Georgia Law Review

Volume 50 | Number 2 Article 9

2016

From Ripe to Rotten: An Examination of the Continued Utility of the Ripeness Doctrine in Light of the Modern Standing Doctrine

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FROM RIPE TO ROTTEN: AN EXAMINATION OF THE CONTINUED UTILITY OF THE RIPENESS DOCTRINE IN LIGHT OF THE MODERN STANDING DOCTRINE

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I. INTRODUCTION

On June 16, 2014, the Supreme Court decided *Susan B. Anthony List v. Driehaus*, a case which involved a pre-enforcement First Amendment challenge to an Ohio statute that prohibited certain false statements made during the course of a political campaign.[1] The issue was whether the challenge was justiciable—and thus, whether the Court could hear it—based on the plaintiff organization's claim that its speech would be chilled due to the threat of the statute being enforced against it in the future.[2] At oral argument, the following dialogue took place between Justice Ginsburg and Michael Carvin, who was arguing on behalf of the plaintiffs:

> JUSTICE GINSBURG: Do you think this is a matter of standing or ripeness? The Sixth Circuit said ripeness.
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> MR. CARVIN: In all candor, Justice Ginsburg, I can't figure out the difference between standing and ripeness in this context. No question that we are being subject to something. I think the question is whether or not the threat is sufficiently immediate. I think people tend to think about that as a ripeness issue, but I think all of the Court's teachings on standing and immediacy of injury from the standing cases apply equally here. So I would view standing and ripeness in this context as essentially coextensive.[3]

The Court did not pause to discuss Mr. Carvin's answer, but his response raises an interesting question. In the typical first-year constitutional law class, standing and ripeness are presented as two independent doctrines that perform different functions but

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[1] 134 S. Ct. 2334, 2338–39 (2014).

[2] *Id.* at 2338, 2340.

[3] Transcript of Oral Argument at 18–19, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (No. 13-193).

work together to achieve the same goal[4]: to help courts determine whether a matter is a "case" or "controversy" they may hear under Article III of the Constitution.[5] Students are taught that standing furthers this goal by asking whether the party bringing suit is the proper party to litigate it, whereas ripeness furthers this goal by asking whether the suit is being brought at the appropriate time and not prematurely.[6] At this theoretical level, the doctrines seem to function differently, which leads most law students to simply conclude that they are distinct and move on, thankful that at least one topic in constitutional law is straightforward.

As Mr. Carvin's answer suggests, however, the difference between standing and ripeness is far less clear in practice. Although standing and ripeness theoretically ask very different questions—whether the party bringing suit is proper as opposed to whether the suit is being brought at the proper time—the Supreme Court's standing and ripeness requirements and its decisions applying those requirements appear to emphasize similar considerations. As a result, many of the Court's standing decisions involving plaintiffs seeking to prevent threatened future harm—the only cases in which ripeness would be an issue—could reasonably be described as ripeness decisions, and vice versa. Indeed, several commentators have recognized the overlap between standing and ripeness in such cases.[7]

Although it seems to be generally accepted that standing and ripeness are substantially similar as applied in cases involving

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[4] *See* KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 34 (Robert C. Clark et al. eds., 18th ed. 2013) (stating that a matter must satisfy the requirements expressed through every justiciability doctrine, including standing and ripeness, to qualify as a case or controversy).

[5] U.S. CONST. art. III, § 2, cl. 1.

[6] *See, e.g.*, Bill J. Hays, Comment, *Standing and Environmental Law: Judicial Policy and the Impact of* Lujan v. National Wildlife Federation, 39 U. KAN. L. REV. 997, 1020–21 (1991) ("[S]tanding doctrine addresses the question of who may litigate, while the ripeness question is meant to address the question of when to litigate.").

[7] *See, e.g.*, William James Goodling, Comment, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 88 WASH. L. REV. 1153, 1184 (2013) ("Ripeness doctrine and standing doctrine overlap at times, such that an opinion could fairly describe dismissing the plaintiff's claim either for being unripe or for lacking standing."); Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 859 n.125 (2004) ("The ripeness and standing doctrines nonetheless overlap.").

threatened future injury, there is a surprising lack of scholarship devoted to the natural question arising from this similarity—whether there is any real need for the ripeness doctrine at all.[8]

