RIPENING GREEN LITIGATION: THE CASE FOR DECONSTITUTIONALIZING RIPENESS IN ENVIRONMENTAL LAW

BY

NORA COON *

The justiciability doctrines of standing and ripeness routinely prevent courts from reaching the merits of environmental cases. In 2014, the Ninth Circuit dealt with the legal sources of standing and ripeness in Montana Environmental Information Center v. Stone-Manning. *Affirming the lower court's dismissal of a challenge to the possible approval of a surface mining permit, the Ninth Circuit ascribed ripeness to the Article III limitation on federal jurisdiction. This Chapter uses the case as a lens to examine the elision of standing and ripeness in the Ninth Circuit. It argues that the Ninth Circuit should abandon the tripartite structure that it currently employs—standing, constitutional ripeness, and prudential ripeness—and instead recognize only two doctrines: an Article III standing doctrine and a prudential ripeness doctrine.*

* Nora Coon is the Ninth Circuit Review Editor of *Environmental Law*, 2015–16; J.D. expected 2016, Lewis & Clark Law School; B.A. English, Grinnell College. The author would like to thank Professor Craig Johnston for his suggestions and guidance in the drafting of this paper and Professor William Funk for his review of this paper. The author would also like to thank her mother and father for an early introduction to environmental law.

I. INTRODUCTION

An environmental plaintiff must clear numerous hurdles when seeking judicial review of an agency action,[1] whether that action is granting a mining permit, approving an oil spill response plan, or failing to safeguard statutorily protected land.[2] The question of justiciability bars many such suits from a decision on the merits.[3] While all cases in federal court must be justiciable,[4] justiciability's demands have a particularly pronounced effect in public law such as environmental litigation.[5] This Chapter focuses on

1 "Action" in this context does not refer to "agency action" under the Administrative Procedure Act, 5 U.S.C. § 551(13) (2012). Rather, it refers to the colloquial understanding of an action or behavior.

2 *See, e.g.*, Mont. Envtl. Info. Ctr. v. Stone-Manning (*Montana*), 766 F.3d 1184 (9th Cir. 2014) (dismissing challenge to mining permit because plaintiffs lacked standing and claim was not ripe for decision); Shell Gulf of Mex. Inc. v. Ctr. for Biological Diversity, Inc., 771 F.3d 632 (9th Cir. 2014) (dismissing suit over oil spill response plan due to lack of standing); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) (dismissing because claims were not ripe and there was no agency action to challenge).

3 Justiciability describes the category of doctrines that "determine which matters federal courts can hear and decide and which must be dismissed." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.1 (3d ed. 1999).

4 *See id.* at §§ 2.3–2.5 (overview of standing, ripeness, and mootness as questions of justiciability).

5 *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (outlining changes to the function of judges in "public law" litigation); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1385–86 (1973) ("While the Court's attempt to reformulate standing doctrine confuses standing with ripeness, the effort is nevertheless significant: It marks an ever-increasing awareness of the public nature

standing and ripeness, two of the justiciability doctrines that routinely prevent courts from reaching the merits of environmental cases.[6] Standing and ripeness have different legal sources, but courts routinely conflate them.[7]

Prudential ripeness balances the fitness of an issue for judicial review with the harms caused to each party by delaying review,[8] while the current doctrine of constitutional ripeness requires a concrete injury.[9] Similarly, to show standing, a plaintiff must demonstrate a concrete, particularized, and actual or imminent injury that is fairly traceable to the defendant's action and can be redressed by a favorable court decision.[10] While the requirement of standing is by now firmly rooted in Article III of the United States Constitution as a jurisdictional limit on the power of federal courts, the legal source of ripeness is less clear.[11] Courts frequently either combine or conflate the standing and ripeness analyses.[12] Courts have also vacillated between describing ripeness as a constitutional or a prudential doctrine; indeed, the U.S. Supreme Court has described some of its previous prudential ripeness cases as addressing constitutional ripeness instead.[13] This Chapter argues that ripeness is not a constitutional doctrine based in Article III. Rather, it is a prudential doctrine intended to avoid "premature adjudication" and "protect the agencies from judicial interference" before the facts warrant it.[14] What courts sometimes call constitutional ripeness is nothing more than the concrete injury component of standing.

This conflation is dangerous because constitutional and prudential limitations do not have the same power. Constitutional limits on the

of constitutional adjudication. The status of the parties is relevant not in its own right, but only insofar as it insures a proper presentation of the constitutional issues. Constitutional exegesis, not the vindication of private rights, is the core of the Court's task."); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2079–90 (1990) (discussing the rise of the administrative state in the early to mid-20th century).

6 *See generally* Cassandra Stubbs, *Is the Environmental Citizen Suit Dead? An Examination of the Erosion of Standards of Justiciability for Environmental Citizen Suits*, 26 N.Y.U. REV. L. & SOC. CHANGE 77 (2001) (describing the difficulties of demonstrating standing in environmental suits).

7 *See infra* Part II.B.1.

8 *See* Abbott Labs. v. Gardner (*Abbott Laboratories*), 387 U.S. 136, 148–49 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

9 *See Montana*, 766 F.3d 1184, 1189–90 (9th Cir. 2014).

10 Lujan v. Defs. of Wildlife (*Defenders of Wildlife*), 504 U.S. 555, 560–61(1992).

11 CHEMERINSKY, *supra* note 3, at § 2.3 (standing as a constitutional limitation on jurisdiction of federal courts). *Id.* at § 2.4 n.8 ("At times the Court describes ripeness as constitutional . . . but at other times, the Court describes the ripeness test as prudential . . . . In large part, this difference might reflect the aspects of ripeness at issue in particular cases.").

12 *See infra* Part II.B.1; Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 162–63 (1987) ("In a series of cases dating from the mid-1970s, the Court has conflated the ripeness inquiry and the case or controversy requirement of article III . . . .").

13 *See, e.g.*, Babbitt v. Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979) (constitutional doctrine); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (prudential doctrine).

14 *Abbott Laboratories*, 387 U.S. 136, 148–49 (1967).

jurisdiction of federal courts cannot be waived or altered, save by a constitutional amendment; prudential limitations, however, may be waived by the parties, disregarded by the court, or removed by Congress.[15] Further, the Supreme Court has recently cast doubt on whether prudential doctrines can ever prevent review of a case within the jurisdiction of federal courts.[16] Because ripeness is a prudential, rather than constitutional, doctrine, courts should be careful to analyze standing and ripeness separately. Currently, they do not do so.[17]

The Ninth Circuit recently dealt with the sources of standing and ripeness in *Montana Environmental Information Center v. Stone-Manning* (*Montana*).[18] The *Montana* plaintiffs sought an injunction to force the director of the Montana Department of Environmental Quality to comply with pre-existing standards for approving mining permits, alleging a pattern of behavior that showed a failure to follow those standards.[19] In affirming the district court's dismissal, the Ninth Circuit concluded that the plaintiffs lacked standing and that their claims were not ripe, ascribing ripeness to the Article III limitation on federal jurisdiction.[20] This Chapter uses *Montana* as a lens to examine the elision of standing and ripeness in the Ninth Circuit. The Ninth Circuit should abandon the tripartite structure that it currently employs—standing, constitutional ripeness, and prudential ripeness—and instead recognize only two doctrines: an Article III standing doctrine and a prudential ripeness doctrine.

Part II examines the Ninth Circuit's treatment of standing and ripeness, exploring the frequency with which the Ninth Circuit fails to separate the standing and ripeness analyses. It also examines what authority the court typically cites for the ripeness doctrine to explore whether that authority is constitutional or prudential. Part III demonstrates that what federal courts call constitutional ripeness is nothing more than the injury-in-fact requirement for Article III standing, while prudential ripeness encompasses the balancing of fitness for review and hardship to the parties typically understood as ripeness. Finally, Part IV looks to the future of the prudential ripeness doctrine in light of recent Supreme Court precedent. This Chapter confines its scope to environmental cases against federal agencies, rather than examining the full gamut of possible environmental litigation.

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15 Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692 (1990).

16 Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) ("To the extent respondents would have us deem petitioners' claims nonjusticiable on grounds that are prudential, rather than constitutional, that request is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.") (internal quotations omitted).

17 *See infra* Part II.B.1.

18 766 F.3d 1184, 1186, 1188 (9th Cir. 2014).

19 *Id.*

20 *Id.* at 1188–89 ("To enforce this constitutional limitation, the Supreme Court has articulated numerous doctrines that restrict the types of disputes that federal courts will entertain, including standing and ripeness.").

II. MERGING THE DOCTRINES OF STANDING AND RIPENESS

In environmental law, as well as more broadly, the notion of "justiciability"—whether the court can decide a case—encompasses many concepts.[21] While some concepts are explicitly constitutional, like standing,[22] some exist in a murky area between constitutional and prudential, like ripeness.[23] To bring a justiciable case, environmental plaintiffs must carefully plead their complaints to include allegations that satisfy the ever-shifting boundaries of standing and ripeness.[24] These are ill-defined boundaries to start with, and the nature of environmental cases, in which the hurdles to standing and ripeness are higher, makes it still harder to match those boundaries.[25] In the Ninth Circuit, where the courts have repeatedly conflated standing and ripeness, the two doctrines often operate together to bar environmental suits.[26] That conflation, however, does not mean that the two doctrines are the same or have the same legal origin.

A. Ripeness: "Standing on a Timeline" or Prudential?

Over the last twenty years, the Ninth Circuit has adopted a view of ripeness that explicitly links it to Article III. Sitting en banc, the court described ripeness as "standing on a timeline."[27] Most recently, particularly in the environmental context, the Ninth Circuit has explicitly distinguished between constitutional ripeness and prudential ripeness, suggesting that they have separate legal sources.[28] Of course, not every court that addresses ripeness explains which type of ripeness it means.[29] The failure to distinguish clearly between constitutional ripeness, prudential ripeness, and standing contributes to ongoing confusion.[30]

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21 Chemerinsky, *supra* note 15, at 677.

