications.[181]

Although Justice Scalia found that the BLM orders did not comprise a program in itself, the Court did find that the individual BLM orders could constitute "rules of general applicability" or individual agency actions.[182] These "rules," according to the Justice, conveyed the agency's intention to permit certain activities upon the territory they covered, refuse to intervene with certain activities, and take certain action if requested.[183] The Court, however, found these directives to be insufficient to support a finding of "final agency action" ripe for judicial review because the action or inaction was discretionary, and either did not occur or immediately harm the plaintiff.[184] Furthermore, Justice Scalia stressed that even if one individual action was ripe for review, the Court would be unable to confer the same upon all 1,250 determinations for "wholesale correction" because not all of the orders

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[179] *Lujan*, 110 S. Ct. at 3189. *See generally* Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 645 (1983) (discussing suits brought against the non-implementation of certain statutes and the Court's reluctance, but capability, to review administrative non-implementation).

[180] *Id.*

[181] Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3189 n.2 (1990). The Court held that, in addition to fulfilling the agency action requirement, the action would also have to be ripe for review. *Id.* Justice Scalia explained that certain statutes allow broad regulations to act as agency action and provide for initial review by the judiciary, prior to the plaintiff feeling actual injury. *Id.* at 3190. *See also supra* notes 121-28 and accompanying text (discussing pre-enforcement review standards). Justice Scalia determined, however, that the APA requires the concrete effects of agency action to be felt first. *Lujan*, 110 S. Ct. at 3190. Justice Scalia stated that, in the absence of a pre-enforcement review statute, a regulation is not usually deemed "ripe for review" under the APA until the scope of the controversy has been determined, and the facts have been established by specific action which, when applied to the plaintiff, establish the harm or threat of harm he alleges. *Id. See supra* notes 116-59 and accompanying text (discussing *Abbott, Toilet Goods I*, and *Toilet Goods II*).

[182] *Lujan*, 110 S. Ct. at 3190.

[183] *Id.*

[184] *Id.*

affected every NWF member.[185] The Justice, however, refused to break from the Court's traditional "final agency action" analysis in determining ripeness merely because an organization was frustrated in protecting the environment.[186]

Rejecting the NWF's contention that the association was personally injured as a result of the non-compliance, Justice Scalia further refused to find standing for the NWF to challenge actions in violation of the NEPA's reporting requirements.[187] The NWF alleged that the violation of the NEPA had affected its ability to perform the organization's central purpose—providing adequate information and facilitating opportunities for public input regarding the land withdrawal review program.[188] Justice Scalia deemed the affidavits insufficient to establish the respondent's right to judicial review.[189]

B. JUSTICE BLACKMUN'S WILLINGNESS TO LOOK BEYOND SEMANTICS IN PLEADING

In a vigorous dissent, Justices Blackmun, joined by Justices Brennan, Marshall, and Stevens, criticized the majority's finding that the NWF's allegations did not "adequately identif[y] particular members who were harmed by the consequences of the Government's actions" or were not "sufficiently specific" to withstand a motion for summary judgment.[190] The dissent found that the NWF had provided adequate evidence of

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[185] *Id.* at 3190-91.

[186] *Id.* *See* Toilet Goods I, 387 U.S. 158, 164-66 (1967).

[187] Lujan v. National Wildlife Fed'n, 110 S.Ct. 3177, 3193 (1990). The NWF alleged that the agency's failure to "publish regulations, to invite public participation, and to prepare an environmental impact statement with respect to the 'land withdrawal review program' as a whole" was unlawful under the NEPA. *Id.* at 3193.

[188] *Id.* at 3193-94.

[189] *Id.* at 3194. (citing National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 330 (D.C. Cir. 1988)). Justice Scalia refused to acknowledge standing because: the NWF did not allege an injury resulting from the deprivation of such information, providing such information to organizations did not appear to be within the zone of interests of the NEPA, and an "agency action" was not identified. *Id.* Justice Scalia stated that the members' affidavits sufficiently identified agency action by pointing to geographical areas so that a link could be made to the BLM order which classified certain lands. *Id.* According to the Court, however, the association's affidavits pointed to the "land withdrawal review program's" failure to provide information to them regarding its operation, a program the Court had determined not to be an agency action and, thus, not subject to judicial review. *Id.*

[190] *Id.* at 3195 (Blackmun, J., dissenting).