This Note will address the question of whether the ripeness doctrine actually serves a useful purpose in light of the modern standing doctrine. It will conclude that ripeness is no longer a necessary tool for assessing justiciability. This conclusion is based on the fact that over the course of time, the standing and ripeness inquiries have merged to a point where satisfaction of the modern standing requirements will necessarily render a claim ripe, thereby obviating the need for an independent ripeness doctrine.[9] It is also supported by the Supreme Court's preference for utilizing standing as opposed to ripeness in threatened future harm cases.[10]

This Note proceeds in two parts. Part II provides a general overview of standing and ripeness and illustrates the historical progressions of the doctrines from their origination to their modern application, where the doctrines have merged. Part III evaluates the similarity between the modern standing requirements and the modern standard for assessing ripeness, discusses the Supreme Court's recognition of this similarity and its preference for utilizing standing to assess justiciability, and argues that the ripeness doctrine should dissolve into standing.

II. BACKGROUND

It is now generally accepted that the standing and ripeness doctrines arise out of the same source: Article III of the United States Constitution.[11] Article III does not explicitly state that a

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[8] Over two decades ago, Professor Erwin Chemerinsky briefly discussed whether ripeness was necessary en route to his conclusion that all of the justiciability doctrines should be replaced with a new approach to justiciability. Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 696 (1990). After comparing ripeness and the injury requirement of standing, Professor Chemerinsky concluded that, in light of the overlap between the doctrines, "[t]here is no identifiable benefit to having a distinct test termed ripeness." *Id.* at 682–83.

[9] *See infra* Parts III.A, III.C.

[10] *See infra* Part III.B.

[11] *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does.").

party must have standing or that their claim must be ripe for a federal court to hear their case, but only states that the judicial power extends to certain "cases" or "controversies."[12] While this appears to be an affirmative grant of power to the federal judiciary, courts have traditionally interpreted it as concurrently implying a restriction of power: "that [the] judicial power does not extend to *anything but* a case or controversy."[13] Of course, Article III does not say exactly what constitutes a "justiciable" case or controversy, so federal courts have created a series of doctrines to determine whether a given action qualifies. These "justiciability doctrines" include standing, ripeness, mootness, the political question doctrine, and the advisory opinion doctrine.[14]

Thus, both standing and ripeness originate from the same limitation on the judicial power.[15] The doctrines' shared origin, however, does not mean that they are identical. Instead, the fact that both doctrines were created to help determine whether a dispute is a case or controversy suggests that they perform different but complementary functions in assessing justiciability.

Many commentators seek to draw distinctions between standing and ripeness,[16] and indeed the history of each doctrine supports the idea that they were created to perform—and did perform—different functions early on. How, then, can this Note argue that ripeness and standing perform such substantially similar functions as to warrant a dissolution of ripeness into standing? The short answer is that the doctrines have shifted over time to a point where their functions have become almost identical. Thus, to understand this Note's conclusion, it is necessary to consider the historical progression of standing and ripeness respectively.

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[12] U.S. CONST. art. III, § 2, cl. 1.

[13] SULLIVAN & FELDMAN, *supra* note 4, at 34 (emphasis added).

[14] *See generally id.* at 34–71 (discussing each justiciability doctrine and compiling cases).

[15] *But see* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 156 (1987) (arguing that the "marriage of ripeness and [A]rticle III is flawed," and suggesting that ripeness does not originate from Article III).

[16] *See, e.g.*, F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 63 (2012) ("Unlike standing, which limits *who* can bring suit, ripeness defines *when* a person may bring suit.").

A. STANDING

The standing doctrine helps determine whether an Article III case or controversy exists by asking whether a litigant bringing a claim is "properly situated to be entitled to its judicial determination."[17] Put more simply, standing ensures that the party bringing suit is the proper party to do so, and thus focuses on the party, not the claim.[18] There are many reasons for inquiring into the propriety of the parties, such as ensuring that litigants are "truly adverse and therefore likely to present the case effectively" and ensuring that those who are "most directly concerned are able to litigate the questions at issue."[19] All of these reasons, however, relate back to ensuring that the action before the court is an Article III case or controversy.

Modern standing doctrine imposes both "constitutional" and "prudential" requirements on litigants seeking federal adjudication of their claims.[20] The constitutional requirements are said to be derived from Article III's case or controversy mandate, and must be established for a court to hear a case.[21] According to the Supreme Court, the constitutional requirements are that a plaintiff must have (1) suffered some "injury in fact" (2) that was caused by the defendant's conduct, and (3) would likely be redressed by a favorable judicial decision.[22]

Even if a plaintiff meets these requirements, a court may still utilize self-imposed "prudential" limits to decline to hear the case when it seems wise not to do so.[23] The Court has recognized three general prudential limits: first, a plaintiff must assert an injury to her own legal rights and interests, not those of third parties; second, the asserted injury must not be a generalized grievance

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[17] 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531 (3d ed. 2008).