22 *Id.* at 691–92.

23 Nichol, *supra* note 12, at 155 ("Aspects of the ripeness doctrine are anomalous for a requirement rooted in the Constitution . . . except for those instances in which ripeness analysis is employed to eschew advisory opinions—a task performed more directly by the standing requirement—the doctrine serves goals that the Court has typically characterized as prudential rather than constitutional.").

24 *See, e.g.*, *Defenders of Wildlife*, 504 U.S. 555, 563–64 (1992) (failing to allege sufficient facts); *Montana*, 766 F.3d at 1191 (same).

25 *See Defenders of Wildlife*, 504 U.S. at 563–64 (demonstrating difficulty of showing sufficient injury to plaintiffs where primary victims were endangered species); Chemerinsky, *supra* note 15, at 682–83 ("The current multiplicity of justiciability doctrines contains many overlapping tests that serve little independent purpose.").

26 *See infra* Appendix I: Combined Analyses.

27 Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000).

28 *Montana*, 766 F.3d at 1188 n.3.

29 *E.g.*, Ohio Forestry Ass'n v. Sierra Club (*Ohio Forestry*), 523 U.S. 726, 733 (1998) (assessing ripeness without specifying type).

30 *See* Chemerinsky, *supra* note 15, at 682 ("The current multiplicity of justiciability doctrines contains many overlapping tests that serve little independent purpose. Confusion is inevitable. One example of this emerges from a comparison of the ripeness doctrine and the injury requirement for standing.").

The basic premise behind ripeness as an Article III doctrine is simple: a dispute is ripe in the constitutional sense if the injury is "concrete."[31] The confusion arises because standing, constitutional ripeness, and prudential ripeness all speak to this question to varying extents.[32] Constitutional ripeness overlaps with the injury-in-fact requirement of standing,[33] while prudential ripeness addresses the timing of cases in which there is already an injury, but the issues may be better presented at a later date.[34] In the Ninth Circuit, courts regularly conflate these questions when deciding environmental cases.[35]

B. Data on the Conflation of Standing and Ripeness in the Ninth Circuit's Environmental Law Cases

To examine the Ninth Circuit's elision of standing and ripeness in environmental law, I reviewed the forty-seven environmental cases in which the Ninth Circuit addressed both standing and ripeness.[36] The first such case appeared in 1980 and began the Ninth Circuit's pattern of merging the standing and ripeness analyses, which continues through the present.[37]

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31 *Montana*, 766 F.3d at 1188.

32 *See* Chemerinsky, *supra* note 15, at 682 (noting overlap between ripeness and injury element of standing).

33 *Id.*

34 *See Abbott Laboratories*, 387 U.S. 136, 148–49 (1967) (providing the prudential ripeness test).

35 For purposes of this Chapter, an "environmental case" is any of the wide range of cases brought against the federal government with the goal of protecting the natural environment.

36 I developed a list of cases by progressively limiting Westlaw's range of Ninth Circuit cases (including both the Court of Appeals for the Ninth Circuit and the various District Courts). I first limited the cases to all those containing the search terms "standing" and "ripe!" which returned both "ripe" and "ripeness." I further limited the data to published cases. For a discussion of the advantages and disadvantages of reviewing only published cases, see Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 941 n.86 (2008) ("Published decisions, offering a fuller discussion of all issues in a case, provide a more accurate picture of a court's complete decision-making process rather than just the ground on which the case is ultimately decided."). I also limited the data to environmental cases. I then read each case to determine how the court decided the questions of standing and ripeness, whether these questions were analyzed separately or together, and what source of authority, if any, the court provided for the ripeness doctrine. I eliminated cases that could not fairly be said to address both issues, including cases that addressed ripeness solely in terms of finality under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012), as well as cases that focused on prudential standing under the APA. I also eliminated takings cases, given the significant difference in the takings ripeness analysis from other environmental ripeness cases. The full data appears in Appendices I–II, *infra*.

37 W. Oil & Gas Ass'n v. U.S. Envtl. Prot. Agency, 633 F.2d 803, 807–08 (9th Cir. 1980) (combining analyses of standing and ripeness). It is unclear why no earlier case addressed both standing and ripeness, but that fact seems to indicate that both are relatively recent phenomena.

1. Combining the Standing and Ripeness Analyses

Approaches to standing and ripeness analyses may shift over time. As a result, a court's statement that it has applied a standing or ripeness framework does not always fully describe the court's underlying action. For example, a court might hold that a case is unripe because the plaintiffs failed to show "practical harm" in the absence of a court decision;[38] while the court framed its analysis as one of ripeness, the same underlying facts would also raise serious standing questions. In the cases discussed below, the Ninth Circuit explicitly referenced both standing *and* ripeness.

The review of Ninth Circuit environmental cases revealed that the court analyzed standing and ripeness separately in 47% of cases—twenty-two out of forty-seven—and combined the analyses in 53%—twenty-five out of forty-seven.[39] In some of these combined cases, the court thoroughly analyzed one requirement and added a footnote to that discussion with a statement that the parties had met the other requirement as well.[40] In other cases, the court explicitly stated that the two issues merged into a single inquiry.[41] And in still other cases, the court combined the analyses without explicitly stating that the requirements of one would satisfy the other.[42] For example, in *Portland Audubon Society v. Babbitt* (*Babbit*),[43] the court analyzed standing and ripeness in a single section and held that "the decision is ripe for review now . . . because . . . the Secretary's failure to comply with NEPA represents a concrete injury."[44] In doing so, the court effectively found that the plaintiffs had met the injury element of the standing requirement set forth in *Lujan v. Defenders of Wildlife* (*Defenders of Wildlife*),[45] but did not say that it was doing so.

What does this data show? Certainly, the constitutional requirements of Article III standing and the prudential requirements of ripeness often overlap significantly. Even given that overlap, though, the Ninth Circuit regularly fails to analyze these as separate issues where they are separate.[46]

38 *Ohio Forestry*, 523 U.S. 726, 727, 733 (1998).

39 *See infra* Appendix II: Separate Analyses; Appendix I: Combined Analyses.

40 *See, e.g.*, *W. Oil and Gas Ass'n*, 633 F.2d at 807–08 (ripeness). *Id.* at 808 n.4 (standing).

41 *See, e.g.*, Kerr-McGee Chem. Corp. v. U.S. Dep't of the Interior, 709 F.2d 597, 600 (9th Cir. 1983) ("In effect, the issues of standing and ripeness here merge into a determination whether the federal recommendation has injured Kerr-McGee.").

42 *Compare* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993) (analyzing standing and ripeness in single section and holding that "the decision is ripe for review now . . . because . . . the Secretary's failure to comply with NEPA represents a concrete injury . . . ."), *with Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (defining "injury in fact" requirement of standing as "an invasion of a legally protected interest which is . . . concrete and particularized.").

43 998 F.2d 705 (9th Cir. 1993).

44 *Id.* at 708.

45 *Defenders of Wildlife*, 504 U.S. at 560 (defining "injury in fact" is "an invasion of a legally protected interest which is . . . concrete and particularized").

46 The Ninth Circuit does not appear to be a particularly worse offender on this point than any other circuit. *See, e.g.*, Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 688 (2d Cir. 2013)

Sometimes it offers a justification for doing so, explicitly recognizing that both standing and ripeness in that particular case depend on the existence of an injury,[47] but sometimes it merges the analyses without any recognition at all of that fact.[48] The Ninth Circuit's merger of these analyses clarifies neither the already-muddled standing requirements nor the inconsistent definitions of ripeness.[49]

2. Source of Ripeness Doctrine

An examination of the sources cited in these decisions reveals that the Ninth Circuit has not always clearly stated what it believes to be the legal source of the ripeness doctrine, whether Article III or simple prudential considerations. The court cited either directly or indirectly to a prudential ripeness case, *Abbott Laboratories v. Gardner* (*Abbott Laboratories*),[50] in 59% of cases.[51] The court identified no legal source at all for ripeness in 8% of

("Often, the best way to think of constitutional ripeness is as a specific application of the actual injury aspect of Article III standing.").

47 *See, e.g.*, *Kerr-McGee Chem. Corp. v. U.S. Dep't of the Interior*, 709 F.2d 597, 600 (9th Cir. 1983) ("In effect, the issues of standing and ripeness here merge into a determination whether the federal recommendation has injured Kerr-McGee.").

48 *E.g.*, *Babbitt*, 998 F.2d at 708 (failing to recognize conflation).

49 *See* Chemerinsky, *supra* note 15, at 677 ("The entire area of justiciability is a morass that confuses more than it clarifies."); Nichol, *supra* note 12, at 180 ("[T]he fusion of the two doctrines threatens the comprehensibility of article III.").

50 387 U.S. 136, 148–49 (1967) (setting forth accepted "fitness of the issues for judicial decision" and "hardship to the parties" standard).