injury which resulted from damage to the environment that was caused by availing lands to mining activities.[191] The Justice further criticized the majority's departure from the holding in *SCRAP*[192] merely because *SCRAP* involved a motion to dismiss rather than a motion for summary judgment.[193] In distinguishing the requirements for both motions, Justice Blackmun stated that Rule 56(e) required the opposing party to "set forth specific facts showing that there is a genuine issue for trial" and that the member's affidavits had satisfied this evidence requirement.[194] According to Justice Blackmun, the affidavits were adequately specific to enable the BLM to identify the termination orders to which the NWF had referred to in its affidavits.[195] The dissent reproached the majority for requiring the NWF to *prove* standing to bring suit.[196] Unlike the majority, the dissenting Justice's view of standing required the NWF only to establish a "genuine issue for trial."[197] Since Rule 56(e) requires that the evidence and inferences derived therefrom be viewed in a "light most favorable to the party opposing the motion," Justice Blackmun asserted that the affidavits should have withstood the motion for summary judgment.[198]

Justice Blackmun also disparaged the majority's view that the affidavits were too ambiguous to withstand a motion of summary judgment because they alleged injury to the lands used in the vicinity of the lands at issue, rather than stating the specific lands ordered to be

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[191] *Id.* at 3194-95 (Blackmun, J., dissenting). The NWF alleged that the government's actions would cause increased mining on public lands which would damage the environment and, consequently, diminish the recreational use of other lands for NWF members. *Id.* The dissent noted "[a]bundant record evidence supported the Federation's assertion that on lands newly opened for mining, mining in fact would occur." *Id.* The dissent also maintained that prior to this action brought by NWF, 406 mining claims had been filed in the South Pass-Green Mountain area and more than 7,200 in 12 other Western States. *Id.* at 3195 n.1 (Blackmun, J., dissenting).

[192] United States v. SCRAP, 412 U.S. 669 (1973).

[193] Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3195 (1990) (Blackmun, J., dissenting). *See supra* notes 173-75 and accompanying text (discussing the majority's semantic distinction).

[194] *Lujan*, 110 S. Ct. at 3195 (quoting FED R. CIV. P. 56).

[195] *Id.* at 3195-96 (Blackmun, J., dissenting).

[196] *Id.* at 3196 (Blackmun, J., dissenting).

[197] *Id.* (citing FED. R. CIV. P. 56(e)).

[198] *Id.* (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

mined.[199] The Justice emphasized that the pleadings and the affidavits should be read as a whole to ascertain the NWF's allegations and that the case should not fail based upon the ambiguity of its pleadings.[200] Furthermore, Justice Blackmun reasoned that both the district court and court of appeals found sufficient showing of injury to justify granting the NWF a preliminary injunction;[201] in fact, the court of appeals stated that "the burden of establishing irreparable harm to support a request for a preliminary injunction is, if anything, at least as great as the burden of resisting a summary judgment motion on the ground that the plaintiff cannot demonstrate 'injury-in-fact.'"[202]

Justice Blackmun further attacked the majority's failure to recognize the land withdrawal review program as an agency action or final agency action.[203] Emphasizing that there was no question regarding the existence of a program,[204] the Justice asserted that the real issue was whether the actions and omissions of the BLM—which the NWF asserted were illegal—were actually part of a plan or a policy.[205] The dissent agreed that if the BLM had formally promulgated regulations governing the withdrawal of lands, the NWF would have an agency action which they could challenge.[206] The majority's position that the land classifications were individual agency actions, however, was sharply criticized by Justice Blackmun as illogical and inaccurate.[207]

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[199] *Id.* Justice Blackmun stated that "[n]o contrary conclusion is compelled by the fact that Peterson alleged that she uses federal lands 'in the vicinity of South Pass-Green Mountain, Wyoming' . . . rather than averring that she uses the precise tract that was recently opened to mining." *Id.* (Blackmun, J., dissenting) (citation omitted).

[200] *Id.*

[201] *Id.* at 3198 n.8 (Blackmun, J., dissenting).

[202] *Id.* (quoting National Wildlife Fed'n v. Burford, 878 F.2d 423, 432 (D.C. Cir. 1989) (emphasis omitted)). The Justice averred that the Fourth Circuit, in affirming the district court's grant of preliminary relief, stated, "the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment." *Id.* (quoting *National Wildlife Fed'n v. Burford*, 835 F.2d at 328).

[203] *Id.* at 3201 (Blackmun, J., dissenting).