[18] *Id.*

[19] William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

[20] WRIGHT ET AL., *supra* note 17, § 3531.

[21] *See, e.g.*, Timothy C. Hodits, Note, *The Fatal Flaw of Standing: A Proposal for an Article I Tribunal for Environmental Claims*, 84 WASH. U. L. REV. 1907, 1911 (2006) (stating that the "Article III standing requirements are mandatory").

[22] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[23] WRIGHT ET AL., *supra* note 17, § 3531; *see also* Hodits, *supra* note 21, at 1911 (stating that the prudential limits are self-imposed).

widely shared by the public; and third, if the plaintiff is challenging action under a statute or constitutional guarantee, the plaintiff's complaint must fall within the "zone of interests" meant to be protected by that statute or constitutional guarantee.[24]

This Note will focus primarily on the constitutional requirements of standing and their relation to the elements of the ripeness doctrine. The modern constitutional requirements of standing and the elements of ripeness are almost identical in practice. This is a fairly recent development. At its inception, standing imposed significantly different requirements on litigants than ripeness. Over time, however, the standing doctrine endured three distinct phases of judicial interpretation that transformed the doctrine into its current form: a form that makes the ripeness doctrine largely irrelevant.

1. The "Legal Right" Model of Standing. Prior to the 1920s, standing did not exist as a separate doctrine.[25] In fact, it is difficult to determine the exact case in which standing was created because it often was not referred to specifically as "standing." For example, the Court's opinion in *Massachusetts v. Mellon*, one of the most frequently cited cases for the generalized grievance prudential limit, does not reference "standing" at all.[26] While the exact point of standing's creation is unclear, there is no doubt that the Supreme Court in the 1920s and 1930s, influenced heavily by Justice Brandeis and later by Justice Frankfurter,[27] sought to substantially limit litigants' ability to access the federal judiciary through a restrictive standing doctrine.[28]

The newly-formed standing doctrine had only one requirement: in order to bring suit in federal court, a plaintiff had to show an

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[24] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474–75 (1982) (discussing the three prudential limits on standing).

[25] Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992).

[26] Massachusetts v. Mellon, 262 U.S. 447 (1923).

[27] *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008) ("Standing developed principally at the hands of Justices Brandeis and Frankfurter . . . .").

[28] *See* WRIGHT ET AL., *supra* note 17, § 3531.1 ("As the [standing] doctrine first developed, it involved a relatively strict approach that came to be expressed as a 'legal right' standard.").

injury to one of her "legal rights."[29] A "legal right" was generally defined as "a legal interest recognized by the Constitution, statutes, or the common law."[30] Thus, the doctrine insulated government regulations from attack unless some independent source of law conferred a right on the plaintiff that the regulations interfered with, and served as an absolute bar to litigants seeking to challenge such regulations on behalf of the public.

The restrictiveness of the "legal right" model of standing is illustrated in the oft-cited case *Tennessee Electric Power Co. v. Tennessee Valley Authority*.[31] In that case, several public utilities companies sought an injunction against the Tennessee Valley Authority (TVA) to prohibit it from, among other things, generating electricity created by the dams it built pursuant to the Tennessee Valley Authority Act and selling the electricity in competition with the plaintiffs.[32] The plaintiffs claimed that the Act was unconstitutional, and alleged that the competition resulting from the TVA's production, sale, and distribution of electricity in the areas the plaintiffs served or would serve would inflict substantial damage upon them.[33]

The Court dismissed the suit for lack of standing.[34] Although the plaintiffs argued that "one threatened with . . . injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute," the Court found that such a challenge was only possible when "the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute

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[29] *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (holding that "neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights" is sufficient to confer standing); Ala. Power Co. v. Ickes, 302 U.S. 464, 479 (1938) (noting that courts may entertain a suit challenging an act of Congress only when the plaintiff has suffered a "direct injury" as a result of the act, and clarifying that "direct injury" is "a wrong which directly results in the violation of a legal right"); *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150–56 (1951) (Frankfurter, J., concurring) (summarizing the "legal right" model of standing).