51 Twenty-eight out of 47 cases cited to *Abbott Laboratories* either directly or indirectly, beginning in 1980. Eighteen of these opinions made direct citations. W. Oil & Gas Ass'n v. U.S. Envtl. Prot. Agency, 633 F.2d 803, 807 (9th Cir. 1980); Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n, 659 F.2d 903, 913 (9th Cir. 1981); Friedman Bros. Inv. Co. v. Lewis, 676 F.2d 1317, 1319 (9th Cir. 1982); *Kerr-McGee Chem. Corp.,* 709 F.2d at 600 (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162 (1967)) (decided the same day as *Abbott Laboratories* and applying same rule); Loux v. Herrington, 777 F.2d 529, 534–35 (9th Cir. 1985); Cal. Energy Res. Conservation & Dev. Comm'n v. Johnson, 807 F.2d 1456, 1464 (9th Cir. 1986); Tr. for Alaska v. Hodel, 806 F.2d 1378, 1381 (9th Cir. 1986); State Water Res. Control Bd. v. Fed. Energy Regulatory Comm'n, 966 F.2d 1541, 1562 (9th Cir. 1992); West v. Sec'y of Dep't. of Transp., 206 F.3d 920, 930 n.14 (9th Cir. 2000); Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 857 (9th Cir. 2002); Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency, 319 F.3d 398, 417 n.31 (9th Cir. 2003); Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 696 (9th Cir. 2007) *aff'd in part, rev'd in part sub nom.* Summers v. Earth Island Inst., 555 U.S. 488 (2009); Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1010–11 (9th Cir. 2009); W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 486 (9th Cir. 2010); San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1173 (9th Cir. 2011); Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1195 (9th Cir. 2011); Mont. Sulphur & Chem. Co. v. U.S. Envtl. Prot. Agency, 666 F.3d 1174, 1183 (9th Cir. 2012); Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1287 (9th Cir. 2013). Ten opinions cited *Abbott Laboratories* indirectly, five of them citing it through a single case, Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992). *See* Nance v. U.S. Envtl. Prot. Agency, 645 F.2d 701, 713 (9th Cir. 1981) (decided the same day as *Abbott Laboratories* and establishing same rule (citing Sierra Club v. U.S. EPA, 540 F.2d 1114, 1139 n.76 (D.C. Cir. 1976) (citing *Toilet Goods Ass'n*, 387 U.S. at 162)))); Or. Envtl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987) (citing Trs. for Alaska v. Hodel, 806 F.2d 1378, 1381) (citing *Abbott Laboratories*)); *Idaho Conservation*

cases.[52] It relied on *Ohio Forestry Association v. Sierra Club* (*Ohio Forestry*)[53] in 17% of cases.[54] Of course, *Ohio Forestry* itself relied primarily on *Abbott Laboratories*,[55] although, as discussed below, by present-day standards *Ohio Forestry* would seem to be a standing case rather than a ripeness case.[56] However, this means that 59% of the Ninth Circuit's ripeness cases cite directly or indirectly to *Abbott Laboratories*. Finally, the court relied on Article III itself as the source of ripeness in 13% of these cases.[57] Combined with the "concrete injury" cases, which are arguably Article III cases, overall around 19% of cases relied directly or indirectly on Article III for the ripeness doctrine.[58] With 59% of cases relying on prudential ripeness,

League, 956 F.2d at 1518–19 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990) (citing *Abbott Laboratories*)); Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993) (citing *Idaho Conservation League*, 956 F.2d at 1513–18); *Babbitt*, 998 F.2d at 708 (citing *Idaho Conservation League*, 956 F.2d at 1513–18); Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1303–04 (9th Cir. 1993) (citing *Idaho Conservation League*, 956 F.2d at 1518–19); Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355 (9th Cir. 1994) (citing *Idaho Conservation League*, 956 F.2d at 1516); Smith v. U.S. Forest Serv., 33 F.3d 1072, 1075–76 (9th Cir. 1994) (citing *Idaho Conservation League*, 956 F.2d at 1515–16); Am. Rivers v. Fed. Energy Regulatory Comm'n, 187 F.3d 1007, 1025–26 (9th Cir. 1999) (citing State Water Resources Control Bd. v. Fed. Energy Regulatory Comm'n, 966 F.2d 1541, 1562 (9th Cir. 1992) (citing *Abbott Laboratories*)); Am. Rivers v. Fed. Energy Regulatory Comm'n, 201 F.3d 1186, 1205–06 (9th Cir. 1999) (citing *State Water Resources Control Bd.*, 966 F.2d at 1562 (citing *Abbott Laboratories*)).

52 Four of forty-seven cases failed to cite an original legal source for ripeness. Nat. Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 966 F.2d 1292, 1299 (9th Cir. 1992) (no citation that traces back to either prudential or constitutional origin); Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 785 (9th Cir. 1995) (noting that "FCC aptly argues that forcing it to wait until after harm has been inflicted would render their claims moot before they become ripe" but citing no legal source of ripeness); Idaho Sporting Congress, Inc. v. U.S. Forest Serv., 92 F.3d 922, 925–26 (9th Cir. 1996) (failing to cite cases traceable to prudential or constitutional origin of ripeness); Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv., 273 F.3d 1229, 1235 (9th Cir. 2001) (concluding that parties had standing and case was ripe without citing source for ripeness).

53 523 U.S. 726 (1998).

54 Eight of forty-seven cases cited to *Ohio Forestry*: ONRC Action v. U.S. Bureau of Land Mgmt., 150 F.3d 1132, 1136 (9th Cir. 1998); Wilderness Soc'y v. Thomas, 188 F.3d 1130, 1133 (9th Cir. 1999); Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1070 (9th Cir. 2002); Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 976–77 (9th Cir. 2003); Laub v. U.S. Dep't of the Interior, 342 F.3d 1080, 1089 (9th Cir. 2003); Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930, 940 (9th Cir. 2006); *Sierra Forest Legacy*, 646 F.3d at 1179 n.2; *W. Watersheds Project*, 632 F.3d at 486.

55 *See Ohio Forestry*, 523 U.S. at 732–36 (referencing *Abbott Laboratories* on every page of the ripeness analysis).

56 *See infra* notes 114–20 and surrounding text.

57 Six of forty-seven cases cited to Article III of the U.S. Constitution. Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n, 659 F.2d 903, 910 (9th Cir. 1981); Didrickson v. U.S. Dep't of the Interior, 982 F.2d 1332, 1338 (9th Cir. 1992); Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 847 (9th Cir. 2002); Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 693 (9th Cir. 2006) (also citing *Abbott Laboratories*); Alcoa, Inc. v. Bonneville Power Admin., 698 F.3d 774, 793 (9th Cir. 2012); *Montana*, 766 F.3d 1184, 1188 (9th Cir. 2014).

58 The six cases listed above, *supra* note 57, plus three additional cases that cite "concrete injury" account for nine of the forty-seven cases. Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 702 (9th Cir. 1993) (citing "concrete injury"); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705,

19% relying on constitutional ripeness, and the rest a confusing miscellany, the interaction between standing and ripeness is never quite clear.

For example, in *Earth Island Institute v. Ruthenbeck*,[59] the Ninth Circuit held that Earth Island Institute could not challenge several regulations because the regulations had not yet been applied in a specific project.[60] While the court found that the plaintiffs had standing, it determined that several of their claims were unripe.[61] Applying *Abbott Laboratories*, the court stated:

> The record is speculative and incomplete with respect to the remaining regulations, so the issues are not fit for judicial decision under *Abbott Laboratories*. While Earth Island has established sufficient injury for standing purposes, it has not shown the sort of injury that would require immediate review of the remaining regulations. There is not a sufficient "case or controversy" for us to review regulations not applied in the context of the record before this court.[62]

As in other Ninth Circuit cases, *Earth Island Institute* seemed to merge constitutional and prudential ripeness considerations. The court relied on *Abbott Laboratories*, a prudential ripeness case, in determining whether the plaintiffs' claims were ripe.[63] However, the court then held that "there [was] not a sufficient 'case or controversy'" when it came to some of the challenged regulations, using the language of standing.[64] The bleed between Article III standing and prudential ripeness continues to complicate matters—as evidenced by the Supreme Court's subsequent reversal of the plaintiffs' successful claims in *Earth Island Institute*, on the ground that they in fact had no standing.[65]

The Ninth Circuit's standing and ripeness jurisprudence does nothing to aid environmental litigants. While the court in *Montana* attempted to distinguish between constitutional and prudential ripeness in rendering its decision, that decision does not clarify Article III's requirements because it nonetheless attributed some part of ripeness to Article III.[66] The chaotic treatment of standing and ripeness in the Ninth Circuit's environmental cases demonstrates the need for the Ninth Circuit, and indeed for all federal courts, to streamline the approach to standing and ripeness by clearly

708 (9th Cir. 1993) (same); Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1302 (9th Cir. 1993) (same).

59 490 F.3d 687 (9th Cir. 2007).

60 *Id.* at 696, *aff'd in part, rev'd in part sub nom.* Summers v. Earth Island Inst., 555 U.S. 488 (2009). The Supreme Court held that Earth Island Institute had failed to establish standing, and so reversed the Ninth Circuit's holding that there was standing. As a result, the Supreme Court did not reach the issue of ripeness.

61 *Id.* at 696.

62 *Id.*

63 *Id.*

64 *Id.*

65 *Summers*, 555 U.S. at 488.

66 *See Montana*, 766 F.3d 1186, 1189–90 (9th Cir. 2014).

identifying the lines between Article III standing and the various ripeness doctrines.[67]

III. DISTINGUISHING BETWEEN STANDING AND RIPENESS

The resolution of any environmental case depends on the court's justiciability determination.[68] No matter how compelling the facts or how strong the legal argument, if a case is not justiciable, a plaintiff cannot obtain a decision on the merits.[69] The Ninth Circuit's tendency to combine its standing and ripeness analyses, and to duplicate the injury prong of standing in constitutional ripeness analyses, confuses the issues for litigants and judges alike.[70] Standing is a constitutional doctrine that arises out of Article III's limitation of federal jurisdiction to cases and controversies.[71] Ripeness, however, is best understood as a prudential doctrine that does not affect a court's jurisdiction. While the material facts may often overlap, courts should recognize the doctrines as separate. Rather than the tripartite structure that it currently employs—standing, constitutional ripeness, and prudential ripeness—the Ninth Circuit should approach the doctrines as twofold: an Article III standing doctrine and a prudential ripeness doctrine.

A. Standing is a Constitutional Doctrine that Limits Jurisdiction

Since the 1970s, the Supreme Court has understood standing as the core component of the Article III limitation of federal jurisdiction to cases and controversies.[72] While courts originally conceived it as a prudential doctrine,[73] the Supreme Court has definitively described standing as an absolute requirement of an Article III case or controversy.[74] Without standing, an environmental plaintiff has no hope of pursuing a suit in federal court.