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* at 3202 (Blackmun, J., dissenting). Justice Blackmun stated, "[t]he majority offers no argument in support of this conclusory assertion, and I am far from certain that the characterization is an accurate one." *Id.*

V. CONCLUSION

The decision in *Lujan* appears to indicate a significant change in the permissive approach taken by the Supreme Court on the issue of standing when environmental organizations challenge government actions.[208] For the most part, Justice Scalia seems to base the decision upon the wording used in drafting the NWF's pleadings.[209] In fact, the Justice refused to find direct injury because the NWF failed to specify which lands under order of the BLM were affecting the NWF's use and enjoyment of their own land.[210] In contrast, the dissent seems to accurately criticize the majority's reasoning as based upon mere semantics.[211]

As noted above, standing under the APA requires that the plaintiff establish both direct injury and that the injury falls within the "zone of interests" of the statute alleged to be violated.[212] Direct injury must be satisfied by proving that the plaintiff has been adversely affected or aggrieved by an identifiable "final" agency action.[213] Justice Scalia acknowledged that the respondent's pleadings were sufficiently worded to identify the BLM orders as an "agency action."[214] Nonetheless, to support the motion for summary judgment, the Justice found the pleadings to be too ambiguous and unsupported by specific facts because the NWF alleged that it was adversely affected by land in the *vicinity* of land under order of the BLM.[215] This exacting scrutiny of the

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[208] *See supra* note 4 (discussing the permissive approach taken by the Supreme Court in finding standing for environmental organizations to challenge the actions of the government prior to *Lujan*).

[209] *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3189 (1990).

[210] *Id.*

[211] *Id.* at 3194-95 (Blackmun, J., dissenting).

[212] *See supra* note 39 and accompanying text (discussing the two-part test for finding standing under the APA).

[213] *See supra* note 128 and accompanying text (discussing the requirements for "final" agency action).

[214] Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3187 (1990).

[215] *Id.* at 3188. Justice Scalia's interpretation of FED. R. CIV. P. 56(e) seems to be one-dimensional. Although the Justice correctly noted that the plaintiff has the burden of proving the elements essential to his case, the Justice failed to consider that evidence contrary to the party presenting the motion must be viewed in the light most favorable to him. *Id.* at 3196 (Blackmun, J., dissenting). Justice Scalia seemed to permit the Court to read inferences from the affidavits that would support the contention of agency action, but refused to read outside the confines of the pleadings to withstand the motion for summary judgment.

pleadings seems to be inconsistent with the standards set forth in *SCRAP*[216] which did not mandate that the plaintiff use the land adversely affected by a government decision so long as the pleadings alleged the adverse impact of the administrative decision upon the property actually used by the plaintiff.[217] Furthermore, the Court in *SCRAP* acknowledged standing, even where the chain of causation was attenuated, so long as an immediate danger of agency harm could be identified.[218]

Additionally, Justice Scalia fails to support his refusal to acknowledge the BLM orders as "final agency action" by any precedent.[219] The BLM orders were issued to take action, either by permitting or refusing certain activities upon government land.[220] The majority's finding that these actions did not occur or have an immediate impact upon the NWF seems ill-founded. The BLM orders were issued upon a reclassification of the land, and the evidence indicated that drilling and mining occurred immediately thereafter—the very action which the NWF had alleged as causing injury to it.[221] Under the precedence of *Abbott*,[222] *Toilet Goods I*,[223] and *Toilet Goods II*,[224] the BLM orders should be deemed "final" since they were formally promulgated, made effective immediately upon publication, and appeared to carry criminal or civil sanctions for interference with their implementation.[225] Furthermore, the considerations set forth in *Toilet Goods II*,[226] which did not permit a finding of "final agency action,"[227] do not appear to be present in *Lujan*. Once the BLM orders were issued, the classification was final,

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[216] *See supra* notes 67-79 and accompanying text (discussing the liberal approach taken to assess standing for an action brought to protect the environment).

[217] United States v. SCRAP, 412 U.S. 669, 684 (1973).

[218] *Id.* at 688-89.

[219] *See Lujan*, 110 S. Ct. at 3190.

[220] *Id.*

[221] *Id.* at 3195 nn.1-2.

[222] 387 U.S. 136 (1967).

[223] 387 U.S. 158 (1967).

[224] 387 U.S. 167 (1967).

[225] *See supra* notes 113-55 and accompanying text (discussing the requirements for ripeness).

[226] 387 U.S. 167 (1967).