[30] Nichol, *supra* note 15, at 157–58.

[31] 306 U.S. 118 (1939).

[32] *See id.* at 134–35 (detailing the plaintiffs' prayers for relief).

[33] *Id.* at 135–37.

[34] *Id.* at 147.

which confers a privilege."[35] Because the plaintiffs did not have exclusive franchises that gave them a monopoly or legal right to be free from competition, and because "competition between natural persons" in the absence of such exclusive franchises is lawful, the plaintiffs' injury resulting from the competition was not an invasion of a legal right sufficient to confer standing.[36]

As indicated in *Tennessee Electric*, the original "legal right" model of standing was substantially different from the modern standing doctrine, and was the narrowest formulation of standing the Court has ever utilized. Future decisions by the Court, however, significantly broadened the standing doctrine.

2. The "Injury in Fact" Model of Standing. The "legal right" model of standing was prevalent for a few decades, but eventually yielded to a very different formulation that emerged in the late 1960s. This "injury in fact" model was extremely permissive and facilitated greater access to the federal judiciary.[37] Unlike the creation of the "legal right" model of standing (or standing at all for that matter), which cannot easily be attributed to one specific judicial decision, the creation of the "injury in fact" model is generally attributed to the Supreme Court's decision in *Association of Data Processing Service Organizations v. Camp*.[38]

In *Data Processing*, a group of firms that sold data processing services sought to challenge a ruling by the Comptroller of the Currency that, as an incident to their banking services, national banks could provide data processing services to other banks and bank customers.[39] The plaintiffs alleged that the ruling caused them injury by permitting national banks to compete with the plaintiffs in providing data processing services, which "might entail some future loss of profits for" the plaintiffs.[40]

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[35] *Id.* at 137–38.

[36] *Id.* at 138–40.

[37] *See* WRIGHT ET AL., *supra* note 17, § 3531.1 ("From 1968 into the early years of the 1970s, the cases . . . culminated in what was . . . a very permissive approach to standing.").

[38] 397 U.S. 150 (1970); *see also, e.g.*, WRIGHT ET AL., *supra* note 17, § 3531.1 (stating that *Data Processing* was "[t]he next major step" in the Supreme Court's standing doctrine).

[39] 397 U.S. at 151.

[40] *See id.* at 152 (discussing the plaintiffs' allegations of injury resulting from the competition).

Under the former "legal right" model, the alleged injury would not have been sufficient to establish standing. The Court, however, refused to apply the "legal right" model, stating that "[t]he 'legal interest' test goes to the merits," but that "[t]he question of standing is different."[41] Instead, the Court utilized a new model of standing that focused on two requirements. First, the plaintiff had to allege "that the challenged action has caused him injury in fact, economic or otherwise."[42] The Court found that the plaintiffs satisfied this requirement by alleging that the competition stemming from the ruling could cause them future economic injury.[43] The second requirement when challenging administrative action, "apart from the 'case' or 'controversy' test,"[44] was that the injured interest be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[45] This interest, the Court held, "may reflect 'aesthetic, conservational, and recreational' as well as economic values."[46] Although the injury to the plaintiffs was purely economic, the Court "mention[ed] these noneconomic values to emphasize that standing may stem from them as well."[47] In applying the second requirement, the Court found that the plaintiffs' interests were arguably within the zone of interests protected by section 4 of the Bank Service Corporation Act of 1962.[48]

Thus, the Supreme Court eliminated the "legal right" model of standing and replaced it with an "injury in fact" model consisting of two requirements: a broadly-defined "injury in fact" requirement and a "zone of interests" requirement. This reformulation of standing increased the public's access to the federal judiciary by

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[41] *Id.* at 153.

[42] *Id.* at 152.

[43] *Id.*

[44] *Id.* at 153. This phrase implies that the "injury in fact" prong of the test satisfies Article III, and thus is the constitutional requirement, whereas the "zone of interest" prong of the test is prudential and not constitutionally mandated. WRIGHT ET AL., *supra* note 17, § 3531.1.

[45] *Data Processing*, 397 U.S. at 153.

[46] *Id.* at 154 (quoting Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965)).