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67 *Cf.* Chemerinsky, *supra* note 15, at 677 (explaining the need to clarify the justiciability doctrine to avoid ongoing confusion).

68 *See* CHEMERINSKY, *supra* note 3, at § 2.1 ("The justiciability doctrines determine which matters federal courts can hear and decide and which must be dismissed.").

69 *Id.*

70 *See* Nichol, *supra* note 12, at 180 ("[T]he fusion of the two doctrines threatens the comprehensibility of [A]rticle III.").

71 CHEMERINSKY, *supra* note 3, at § 2.3 (summarizing requirements of standing).

72 *See* Nichol, *supra* note 12, at 157–58 (describing the rise of standing). The Court had previously suggested that standing was a prudential doctrine. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

73 *See Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring) (discussing the variety of prudential doctrines); *see also* Nichol, *supra* note 12, at 162 n.64 (explaining that courts recognize *Ashwander* concurrence as discussion of both standing and ripeness doctrines).

74 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (setting forth the "irreducible constitutional minimum" of standing); *see* Chemerinsky, *supra* note 15, at 692–93 (discussing the Supreme Court's jurisprudence establishing that "injury, causation, and redressability [are] deemed constitutionally mandated" to establish standing).

In 1992, the Supreme Court decided *Defenders of Wildlife*, setting forth the now familiar test for standing.[75] Defenders of Wildlife sought to challenge new regulations promulgated by the Secretary of the Interior that were less protective of endangered species overseas.[76] Justice Scalia laid out the three-part standing test in a single paragraph. First, standing requires the plaintiff to show "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[77] Second, the plaintiff must show "a causal connection between the injury and the conduct complained of," meaning that the injury is "fairly traceable" to the injurious conduct.[78] And third, the plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[79] While none of these tests or concepts were new,[80] their combined articulation in *Defenders of Wildlife* was a shot across the bow for optimistic environmental litigants who sought to challenge federal environmental policy without a clear injury recognized by the law.

Even as it laid out the requirements of standing, the Court offered a vision of standing that seemed instead to describe justiciability. After discussing the Federalist Papers, Justice Scalia stated: "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."[81] The Court seems to say that standing encompasses both constitutional and prudential considerations—that the notion of standing is more than just Article III standing.[82] For example, standing also encompasses the "zone-of-interests" tests, a prudential restriction of standing that limits it to situations in which "the interest sought to be protected is 'arguably within the zone-of-interests to be protected or regulated by the statute or constitutional guarantee in question.'"[83] However, the Court decided *Defenders of Wildlife* on Article III standing grounds.[84] Ultimately, it is *Defenders of Wildlife*'s three-part standing test that continues to challenge environmental litigants

75 *See Defenders of Wildlife*, 504 U.S. at 560.

76 *Id.* at 558–59.

77 *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (internal quotation marks and citations omitted).

78 *Id.* at 560–61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)) (internal quotation marks omitted).

79 *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43) (internal quotations omitted).

80 *See, e.g.*, *Whitmore*, 495 U.S. at 155; Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); *Simon*, 426 U.S. at 41–42; Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740–41 & n.16 (1972).

81 *Defenders of Wildlife*, 504 U.S. at 560.

82 *See id.*

83 Sheldon K. Rennie, Bennett v. Plenert: *Using the Zone-of-Interests Test to Limit Standing under the Endangered Species Act*, 7 VILL. ENVTL. L.J. 375, 381 (1996) (quoting *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

84 *Defenders of Wildlife*, 504 U.S. at 560.

in their quests to litigate harmful policies,[85] and it is that standing test that contains the "concrete injury" requirement often understood to be constitutional ripeness.[86]

B. Ripeness is a Prudential Doctrine

As the Ninth Circuit noted in *Montana*, courts have regularly found both constitutional and prudential components to ripeness.[87] However, few cases analyze both constitutional and prudential ripeness. Rather, they typically note that the court is concerned only "with the constitutional aspects of . . . ripeness"[88] or refer only to "prudential ripeness."[89] Some reference ripeness without distinguishing between what the court considers constitutional or prudential ripeness.[90] The flexibility with which various courts have understood ripeness over the years has contributed to the confusion over whether ripeness is a constitutional doctrine derived from Article III or a prudential doctrine to ensure the sharpest presentation of a case.

1. The Supreme Court's Orphan Ripeness Doctrine

The Supreme Court's descriptions sometimes trace ripeness to Article III of the Constitution, but historically the Court identified no source at all for the doctrine.[91] In recent cases, the Court has seemed to distinguish between concepts of prudential ripeness and constitutional ripeness.[92] However, the origin of ripeness remains shrouded in confusion.

The Supreme Court first articulated the concept of ripeness in 1936 in *Ashwander v. Tennessee Valley Authority*.[93] Justice Brandeis, concurring in the majority's decision, set forth his understanding of prudential doctrines that courts could use to avoid deciding a constitutional case:

> The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." . . . The

85 *See, e.g.*, *Montana*, 766 F.3d 1184, 1189 (9th Cir. 2014) (exhibiting MEIC's failure to gain standing under the three-part test used in *Defenders of Wildlife*).

86 *See Defenders of Wildlife*, 504 U.S. at 560 (describing the "concrete injury" requirement).

87 *See Montana*, 766 F.3d at 1188–89.

88 *Id.* at 1188 n.3.

89 Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014).

90 *See generally Ohio Forestry*, 523 U.S. 726, 732–33 (1998) (analyzing ripeness without identifying legal authority).

91 *Compare Susan B. Anthony List*, 134 S. Ct. at 2347 (linking ripeness to Article III), *with Ohio Forestry*, 523 U.S. at 732–33 (failing to identify source of doctrine).

92 *Susan B. Anthony List*, 134 S. Ct. at 2347.

93 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

> Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."[94]

While this case appears to discuss the Article III requirement of a case or controversy, later courts have recognized this concurrence as an explanation of both standing and ripeness doctrines.[95] Notably, Justice Brandeis framed these policies in terms of prudential choices rather than constitutional mandates.[96] These doctrines allowed the courts to manage their workloads and decide cases at the appropriate time, but Justice Brandeis's discussion did not suggest that in every case, whether deciding the constitutionality of legislation or not, federal courts would lack Article III jurisdiction if these requirements were not met.

Subsequent decisions further clarified the Supreme Court's understanding of ripeness without identifying the legal source of authority for the ripeness doctrine.[97] For example, the Court set forth the current ripeness formulation in 1967 in *Abbott Laboratories*.[98] In *Abbott Laboratories*, a pharmaceutical company sought to challenge regulations promulgated by the Commissioner of Food and Drugs.[99] The Court of Appeals for the Third Circuit refused to decide the merits, holding that no "actual case or controversy" existed under the Declaratory Judgment Act.[100] The Supreme Court reversed the decision of the Third Circuit.[101] In doing so, the Supreme Court explained:

> [I]t is fair to say that [the ripeness doctrine's] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way.[102]

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94 *Id.*

95 *See* Nichol, *supra* note 12, at 162 n.64.

96 *Id.*

97 *See, e.g.*, *Abbott Laboratories*, 387 U.S. 136, 148–49 (1967).

98 *Id.*

99 *Id.* at 138–39.

100 Abbott Labs. v. Celebrezze, 352 F.2d 286, 291 (3d Cir. 1965) *rev'd sub nom. Abbott Laboratories*, 387 U.S. 136 (1967). In finding that no justiciable controversy existed, the Third Circuit stated:

> We, therefore, hold that in view of the policy of Congress limiting prior judicial review of administrative actions under this Act to specific sections, not including the ones in question, and in view of the absence of an 'actual case or controversy' required for justiciability under the Declaratory Judgment Act, the action of the district court was beyond its permissible area of discretion . . . .

Id.

101 *Abbott Laboratories*, 387 U.S. at 137, 156.

102 *Id.* at 148.

Setting forth the current test for prudential ripeness, the Court clarified that a ripeness determination "requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[103]

The only reference to Article III was implicit in the Court's later comment that "there is no question in the present case that petitioners have sufficient standing as plaintiffs" as the Court rejected the government's assertion that financial injury was an insufficient hardship to the parties.[104] However, the Court reasoned that the purpose of the prudential ripeness doctrine was to delay judicial involvement until a party felt the effects of a decision "in a concrete way,"[105] perhaps foreshadowing the "concrete and particularized" injury that became central to Article III standing.[106] Nowhere did the Court link its ripeness decision in *Abbott Laboratories* to the requirements of Article III or, more importantly, question whether the plaintiffs had standing.[107] Rather, the Court explicitly based its explanation of ripeness in *Abbott Laboratories* on the underlying statute, the Administrative Procedure Act (APA).[108]

The next decades offered a mixed understanding of the ripeness doctrine. In *Socialist Labor Party v. Gilligan* (*Socialist Labor Party*),[109] the Court explained that "even when jurisdiction exists it should not be exercised unless the case tenders the underlying . . . issues in clean-cut and concrete form," again suggesting that ripeness was a prudential, rather than constitutional, doctrine.[110] In other words, the phrase "even when jurisdiction exists" implied that Article III jurisdiction over a case or controversy is not determinative of justiciability, and indicated that—under certain circumstances—jurisdiction "should not be exercised" because of prudential ripeness considerations.[111] However, even though *Socialist Labor Party* framed ripeness as prudential, the Court decided the case on the ground that "[n]othing in the record shows that appellants have suffered any injury thus far, and the law's future effect remains wholly speculative."[112] The decision itself seemed to rest on some combination of standing and ripeness concerns.

The Supreme Court did explicitly link ripeness to Article III seven years after *Abbott Laboratories*, in the *Regional Rail Reorganization Act Cases*.[113]

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103 *Id.* at 149.

104 *Id.* at 153–54.

105 *Id.* at 148.