[227] *See supra* note 145-53 and accompanying text (discussing other considerations to determine final agency action).

although its application was discretionary.[228] Moreover, the impact of the orders did immediately affect or, at the very least, had the potential of immediately affecting, the conduct of the petitioner; namely, their aesthetic use and enjoyment of the lands.[229]

Justice Scalia provided additional obstacles to the NWF's attempt to preserve the environment by refusing to recognize the existence of the "land withdrawal review program."[230] The Justice supported his conclusion with the finding that, since the BLM never issued an order or regulation formally organizing such a program, the program cannot exist for purposes of "agency action" under the APA.[231] Technically, Justice Scalia is correct; the Justice's reasoning, however, seems to be based more upon inhibiting environmental litigation by rewarding the BLM for creating and implementing a program on a piecemeal basis.[232] Although the majority recognized that the land withdrawal program exists as an inter-departmental policy, the Court provided no guidance as to how litigation may be brought to challenge the BLM's actions or the adverse effects of its application beyond challenging each BLM order individually.[233]

Adhering to the majority's line of reasoning with respect to the "land withdrawal review program," it is understandable why the Court denied standing to the organization seeking to challenge the agency's actions as a violation of the NEPA.[234] To say that providing information to the public is not within the "zone of interests" of NEPA, however, is an absurdity. The purpose of the NEPA is to provide information to the public by requiring written environmental impact statements.[235] Therefore, although the majority correctly ruled that the NWF did not

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[228] Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3190 (1990).

[229] *Id.* at 3194-95 (Blackmun J., dissenting).

[230] *Id.* at 3189.

[231] *Id.*

[232] *See* DOLGIN & GUILBERT, FEDERAL ENVIRONMENTAL LAW 507-08 (1974). The procedures of federal agencies for land use planning have two bases. *Id.* First, agencies create their own objectives where a legislatively-mandated purpose is absent, Congress has been overly general, or where the legislation provides specific objectives but no set of priorities. *Id.* at 508. Second, the procedures of federal agencies are not published in regulations by the agencies, rather in their own "manuals" and handbooks" which often makes it difficult to obtain and ascertain the policies of their planning systems. *Id.*

[233] Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3191 (1990).

[234] *Id.* at 3194.

[235] *See supra* note 69 for the text of the NEPA applicable to the issue at hand.

have standing to challenge the land withdrawal review program under the standards of the NEPA, the Court erred in finding that providing information to the public is not within the "zone of interests" of the NEPA.

Justice Scalia's conservative attitude toward environmental litigation has been previously noted and the *Lujan* decision appears to set a new trend under his guidance.[236] By rejecting the holding in *SCRAP*, Justice Scalia has attempted to tighten the Court's approach towards evaluating allegations of direct injury in litigation brought to protect the environment. Justice Scalia's interpretations of *Abbott*,[237] *Toilet Goods I*,[238] and *Toilet Goods II*[239] also appear to place new restrictions upon the meaning of "final agency action," further inhibiting the efforts of organizations such as the NWF to protect the environment. The result in *Lujan*, therefore, is contrary to the congressional policies underlying the FLMPA and the NEPA,[240] and the Supreme Court has unnecessarily restricted access to the courts by placing a check upon administrative decisions which injure the environment. The Court should have acknowledged that the NWF's member's affidavits were sufficiently specific under its prior decision in *SCRAP* to permit the litigation to commence. Furthermore, the Supreme Court should have attempted to formulate a holding that would better effectuate the goals of the FLMPA and NEPA by permitting the litigation to proceed against the program as a whole. Instead, the Supreme Court has hindered the purposes of these Acts and, in turn, aided in the destruction of our environment.

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[236] *See* Sheldon, NWF v. Lujan: *Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENVTL. L. RPTR. 1057 (1990) (discussing *Lujan* and its restriction upon the standing of environmentalists to challenge actions of the government); Steuer & Juni, *Court Access for Environmental Plaintiffs: Standing Doctrine in* Lujan v. National Wildlife Federation, 15 HARV. ENVTL. L. REV. 187 (1991) (explaining procedural history of *Lujan* and its future impact); Perino, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135 (1987) (examining Justice Scalia's perspective regarding standing in environmental litigation); Note, *Standing: Closing the Doors of Judicial Reform*, 36 S.D.L. REV. 136 (1991).

[237] 387 U.S. 136 (1967).

[238] 387 U.S. 158 (1967).

[239] 387 U.S. 167 (1967).

[240] Both the FLMPA and NEPA were enacted to protect and preserve the environment and to inform the public of administrative actions which have an important impact on the quality of daily living. Note, *supra* note 8, at 159.