[47] *Id.*

[48] *Id.* at 155–56.

allowing cases that would normally not have been justiciable under the "legal right" model to be heard, while preserving the justiciability of cases that were already justiciable under the former model.[49]

Additionally, the Court's replacement of the "legal right" model of standing with the "injury in fact" model laid the foundation for modern standing.[50] Injury in fact is one of the key elements of modern standing.[51] The fact that the *Data Processing* decision transformed the standing doctrine into the precursor of modern standing, however, does not mean that the decision is favorably regarded like many of the Supreme Court's liberal and transformative decisions in other substantive areas of law. Modern standing jurisprudence is widely regarded as complex and confusing,[52] and the Court's replacement of the concrete "legal right" model with a seemingly arbitrarily-created "injury in fact" model in *Data Processing* is often criticized as the source of this confusion.[53]

The immediate effect of the Court's transition from the "legal right" model to the "injury in fact" model established in *Data Processing* was a significant expansion in plaintiffs' access to the federal judiciary. In fact, the few years following *Data Processing* constituted the most liberal era of standing, and were characterized by decisions granting standing to plaintiffs who would have never had standing under either the "legal right" model or the modern standing doctrine.[54] This unparalleled level

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[49] *See* Hessick, *supra* note 27, at 295 (stating that the Court's intention in adopting the injury in fact standard was to grant standing in more cases without restricting standing in cases where it would have already existed under the "legal right" model).

[50] *See, e.g.*, Alberto B. Lopez, Laidlaw *and the Clean Water Act: Standing in the Bermuda Triangle of Injury in Fact, Environmental Harm, and "Mere" Permit Exceedances*, 69 U. CIN. L. REV. 159, 164 (2000) (asserting that *Data Processing* was a case in which the Court "laid down the underpinnings of the modern idea of" standing).

[51] *See infra* Part II.A.*3*.

[52] *See, e.g.*, Hessick, *supra* note 27, at 276 ("Although seemingly simple on its face, [standing] doctrine has produced an incoherent and confusing law of federal courts.").

[53] *See, e.g.*, Fletcher, *supra* note 19, at 229 ("More damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision.").

[54] *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 678, 686–90 (1973) (denying the defendants' motion to dismiss the plaintiff organization's challenge to an ICC order authorizing railroads to impose a surcharge on freight rates based on the plaintiff's claim that, through a long chain of events,

of permissiveness, however, was short-lived. While the "injury in fact" model may have been beneficial to members of the public, courts later viewed it as unnecessarily permissive, and imposed significant restrictions on plaintiffs' access to courts.

3. The Modern Standing Doctrine. The "injury in fact" model of standing greatly expanded access to the federal judiciary, but the extreme level of permissiveness shown in the cases immediately following *Data Processing* would not last long. Shortly after *Data Processing*, the Court started to limit the broad standing model it had created,[55] but did not do so by reinstituting the "legal right" model. Instead, the Court, in a series of decisions beginning in the mid-1970s, began to require that plaintiffs show "causation" and "redressability" to establish standing, and started placing restrictions on the injury in fact requirement.

Although the Court informally established and applied the causation and redressability elements in a few cases decided shortly after *Data Processing*,[56] the Court's 1975 decision in *Warth v. Seldin* explicitly set them forth as mandatory requirements under Article III.[57] In *Warth*, three minority plaintiffs with low to moderate income brought suit against the town of Penfield and members of its Zoning, Planning, and Town Boards, seeking both a declaration that Penfield's zoning ordinance was unconstitutional and an injunction against enforcement of the ordinance, which allegedly had the purpose and effect of excluding people of low and moderate income, and concomitantly, racial and ethnic minorities, from living in Penfield.[58] The plaintiffs alleged that they were injured by the discriminatory zoning practices, even though none

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the surcharge would cause the plaintiff's members "recreational and aesthetic harm," despite the exceedingly "attenuated line of causation" between the injury and the surcharge).

[55] *See* Hessick, *supra* note 27, at 296 ("Under Chief Justice Burger, the Court again began to restrict standing . . . .").

[56] *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617–19 (1973) (denying standing because the plaintiff failed to demonstrate a "sufficient nexus" or "direct relationship" between the injury she suffered and the government action she was challenging).

[57] 422 U.S. 490, 505 (1975) (stating that a showing of causation or redressability is necessary to "meet the minimum requirement" of Article III); *see also* WRIGHT ET AL., *supra* note 17, § 3531.1 (stating that *Warth* "gave clear focus to a three-pronged test of injury" prevalent in modern standing doctrine).