106 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (defining the "injury in fact" requirement of standing as "an invasion of a legally protected interest which is . . . concrete and particularized").

107 *See generally Abbott Laboratories*, 387 U.S. 136 (containing no reference to Article III).

108 *Id.* at 137; 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

109 406 U.S. 583 (1972).

110 *Id.* at 588 (internal citation and quotation marks omitted).

111 *See id.*

112 *Id.* at 589.

113 U.S. 102, 138 (1974).

The Court's explanation of ripeness began the trend toward understanding ripeness as some kind of hybrid doctrine:

> [B]ecause issues of ripeness involve, at least in part, the existence of a live "Case or Controversy," we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the "Case or Controversy" sense. Further, to the extent that questions of ripeness involve the exercise of judicial restraint . . . the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties.[114]

In two sentences, the Court first suggested that ripeness was at least partially a constitutional doctrine and then said that it was prudential, involving "judicial restraint."[115] The Court further explained that "there are situations where, even though an allegedly injurious event is certain to occur, the Court may delay resolution of constitutional questions until a time closer to the actual occurrence of the disputed event, when a better factual record might be available"—a statement that paralleled the *Abbott Laboratories* test for prudential ripeness while also considering the certainty of injury, a question of standing.[116]

Despite that hybrid understanding, the Court described ripeness as exclusively prudential only two years later in *Buckley v. Valeo* (*Buckley*).[117] The Supreme Court framed an issue as "a question of ripeness, rather than lack of case or controversy under Art[icle] III," suggesting that ripeness was in fact prudential.[118] The Court specifically noted that "[w]e have recently recognized the distinction between jurisdictional limitations imposed by Art[icle] III and problems of prematurity and abstractness that may prevent adjudication in all but the exceptional case."[119] The Court held that the case was ripe for decision and then proceeded to the merits.[120] It did not analyze the question of whether the parties had standing. These conflicting cases foreshadowed the confusion that now troubles the doctrine of ripeness.

Thirty years after *Abbott Laboratories*, the Supreme Court offered an explication of ripeness in the environmental context when it decided *Ohio Forestry*.[121] In *Ohio Forestry*, the Sierra Club sought to challenge a Land and Resource Management Plan developed under the National Forest

114 *Id.* at 138 (citing Poe v. Ullman, 367 U.S. 497, 502–03 (1961); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140–41, 154–55 (1951) (Frankfurter, J., concurring); Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–42 (1937); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring)).

115 *Id.*

116 *Id.* at 143.

117 424 U.S. 1 (1976).

118 *Id.* at 117.

119 *Id.* at 114 (quoting *Socialist Labor Party*, 406 U.S. 583, 588 (1972) (internal quotation marks omitted).

120 *Id.* at 117–18.

121 523 U.S. 726 (1998).

Management Act of 1976 (NFMA).[122] While the Sixth Circuit found the case justiciable, the Supreme Court concluded that it was not ripe for review and reversed.[123] The Court explained that the NFMA did not provide for pre-implementation judicial review of forest plans.[124] It did not address the question of whether the lack of "practical harms," which was fatal to the ripeness analysis, also deprived the Sierra Club of standing.[125] While *Ohio Forestry* cited to *Abbott Laboratories*, it made no mention of Article III or any constitutional ripeness requirement—and yet it seemed to decide the case on facts more relevant to standing than to ripeness.[126]

Like its predecessor *Abbott Laboratories*, *Ohio Forestry* identified no constitutional ground for its ripeness requirement.[127] But unlike the facts in *Abbott Laboratories*, the facts in *Ohio Forestry* raised serious questions as to whether the Sierra Club could show Article III standing to sue. While the Court framed the issue as one of ripeness, the case actually failed due to a lack of injury: the plaintiffs could not show that in practice they had been harmed, nor that they were likely to be harmed, by the agency's actions. That lack of injury suggests that the Court at least partially decided *Ohio Forestry* on grounds traditionally understood as Article III standing. The failure to identify them as such is problematic, to say the least. Standing is a jurisdictional question; if a party does not have standing, the court has no jurisdiction to decide a case. As a result, if the Sierra Club lacked standing in the first place, the Court had no jurisdiction to hold that the case was unripe.

Even before *Ohio Forestry*, the Supreme Court had begun to explicitly differentiate between prudential ripeness and an Article III limitation, though it referred to that limitation as constitutional ripeness rather than the injury element of standing. In *Reno v. Catholic Social Services*,[128] the Court stated that the "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."[129] Notably, both of the cases that it cited to support that statement, *Buckley* and *Socialist Labor Party*, were *prudential* ripeness cases.[130] However, at least *Socialist Labor Party*, while nominally a prudential ripeness case, carried undertones of Article III.[131]

Most recently, the Court in *Susan B. Anthony List v. Driehaus*[132] stated, "[t]he doctrines of standing and ripeness 'originate' from the same Article III

122 *Id.* at 728–29. NMFA is codified at 16 U.S.C. §§1600–1614 (2012).

123 *Ohio Forestry*, 523 U.S. at 732, 739.

124 *Id.* at 737.

125 *Id.* at 733–34, 737.

126 *Id.* at 732–34 (discussing injury and causation while reviewing ripeness).

127 *See generally id.* at 726 (failing to identify constitutional source of ripeness doctrine).

128 509 U.S. 43 (1993).

129 *Id.* at 57 n.18.

130 *Id.* (citing *Buckley*, 424 U.S. 1, 114 (1976); and *Socialist Labor Party*, 406 U.S. 583, 588 (1972)).

131 *Socialist Labor Party*, 406 U.S. at 588.

132 134 S. Ct. 2334 (2014).

limitation."[133] Once again, though, the Supreme Court cited to a line of cases that originally described ripeness as a prudential limitation.[134] In other words, while the Court described the cases it cited as supporting a constitutional understanding of ripeness, those cases *actually* described ripeness as prudential.[135] In *Buckley*, at least, the Court's analysis seemed to bear out a prudential understanding of ripeness.[136] However, *Socialist Labor Party* might today be analyzed under an Article III rubric.[137] Thus, while the Supreme Court has most recently described ripeness as both prudential and constitutional, the precedent that it cites to support that assertion is as tangled as it has ever been.[138]

2. The Ninth Circuit's Treatment of Ripeness

Given that the Supreme Court has at times suggested that ripeness is a prudential doctrine, and at other times indicated that it comes from Article III,[139] some lower courts have attempted to articulate the difference between constitutional and prudential ripeness.[140] There is some consensus that constitutional ripeness requires a "concrete injury,"[141] which does nothing

133 *Id.* at 2341 n.5.

134 *Id.* (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335 (2006)).

135 Tracing the lineage of the cases that the Court relied on in *Susan B. Anthony List* demonstrates that the Court's understanding of ripeness appears to have suddenly changed from prudential to constitutional. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. at 352; Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993); *Buckley*, 424 U.S. at 114 ("We have recently recognized the distinction between jurisdictional limitations imposed by Art. III and '[p]roblems of prematurity and abstractness' that may prevent adjudication in all but the exceptional case."); *Socialist Labor Party*, 406 U.S. at 588 ("Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present."). In other words, at a certain point—namely, in *Catholic Social Services* in 1993—the Court abruptly described its prudential ripeness cases *Buckley* and *Socialist Labor Party* as constitutional ripeness cases.

136 *Buckley*, 424 U.S. at 114.

137 *Socialist Labor Party*, 406 U.S. at 588 (discussing that the issue is not ripe because of a lack of injury).

138 *Buckley*, 424 U.S. at 114 ("We have recently recognized the distinction between jurisdictional limitations imposed by Art. III and '[p]roblems of prematurity and abstractness' that may prevent adjudication in all but the exceptional case.").

139 *See supra* Part II.B.1.

140 *See, e.g.*, Simmonds v. Immigration & Naturalization Serv., 326 F.3d 351, 357 (2d Cir. 2003) ("Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary. It prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it. But when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay. It does not mean that the case is not a real or concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III. Of course, in deciding whether 'better' means later, the court must consider the likelihood that some of the parties will be made worse off on account of the delay. But that, and its degree, is just one—albeit important—factor the court must consider.").

141 *See, e.g.*, *id.* at 360; *Montana,* 766 F.3d 1184, 1188 (9th Cir. 2014).

more than duplicate the requirement of a "concrete and particularized injury" to establish Article III standing.[142] In contrast, courts often link prudential ripeness to the requirements of fitness for judicial review and hardship to the parties, as articulated in *Abbott Laboratories*.[143] To the extent that a constitutional ripeness doctrine exists at all, it is best understood as a requirement that, practically speaking, will always be met by the concrete injury prong of the Article III standing analysis.[144] In contrast, prudential ripeness speaks to the stage of the case and whether further development of the facts will present the issues more clearly.

The Ninth Circuit has had many occasions to explore the contours of its understanding of constitutional ripeness. It has developed new approaches in two significant cases, *Freedom to Travel Campaign v. Newcomb* (*Freedom to Travel Campaign*)[145] and *Thomas v. Anchorage Equal Rights Commission* (*Thomas*).[146] The Ninth Circuit applied both approaches to ripeness in its most recent environmental ripeness and standing case, *Montana*.[147] In doing so, the Ninth Circuit has continued to affirm its understanding of ripeness as both a constitutional and a prudential doctrine.[148]

a. The Firm Prediction Rule: Freedom to Travel Campaign v. Newcomb

While it was not an environmental case, *Freedom to Travel Campaign* developed an important doctrine in Ninth Circuit ripeness and standing: the "firm prediction" rule.[149] *Freedom to Travel Campaign* addressed a challenge to the restrictions imposed on travel to Cuba.[150] Freedom to Travel Campaign challenged the restrictions despite having not applied for a specific license under those restrictions.[151] The Ninth Circuit turned to the familiar *Abbott Laboratories* ripeness test, considering fitness for judicial review and hardship to the parties.[152] Under that standard, the Ninth Circuit concluded that at least some of Freedom to Travel's claims were ripe, though it did not specify whether this statement referred to constitutional or prudential

142 *See Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (defining the "injury in fact" requirement of standing as "an invasion of a legally protected interest which is . . . concrete and particularized").