[58] *Warth*, 422 U.S. at 493–96.

of them lived in Penfield, because they all desired to live in Penfield, but were unable to locate housing there that was both within their means and adequate for their families.[59]

Although the Court implicitly held that this injury was sufficient for standing, it went on to say that the plaintiffs must also allege facts showing both that "absent the [defendants'] restrictive zoning practices, there is a substantial probability that [plaintiffs] would have been able to purchase or lease in Penfield," and that if the Court granted the injunction, the plaintiffs would be able to do so.[60] The Court found that the zoning ordinance did not directly harm the plaintiffs, but may have precluded third parties such as developers and builders from constructing housing that would be suitable for the plaintiffs, thereby indirectly harming them.[61] Thus, in order to show causation and redressability, the plaintiffs had to show that third parties attempted to build housing sufficient to meet the plaintiffs' needs but were precluded from doing so because of the zoning ordinance. The plaintiffs referenced two previously rejected efforts to build lower cost housing, but the Court held there was no "indication that these projects, or other like projects, would have satisfied [plaintiffs'] needs at prices they could afford," and concluded that "the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and [plaintiffs'] asserted injury."[62] Therefore, the plaintiffs did not establish standing.

Although the causation and redressability requirements posed significant hurdles to plaintiffs' access to the judiciary,[63] the Court also limited this access by narrowing the injury in fact requirement, especially when plaintiffs alleged a threatened future injury. For example, in *Lujan v. Defenders of Wildlife*, wildlife conservation and environmental organizations challenged a

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[59] *Id.* at 503.

[60] *Id.* at 504. The Court would later note that a showing of causation or redressability was necessary to "meet the minimum requirement" of Article III. *Id.* at 505.

[61] *Id.* at 504–05.

[62] *Id.* at 505–07.

[63] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 756–59 (1984) (denying standing to the plaintiffs because the causal connection between their alleged injury and the challenged conduct was dependent on uncertain, speculative contingencies and the conduct of absent third parties).

regulation enacted by the Secretary of the Interior interpreting section 7(a)(2) of the Endangered Species Act of 1973, which requires federal agencies to consult with the Secretary prior to authorizing, funding, or carrying out any action to ensure that the action will not jeopardize endangered or threatened species or adversely affect their critical habitat.[64] While a former regulation had interpreted section 7(a)(2) to require consultation for agency action "taken in foreign nations," the challenged regulation reinterpreted section 7(a)(2) to require consultation only for agency action "taken in the United States or on the high seas."[65]

Before discussing the plaintiffs' standing, the Court set forth a restatement of the modern elements of Article III standing that has been cited in nearly every subsequent standing decision:

> First, the plaintiff must have suffered 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. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[66]

The plaintiffs relied on affidavits from two of their members to show the requisite injury in fact.[67] Both members asserted that they had previously traveled to foreign nations and observed the traditional habitats of endangered species; that they intended to return to those nations to observe the species in the future; that federal agencies were participating in or funding projects in those nations that would harm the habitats of the species—and thus

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[64] 504 U.S. 555, 557–59 (1992).

[65] *Id.* at 558–59.

[66] *Id.* at 560–61 (citations omitted) (internal quotation marks omitted).

[67] *Id.* at 563.

could increase the rate of extinction of those species—without consulting the Secretary; and that the members would suffer harm as a result by not being able to observe the species upon returning.[68] Despite their intent to return to those nations in the future, however, neither member pointed to any current, concrete plans to do so.[69] While the Court acknowledged that the "desire to use or observe an animal species . . . is undeniably a cognizable interest for the purpose of standing," it denied standing because the plaintiffs' members could not show that their injury was sufficiently "imminent" to satisfy the injury in fact requirement.[70] According to the Court, the members had to show more than an intent to return to the nations they previously visited: "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[71]

The requirement that an alleged injury be imminent imposes a substantial burden on plaintiffs seeking to establish standing based on threatened future harm, and this burden seems to have become even greater as of late. In one of the Supreme Court's most recent standing decisions, *Clapper v. Amnesty International USA*,[72] the Court appeared to increase the degree of imminence necessary for a threatened future injury to constitute an injury in fact. In discussing the imminence requirement, the Court held that a " 'threatened injury must be *certainly impending* to constitute injury in fact,' " and that " '[a]llegations of *possible* future injury' are not sufficient."[73] Accordingly, the Court rejected the imminence standard employed by the Second Circuit below, which required that the plaintiff show only an "objectively reasonable likelihood" that the threatened injury would occur in the future.[74]

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[68] *See id.* at 562–63 (discussing the plaintiffs' members' alleged injuries).
[69] *Id.* at 563–64.
[70] *Id.* at 562–64.
[71] *Id.* at 564.
[72] 133 S. Ct. 1138 (2013).
[73] *Id.* at 1147 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).
[74] *Id.* at 1146–47.

While it is uncertain whether the Court will continue to apply the seemingly more restrictive "certainly impending" standard to determine whether an injury is sufficiently imminent to qualify as an injury in fact, it is clear that standing is steadily moving in a more restrictive, rather than permissive, direction. A continuously narrowing injury in fact requirement, as well as the imposition of the causation and redressability requirements, are indicative of this movement.

B. RIPENESS

If standing ensures that the parties bringing suit are the proper parties to adjudicate the claim, ripeness ensures that a claim brought by proper parties is adjudicated at the appropriate time.[75] "Ripeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision," and its "central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[76] The rationale of the ripeness doctrine is "to prevent the courts, through [avoidance of] premature adjudication, from entangling themselves in abstract disagreements."[77] This rationale parallels the rationales of the other justiciability doctrines,[78] and appears to reflect the Article III requirement that federal courts hear only actual cases or controversies, not hypothetical disagreements.

Although the ripeness doctrine appears to be grounded in Article III's case or controversy requirement, it is widely recognized that ripeness is grounded in both constitutional and prudential policies and that ripeness decisions, like standing

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[75] *See, e.g.*, Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. REV. 1, 68 (1992) (asserting that standing determines who can bring a suit in federal court whereas ripeness relates to when someone can bring a suit).

[76] 13B WRIGHT ET AL., *supra* note 17, § 3532.

[77] Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580 (1985) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977)).

[78] 13B WRIGHT ET AL., *supra* note 17, § 3532.1.

decisions, may rest on prudential grounds.[79] Unlike standing, however, it is difficult to draw a clear line between the constitutional and prudential dimensions of ripeness, so the doctrine is best analyzed as a whole.[80]

Ripeness decisions usually involve a judicial balancing of the need for a decision in the instant case against the risk of issuing a decision.[81] In general, the need for decision is based on the "probability and importance of the [plaintiff's] anticipated injury," while the risk of issuing a decision is "measured by the difficulty and sensitivity of the issues presented, and by the need for further factual development to aid decision."[82]

The modern standard for determining whether a claim is ripe, as set forth in the Supreme Court's 1967 decision *Abbott Laboratories v. Gardner*,[83] epitomizes this judicial balancing between the need for and risk of decision. In determining whether an action is ripe under the modern standard, a court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[84] The "fitness" prong is satisfied when no further factual development is needed to decide the case or (in most cases) when the issues presented are purely legal, and where the conduct causing the plaintiff's harm is sufficiently likely to occur, whereas the "hardship" prong is satisfied when the challenged conduct would have a sufficiently direct and immediate impact on the plaintiff.[85]

Unlike modern standing analysis, "the ripeness analysis employed by modern federal courts has met with consistent approval."[86] As a result, the ripeness doctrine has changed very

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[79] *See* SULLIVAN & FELDMAN, *supra* note 4, at 54 ("Ripeness rulings may rest on Art[icle] III case or controversy grounds, but are sometimes based on discretionary, remedial or prudential grounds."); 13B WRIGHT ET AL., *supra* note 17, § 3532.1 (stating that "[m]any current cases expressly assert that ripeness has dual sources in constitutional and prudential policies").

[80] 13B WRIGHT ET AL., *supra* note 17, § 3532.1.

[81] *Id.*

[82] *Id.*

[83] 387 U.S. 136 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977). This decision will be discussed later. *See infra* Part II.B.*2*.

[84] *Abbott Labs.*, 387 U.S. at 149.

[85] *See infra* Part II.B.*2*.

[86] Nichol, *supra* note 15, at 155.

little since *Abbott Laboratories* was decided in 1967. That is not to say, however, that ripeness analysis prior to *Abbott Laboratories* was substantially different from the modern analysis. Many ripeness decisions prior to *Abbott Laboratories* emphasized the same considerations as modern ripeness decisions, but in a less formalistic way.[87]

Despite the historical consistency of the ripeness doctrine, courts have struggled with the value judgments required to apply it in various factual situations.[88] Because this Note focuses on the similarity between standing and ripeness *as applied*, it is helpful to discuss some notable applications of the ripeness doctrine in both the "pre-modern" and "modern" eras of ripeness.