143 *See, e.g.*, *Ohio Forestry*, 523 U.S. 726, 732–33 (1998) (citing *Abbott Laboratories*, 387 U.S. 136, 148–49 (1967)).

144 *See, e.g.*, *Montana*, 766 F.3d at 1189; Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc).

145 82 F.3d 1431 (9th Cir. 1996).

146 220 F.3d 1134 (9th Cir. 2000).

147 *Montana*, 766 F.3d at 1189–90.

148 *Id.* at 1188 n.3.

149 *Freedom to Travel Campaign*, 82 F.3d at 1435–36.

150 *Id.* at 1433.

151 *Id.* at 1434.

152 *Id.*

ripeness.[153] However, it did adopt the "firm prediction" rule articulated in Justice O'Connor's concurrence in *Reno v. Catholic Social Services*:[154]

> If it is "inevitable" that the challenged rule will "operate" to the plaintiff's disadvantage—if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule—then there may be a justiciable controversy that the court may find prudent to resolve.[155]

The Ninth Circuit used the firm prediction rule to conclude that Freedom to Travel's claims were indeed ripe, because the court could firmly predict that the government would deny any application for a license.[156] The firm prediction rule, as described by Justice O'Connor, spoke to both prudential and constitutional or standing considerations: if satisfied, "there may be a justiciable controversy" which would seem to mean standing; "that the court may find prudent to resolve," meaning that the controversy is prudentially ripe.[157]Judge Kozinski dissented from the adoption of the firm prediction rule, arguing that it undermined the basic rationale behind the ripeness doctrine.[158] Quoting *Abbott Laboratories*, he warned, "[t]he better rule is for courts to wait 'until an administrative decision has been formalized and its effects felt in a *concrete* way by the challenging parties.'"[159] Judge Kozinski focused on the portion of *Abbott Laboratories* that most resembles the constitutional standing requirements—the requirement of "concrete" effects.[160]

The firm prediction rule tracked closely the Supreme Court's decision in *Defenders of Wildlife*, a case that turned entirely on standing.[161] The environmentalist plaintiffs in *Defenders of Wildlife* could not show an injury because, while they planned to return to the location that might be affected by changes in policy, they could not demonstrate when they would return to reach the necessary level of certainty.[162] But under the firm prediction rule, the Court could have held that the *Defenders of Wildlife* plaintiffs' injuries were sufficiently certain to meet the injury prong if the Court could firmly predict that they would eventually be affected. The overlap between the *Defenders of Wildlife* standing test and the Ninth Circuit's newly adopted firm prediction rule further demonstrates the overlap that often went unacknowledged at that time.

153 *Id.* at 1435.

154 Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 69 (1993) (O'Connor, J., concurring).

155 *Freedom to Travel Campaign*, 82 F.3d at 1436 ("[W]e are free to adopt [the firm prediction rule] in this Circuit and do so now") (citing *Catholic Soc. Servs., Inc.*, 509 U.S. at 69 (O'Connor, J., concurring)).

156 *Id.*

157 *Catholic Soc. Servs., Inc.*, 509 U.S. at 69.

158 *Freedom to Travel Campaign*, 82 F.3d at 1443–44 (Kozinski, J. dissenting).

159 *Id.* at 1444 (emphasis added) (quoting *Abbott Laboratories*, 387 U.S. 136, 148–49 (1967)).

160 *Id.*

161 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

162 *Id.* at 564.

b. The Abrupt Narrowing of Standing and Ripeness in the Ninth Circuit: Thomas v. Anchorage Equal Rights Commission

The Ninth Circuit further clarified its approach to ripeness and standing in *Thomas*, another non-environmental case that would have significant consequences for later environmental cases.[163] *Thomas* decided a First Amendment challenge to city and state laws outlawing discrimination in rental housing based on marital status.[164] Two landlords challenged the laws on the ground that the laws infringed on their rights to free exercise of religion and free speech.[165] Rehearing the case en banc, the Ninth Circuit stated, "the ripeness inquiry contains both a constitutional and a prudential component."[166]

The court folded standing into constitutional ripeness, but sought to distinguish the constitutional and prudential ripeness doctrines by analyzing each separately.[167] The court noted:

> The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong. Sorting out where standing ends and ripeness begins is not an easy task. . . . The overlap between these concepts has led some legal commentators to suggest that the doctrines are often indistinguishable.[168]

The court recognized that, at least based on the facts presented, constitutional ripeness effectively required no more than the injury-in-fact prong of standing.[169] In contrast, the court described prudential ripeness as "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration"—the familiar *Abbott Laboratories* definition of ripeness.[170] In doing so, the court set forth an understanding of constitutional and prudential ripeness that would guide its decisions in later cases addressing environmental issues.[171] Judge O'Scannlain, who would later decide *Montana*,[172] concurred in the decision and explicitly noted the constitutional nature of ripeness: "Today, the court . . . commendably reshapes this circuit's overly permissive jurisprudence of ripeness and standing by tightening the requirements for bringing lawsuits. These

163 *Thomas*, 220 F.3d 1134 (9th Cir. 2000).

164 *Id.* at 1137.

165 *Id.* at 1138.

166 *Id.* (quoting Portman v. Cnty. of Santa Clara, 995 F.2d 898, 902 (9th Cir. 1993)).

167 *Id.*

168 *Id.* (internal citations and footnotes omitted).

169 *See id.* at 1139 ("We need not delve into the nuances of the distinction between the injury in fact prong of standing and the constitutional component of ripeness: in this case, the analysis is the same.").

170 *Id.* at 1141 (quoting *Abbott Laboratories*, 387 U.S. 136, 149 (1967)).

171 *See, e.g.*, *Montana*, 766 F.3d 1184, 1188–89 (9th Cir. 2014).

172 *Id.* at 1186.

requirements are born of Article III."[173] Judge O'Scannlain did not distinguish between constitutional and prudential ripeness. The reshaping of the Ninth Circuit's ripeness doctrine in *Thomas*, and before that in *Freedom to Travel Campaign*, had a direct impact on the results in the environmental cases like *Montana* that followed.

c. The Future of the Ninth Circuit's Approach to Ripeness: Montana Environmental Information Center v. Stone-Manning

The Ninth Circuit has recently clarified its conception of standing and constitutional ripeness in environmental law cases. In late 2014, the Ninth Circuit decided *Montana* and once again set forth the court's understanding of the interaction between standing and constitutional ripeness.[174] In *Montana*, the Montana Environmental Information Center (MEIC) and Sierra Club sought declaratory and injunctive relief to force the Director of the Montana Department of Environmental Quality to obey the Surface Mining Control and Reclamation Act (SMCRA).[175] MEIC and the Sierra Club alleged that the Director had engaged in a pattern of violating the duties imposed by the SMCRA by approving permits without performing the necessary analyses.[176] MEIC argued that its members would be injured by the mining operations for which the Director granted permits.[177]

The Ninth Circuit decided the case on both ripeness and standing grounds.[178] It took care to note that "[w]e are concerned here with the constitutional aspects of standing and ripeness. We need not analyze prudential standing or prudential ripeness."[179] The court first laid out the familiar requirements of constitutional standing—injury, causation, and redressability.[180] Explaining that "[a] dispute is ripe in the constitutional sense if it presents concrete legal issues, presented in actual cases, not abstractions,"[181] the court stated that "[r]ipeness and standing are closely related because they originate from the same Article III limitation."[182]

However, the court's analysis seemed to conflate cases in which the ripeness and standing questions could be answered with a single analysis—that is, where the lack of any injury clearly meant that the case was not fit

173 *Thomas*, 220 F.3d at 1142.

174 *Montana*, 766 F.3d at 1184, 1186. Judges O'Scannlain and Kleinfeld, who had disagreed about standing and ripeness in *Thomas*, were united 14 years later in the *Montana* decision.

175 *Id.* at 1186. SMCRA is codified at 30 U.S.C. §§ 1201–1328 (2012).

176 *Montana*, 766 F.3d at 1187.

177 *Id.* at 1189.

178 *Id.* at 1188–89.

179 *Id.* at 1188 n.3.

180 *Id.* at 1188 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc., 528 U.S. 167, 180–81 (2000)).

181 *Id.* (quoting Colwell v. Dep't of Health and Human Servs., 558 F.3d 1112, 1123 (9th Cir. 2009)) (internal punctuation marks omitted).

182 *Id.* (quoting Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n. 5 (2014)) (internal quotation marks omitted).

for judicial review—and cases in which the court explicitly held that ripeness originated from Article III rather than prudential considerations.[183] It is certainly true that, as the Ninth Circuit recognized in *Thomas*, "in many cases, ripeness coincides squarely with standing's injury in fact prong."[184] But the fact that two analyses overlap does not mean that they both have the same legal source.[185] Where the goals of the analyses are different—as they are with standing and ripeness[186]—the overlap of the analyses does not mean that both originate entirely from Article III.

Despite noting that the analyses were essentially the same, the Ninth Circuit proceeded to analyze both standing and ripeness.[187] The court easily disposed of the standing question, holding that the environmental plaintiffs had failed to allege an "actual or imminent injury" based solely on a supposed pattern of failure to comply with the SMCRA because the plaintiffs had not alleged specific facts showing that the challenged permit would be granted, among other reasons.[188]

The court spent more time on the question of ripeness, despite the overlap in analysis.[189] The Ninth Circuit explained that "[a]nalyzing the sufficiency of MEIC's complaint under the constitutional ripeness standard yields the same answer for the same reasons,"[190] citing with approval the Second Circuit's statement that "'[c]onstitutional ripeness . . . is really just about' the injury-in-fact requirement."[191] The environmental plaintiffs argued for application of the Ninth Circuit's firm prediction rule established in *Freedom to Travel Campaign*, asserting that if the case had been ripe under that rule, MEIC would also have standing.[192] The Ninth Circuit rejected that argument as well, both refusing to decide whether the firm prediction ripeness rule could apply in such a case and holding that even if it did apply, MEIC had failed to satisfy it.[193]

Given the court's statement that the constitutional ripeness inquiry is essentially the injury-in-fact prong of standing, the standing decision doomed MEIC's ripeness arguments and rendered the court's decision unnecessary.[194] Given MEIC's lack of standing, the court did not need to

183 *See id.* at 1189.

184 *Id.* (quoting Thomas v. Anchorage Equal Rights Comm'n., 220 F.3d 1134, 1138 (9th Cir. 1999) (en banc)) (internal quotation marks omitted).

185 *See* Nichol, *supra* note 12, at 155 ("[T]he [ripeness] doctrine serves goals that the Court has typically characterized as prudential rather than constitutional.").

186 Standing seeks to ensure that both parties have a sufficient stake in the controversy. *See Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992). In contrast, ripeness is concerned with the timing and factual development of a case. *See Abbott Laboratories*, 387 U.S. 136, 148–49 (1967).

187 *Montana*, 766 F.3d at 1189.

188 *Id.* (internal citations and quotations omitted).

189 *Id.* at 1189–91.

190 *Id.* at 1189.

191 *Id.* at 1189–90 (quoting Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 688–89 & n.6 (2d Cir. 2013)).

192 *Id.* at 1190.

193 *Id.* at 1190–91.

194 *Id.* at 1189.

reach the ripeness argument.[195] If MEIC always lacked standing, it did not matter whether its claim was ripe or not; the court lacked jurisdiction to decide it. Indeed, if constitutional ripeness really is "'just about' the injury-in-fact requirement,"[196] why bother with it at all?

Prudential ripeness, as discussed above, serves an independent purpose. It allows courts to balance the wide range of considerations present in any environmental case—when it is too early to decide, and when it will harm the parties too much to wait for further facts. The Ninth Circuit should cease to apply an independent constitutional ripeness doctrine and consider only prudential ripeness and standing when deciding whether it should reach the merits of an environmental case.

IV. THE FUTURE OF THE PRUDENTIAL RIPENESS DOCTRINE

If the courts recognized ripeness as an exclusively prudential doctrine, such recognition would have a significant, but not overwhelming, impact on the number of cases heard by federal courts each year. Prudential doctrines do not affect a court's jurisdiction; they bear only on whether the court, in managing its workload and striving to decide cases correctly, determines that it should hear a case at a different time.[197] Further, the Supreme Court has cast doubt on whether courts can decide not to hear a case within their jurisdiction on prudential grounds.[198]

A. Recent Supreme Court Jurisprudence

While *Abbott Laboratories* is still good law, the Supreme Court has raised doubts about the future of prudential ripeness. The question of whether federal courts can decline to hear cases on the basis of prudential concerns has long plagued both courts and legal scholars. Some scholars argue that Justice Marshall was correct when he stated that "[w]e have no more right to decline the exercise of jurisdiction which is given . . . than to usurp that which is not given."[199] Others describe this as dictum with no bearing on the use of prudential doctrines to avoid deciding cases within the court's jurisdiction.[200] When the Supreme Court ultimately resolves the dispute, it will have a significant impact on ripeness cases—particularly the

195 *Id.*

196 *Id.* at 1189–90 (quoting *Nat'l Org. for Marriage, Inc.*, 714 F.3d at 688–89 & n.6).

197 *Abbott Laboratories*, 387 U.S. 136, 148–49 (1967).

198 Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014).

199 Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 19 (1964) (quoting Cohens v. Virginia, 19 U.S. 264, 404 (1821)) (internal quotations omitted).

200 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 147 (2d ed. 1986).

environmental cases that prudential doctrines can bar from decision on their merits.[201]

In the nearly 200 years since Justice Marshall first suggested that federal courts could not decline to decide cases over which they had jurisdiction, the courts have repeatedly applied such prudential doctrines to reject cases.[202] In its most recent term, however, the Supreme Court questioned whether prudential ripeness could, in fact, allow federal courts to decline to decide cases: "To the extent respondents would have us deem petitioners' claims nonjusticiable on grounds that are prudential, rather than constitutional, that request is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[203] However, the Court found it unnecessary to "resolve the continuing vitality of the prudential ripeness doctrine" in that case because the prudential ripeness factors were "easily satisfied."[204] If the Court later holds that the prudential ripeness doctrine is dead,[205] it will have significant implications for the environmental cases heard by federal courts, particularly if, as argued in this Chapter, courts accept that ripeness is a solely prudential doctrine without roots in Article III.

For example, as discussed above, the Ninth Circuit refused to decide several of the claims raised in *Earth Island Institute* because they did not meet the prudential ripeness standard, despite the fact that the plaintiffs had standing to bring those claims.[206] Without the barrier of prudential ripeness, the Ninth Circuit would have reached the merits of all of the plaintiff's claims, rather than only a few. Similarly, in *Natural Resources Defense Council v. Abraham*,[207] the Ninth Circuit again refused to decide a case on the merits based on prudential ripeness, while at least assuming that the parties had standing.[208] The plaintiffs had succeeded on the merits of their claim

201 *See, e.g.*, Nat. Res. Def. Council v. Abraham, 388 F.3d 701, 705 (9th Cir. 2004) (deciding ripeness without any mention of standing, holding that "[t]he abstruse and abstract arguments by the parties show that this case is not presently fit for review . . . There simply are times when further factual development would significantly advance our ability to deal with the legal issues presented") (internal citation and quotation marks omitted).

202 *See, e.g.*, Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 160–61 (1967); Nat. Res. Def. Council, 388 F.3d at 703.

203 *Susan B. Anthony List*, 134 S. Ct. at 2347 (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014), Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)) (internal quotation marks omitted).

204 *Id.*

205 The debate over whether courts may decline to decide cases within their jurisdiction based on prudential concerns is certainly not over, given that the Supreme Court did not need to reach ripeness to decide *Susan B. Anthony List*. *See, e.g.*, Kentucky v. United States, 759 F.3d 588, 595–96 & n.3 (6th Cir. 2014).

206 *Earth Island Inst.*, 490 F.3d 687, 696 (9th Cir. 2007), *aff'd in part, rev'd in part sub nom.* Summers v. Earth Island Inst., 555 U.S. 488 (2009). The Supreme Court later reversed *Earth Island Institute* because it held that the Ninth Circuit had incorrectly determined that the plaintiffs had standing. *Earth Island Inst.*, 555 U.S. at 500–01.

207 388 F.3d 701 (9th Cir. 2004).

208 *Id.* at 705.

before the district court, but the Ninth Circuit reversed because it determined that the claims were unripe.[209] In both cases, the Ninth Circuit used prudential ripeness to avoid deciding the merits of environmental claims. Without the doctrine of prudential ripeness as a bar, the court would have had to decide the merits of those claims, and in *Abraham* at least, might well have affirmed the lower court's decision on the merits. Thus, the elimination of prudential ripeness as a bar to relief would broaden the range of environmental cases decided on their merits in the Ninth Circuit.[210]

B. The Effect on Courts of an End to Prudential Ripeness

Prudential ripeness exists in part to help federal courts manage their workloads and avoid unnecessary interference by deciding only those cases where the issues are fully and concretely presented.[211] As a result, if the Supreme Court concluded that prudential ripeness cannot stand in the way of a decision on the merits, the number of cases heard by federal courts might rise. However, the increase should be relatively small. Many "unripe" cases are nonjusticiable in other ways, either because they do not satisfy all of the statutory requirements of the cause of action under which they are brought,[212] or because the same considerations that make them unripe similarly render one party without standing.[213] Accordingly, recognizing ripeness as a prudential doctrine, even if the Supreme Court subsequently does away with prudential doctrines altogether, will not overwhelm the federal docket.

1. Statutory and Constitutional Law Perform the Same Function as Prudential Ripeness

Every case in federal court requires some cause of action to confer jurisdiction.[214] In some environmental cases, the strict requirements of the statutes that give rise to the cause of action, such as finality and exhaustion of administrative remedies, will keep federal courts from deciding otherwise

209 *Id.* at 704–05.

210 *See, e.g.*, U.S. v. Braren, 338 F.3d 971, 975–76 (9th Cir. 2003) (holding that "[t]here is little doubt that the constitutional ripeness test is met here. . . . The prudential component of ripeness requires more thorough consideration," ultimately concluding that case was unripe prudentially). *See also* Defs. of Wildlife v. Hall, 807 F. Supp. 2d 972, 978–71 (D. Mont. 2011); Northern Cheyenne Tribe v. Norton, 503 F.3d 836, 845–46 (9th Cir. 2007).

211 *Abbott Laboratories*, 387 U.S. 136, 148–49 (1967).

212 *E.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990) (holding that the claim was unripe, there was no final agency action, and there was no standing); Ecology Center, Inc. v. U.S. Forest Serv., 192 F.3d 922, 924–25 (9th Cir. 1999) (holding that there was no final agency action and that case was unripe); *Braren*, 338 F.3d at 975–76 (holding that there was no final agency action and that case was prudentially, though not constitutionally, unripe).

213 *See Montana*, 766 F.3d 1184, 1188–89 (9th Cir. 2014) (holding that there was no standing or constitutional ripeness, and stating that the case cannot be "fit for judicial review" under prudential ripeness standard).

214 *See* U.S. CONST. art. III, § 2, cl. 1 (describing the jurisdiction of the federal courts).

unripe cases before their time. By eliminating the confusion over the boundaries of Article III standing and prudential ripeness, the courts may be able to create a more coherent and clearly delineated body of standing jurisprudence that tells litigants just what is required of them.[215]

The statutory requirements of both environmental statutes and the APA govern numerous environmental cases.[216] As such, even if the Supreme Court did away with prudential ripeness in general, that decision would not open the courthouse doors to every litigant with some conceivable injury that satisfied Article III's standing requirements. For example, the APA itself provides several barriers that would continue to serve much the same function as prudential ripeness does generally.[217] The specific statutory requirements of agency action,[218] finality,[219] and exhaustion of administrative remedies[220] together serve many of the same interests that the prudential ripeness doctrine seeks to protect.[221] These statutory requirements ensure that disputes are fit for review, in the sense that the issues are concretely presented and require no further development. Accordingly, even if the Supreme Court eventually overrules *Abbott Laboratories*' prudential ripeness doctrine, the technical requirements of the APA and similar statutes will hold back any flood of cases previously rejected as unripe.

2. Constitutional Ripeness is Redundant

As discussed above, 53% of the reported environmental cases decided by the Court of Appeals for the Ninth Circuit combined the standing and ripeness analyses.[222] While some of that combination may simply be due to

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215 *See* Chemerinsky, *supra* note 15, at 677 (describing the current area of justiciability as "a morass that confuses more than it clarifies").

216 *See, e.g.*, Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012); Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012).

217 Ripeness serves three basic goals: "measur[ing] the demands of substantive statutory or constitutional causes of action . . . determin[ing] whether the litigant's asserted harm is real and concrete . . . , [and] serv[ing] the goals of prudent judicial decision making." Nichol, *supra* note 12, at 162.

218 5 U.S.C. § 702 (2012) (offering a right of review to people "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action").

219 *Id.* § 704 (2012) (making judicial review available for "final agency action for which there is no other adequate remedy in a court").

220 *See* Darby v. Cisneros, 509 U.S. 137, 153–54 (1993) (setting forth modern exhaustion requirements).

221 The goals of ripeness are "measur[ing] the demands of substantive statutory or constitutional causes of action. . . . determin[ing] whether the litigant's asserted harm is real and concrete . . . [and] serv[ing] the goals of prudent judicial decision making." Nichol, *supra* note 12, at 162.

222 *See supra* Part II.B.1 (discussing the Ninth Circuit's propensity for combining these issues); *infra* Appendix I (listing Ninth Circuit cases that do this).

the chaotic nature of the ripeness doctrine, in environmental cases much of the merger occurs, explicitly or implicitly, because the Ninth Circuit understands at least some portion of ripeness to involve "concrete" injury.[223] A "concrete injury" replicates the requirement of a "concrete and particularized injury" that is part of the "irreducible constitutional minimum of standing."[224] In any environmental case where a party can demonstrate standing, the party will at least be able to meet the constitutional ripeness standard.[225] As a result, constitutional ripeness is a redundancy and courts should fold it back into Article III standing where it belongs.

V. CONCLUSION

Ripeness acts as the gatekeeper to any environmental litigant seeking a decision on the merits. But in the environmental context, the Ninth Circuit has followed the Supreme Court's lead and has routinely analyzed ripeness, a prudential doctrine, in combination with standing, a constitutional requirement. In *Montana*, the Ninth Circuit's most recent attempt to deal with ripeness and standing, the court correctly separated the analyses but focused on "constitutional ripeness."[226] The Supreme Court's chaotic ripeness doctrines have led the Ninth Circuit into this morass. From Justice Brandeis's musings on the nature of justiciability,[227] the Supreme Court has waffled between describing ripeness as prudential or constitutional, to the point of deciding cases on prudential ripeness grounds and then describing those cases as addressing constitutional ripeness.

Fundamentally, ripeness is prudential and distinct from Article III standing. Courts have not suggested that constitutional ripeness embodies something beyond the "concrete injury" requirement subsumed in the requirement of standing.[228] Rather, that is exactly how courts describe it, repeatedly noting that the standing and ripeness analyses merge.[229] Constitutional ripeness simply duplicates part of the requirements of standing. The Ninth Circuit should stop analyzing environmental cases under a rubric of constitutional ripeness that it acknowledges merges with the injury-in-fact requirement of standing. Instead, the Ninth Circuit should explicitly state when it employs prudential ripeness to choose not to decide an otherwise justiciable environmental case. Doing so will allow the courts to continue to analyze cases clearly in the event that the Supreme Court

223 *Montana*, 766 F.3d 1184, 1188 (9th Cir. 2014).

224 *See Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (laying out the test for constitutional standing).

225 *See Montana*, 766 F.3d at 1189 ("[I]n many cases, ripeness coincides squarely with standing's injury in fact prong." (citation omitted)).

226 *Id.*

227 *See supra* Part III.B.1.

228 *See Montana*, 766 F.3d at 1188 (discussing the two doctrines as one issue).

229 *See, e.g.*, Kerr-McGee Chem. Corp. v. U.S. Dep't of Interior, 709 F.2d 597, 600 (1983) (noting that "the issues of standing and ripeness here merge"); *see also supra* Part II.B.1 (discussing the Ninth Circuit's merging of these doctrines).

decides, as it has suggested, that federal courts cannot turn away cases over which they have power.

As discussed above, the Ninth Circuit alone provides multiple examples of environmental cases in which prudential ripeness, and nothing else, prevented a decision on the merits of a claim. By distinguishing clearly between prudential ripeness and other justiciability doctrines, the Ninth Circuit would allow plaintiffs to enforce environmental legislation as Congress intended. Doing so will also help to clarify, or at least not confuse further, an area of the law that is in desperate need of clarity. The Ninth Circuit should reverse course and analyze standing and ripeness separately, one as a constitutional doctrine and the other as a prudential doctrine.

APPENDIX I: COMBINED ANALYSES—NINTH CIRCUIT

- W. Oil & Gas Ass'n v. U.S. Envtl. Prot. Agency, 633 F.2d 803 (9th Cir. 1980)
- Nance v. U.S. Envtl. Prot. Agency, 645 F.2d 701 (9th Cir. 1981)
- Kerr-McGee Chem. Corp. v. U.S. Dep't of the Interior, 709 F.2d 597 (9th Cir. 1983)
- Cal. Energy Res. Conservation & Dev. Comm'n v. Johnson, 807 F.2d 1456 (9th Cir. 1986)
- Or. Envtl. Council v. Kunzman, 817 F.2d 484 (9th Cir. 1987)
- Didrickson v. U.S. Dep't of the Interior, 982 F.2d 1332 (9th Cir. 1992)
- Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993)
- Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993)
- Smith v. U.S. Forest Serv., 33 F.3d 1072 (9th Cir. 1994)
- Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir. 1995)
- ONRC Action v. U.S. Bureau of Land Mgmt., 150 F.3d 1132 (9th Cir. 1998)
- Am. Rivers v. Fed. Energy Regulatory Comm'n, 187 F.3d 1007 (9th Cir. 1999)
- Wilderness Soc'y v. Thomas, 188 F.3d 1130 (9th Cir. 1999)
- Am. Rivers v. Fed. Energy Regulatory Comm'n, 201 F.3d 1186 (9th Cir. 1999)
- West v. Sec. of U.S. Dep't of Transp., 206 F.3d 920 (9th Cir. 2000)
- Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., U.S. Bureau of Land Mgmt., 273 F.3d 1229 (9th Cir. 2001)
- Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062 (9th Cir. 2002)
- Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency, 319 F.3d 398 (9th Cir. 2003)
- Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency, 344 F.3d 832 (9th Cir. 2003)
- High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630 (9th Cir. 2004)
- Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999 (9th Cir. 2009)
- Sierra Forest Legacy v. Sherman, 646 F.3d 1161 (9th Cir. 2011)

- Montana Sulphur & Chem. Co. v. U.S. Envtl. Prot. Agency, 666 F.3d 1174 (9th Cir. 2012)
- Alcoa, Inc. v. Bonneville Power Admin., 698 F.3d 774 (9th Cir. 2012)
- Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281 (9th Cir. 2013)

APPENDIX II: SEPARATE ANALYSES—NINTH CIRCUIT

- Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n, 659 F.2d 903 (9th Cir. 1981)
- Friedman Bros. Inv. Co. v. Lewis, 676 F.2d 1317 (9th Cir. 1982)
- State of Nev. ex rel. Loux v. Herrington, 777 F.2d 529 (9th Cir. 1985)
- Trs. for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986)
- Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992)
- Nat. Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 966 F.2d 1292 (9th Cir. 1992)
- State of Cal. *ex rel.* State Water Res. Control Bd. v. Fed. Energy Regulatory Comm'n, 966 F.2d 1541 (9th Cir. 1992)
- Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346 (9th Cir. 1994)
- Res. Ltd., Inc. v. Robertson, 35 F.3d 1300 (9th Cir. 1993)
- Idaho Sporting Cong., Inc. v. U.S. Forest Serv., 92 F.3d 922 (9th Cir. 1996)
- Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835 (9th Cir. 2002)
- Bell v. Bonneville Power Admin., 340 F.3d 945 (9th Cir. 2003)
- Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961 (9th Cir. 2003)
- Laub v. U.S. Dep't of the Interior, 342 F.3d 1080 (9th Cir. 2003)
- Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930 (9th Cir. 2006)
- Earth Island Inst. v. Ruthenbeck, 490 F.3d 687 (9th Cir. 2006)
- City of Rialto v. W. Coast Loading Corp., 581 F.3d 865 (9th Cir. 2009)
- Ctr. For Biological Diversity v. Kempthorne, 588 F.3d 701 (9th Cir. 2009)
- W. Watersheds Project v. Kraayenbrink, 632 F.3d 472 (9th Cir. 2010)
- San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011)
- Pub. Lands for the People, Inc. v. U.S. Dep't of Agric., 697 F.3d 1192 (9th Cir. 2012)
- Mont. Envtl. Info. Ctr. v. Stone-Manning, 766 F.3d 1184 (9th Cir. 2014)