1. The "Pre-Modern" Ripeness Era. Although the ripeness doctrine has remained relatively unchanged throughout its history, there are two primary differences between early and modern ripeness decisions. First, early courts did not consider the ripeness inquiry to be constitutionally mandated under Article III, but rather viewed it as a prudential limit that courts could utilize to avoid passing judgment on cases concededly within their constitutional jurisdiction.[89] Second, many courts that employed the ripeness doctrine did not actually use the term "ripeness," but instead considered the "maturity" of the action, whether the case was "reviewable," or whether the case was "justiciable" in general.[90] Apart from these differences, however, the method for

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[87] *See infra* Part II.B.*1*.

[88] *See* 13B WRIGHT ET AL., *supra* note 17, § 3532 (stating that "ripeness decisions have developed a generally satisfactory method for resolving the problems of prematurity," but acknowledging the difficulties inherent in applying that method).

[89] *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring) (stating that "[t]he Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon . . . constitutional questions," including the rule that the Court will not decide a question of constitutional law before it is necessary to do so).

[90] *See, e.g.*, Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 424–25 (1942) (couching the decision to hear the case in terms of "reviewability," but considering the likelihood of "irreparable injury" and the lack of a reason to suspend the plaintiff's challenge to a later time).

determining whether an action was ripe was substantially similar to the modern method.[91]

The Supreme Court's decision in *Pierce v. Society of Sisters*[92] illustrates the similarities between the pre-modern and modern ripeness doctrines. *Pierce* involved a constitutional challenge to the Compulsory Education Act, an Oregon statute which required every person having control or custody of a child between the ages of eight and sixteen to send the child to public school.[93] Although the Act had not gone into effect when the consolidated suits were filed, the defendants—the Governor of Oregon and state and county law officers—had announced that the Act was valid and declared their intention to enforce it.[94] The plaintiffs, who operated private schools, alleged that the defendants' threats to enforce the Act had caused them injury by way of children withdrawing from their schools and decreases in enrollment, and that they would suffer irreparable injury to their business and property unless the defendants were enjoined from enforcing and threatening to enforce the Act.[95]

The Court acknowledged that the "inevitable practical result" of the Act's enforcement would be the destruction of the plaintiffs' schools[96] and, without mentioning Article III or "ripeness," held that the plaintiffs' suits "were not premature."[97] The Court justified its holding by stating that the plaintiffs' injury was "present and very real, not a mere possibility in the remote future," and that "[i]f no relief had been possible prior to the effective date of the Act, the injury would have become irreparable."[98]

The Court's analysis, though couched in terms of "maturity" and not Article III ripeness, highlights the similarity between the modern and pre-modern ripeness doctrines. By stating that the

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[91] *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 508–09 (1961) (dismissing the case on general justiciability grounds based on "the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought").

[92] 268 U.S. 510 (1925).

[93] *Id.* at 530.

[94] *Id.* at 533.

[95] *Id.* at 531–33.

[96] *Id.* at 534.

[97] *Id.* at 536.

[98] *Id.*

plaintiffs would suffer immediate irreparable injury in the absence of relief, the Court emphasized what would later become the second prong of modern ripeness analysis: the hardship to the parties of withholding court consideration. Thus, despite the difference in terminology used by early courts to express ripeness and early courts' perception that ripeness was prudential rather than constitutional, applications of the ripeness doctrine in early decisions were substantially similar to applications in modern decisions.

2. The Modern Ripeness Era. Unlike the transitions between the three eras of standing, which were characterized by large substantive doctrinal shifts, the transition between the pre-modern and modern eras of ripeness was relatively slight. This is because the modern standard for determining whether a claim is ripe, the creation of which ushered in the modern era of ripeness, can be seen as a simple formalization of the existing processes and considerations that pre-modern era courts had already been using to assess ripeness. Thus, the transition between the pre-modern and modern eras of ripeness was a transition in form rather than function. In fact, the only meaningful distinction between modern and pre-modern ripeness decisions—the recognition of ripeness as a constitutional rather than a prudential doctrine—was not established until the decade following the creation of the modern standard.[99]

The creation of the modern standard for assessing ripeness, and thus the start of the modern era of ripeness, is generally attributed to the Supreme Court's decision in *Abbott Laboratories v. Gardner*.[100] The issue in *Abbott Laboratories* was whether the plaintiffs, individual drug manufacturers and their association, could obtain pre-enforcement review of the regulations promulgated by the Commissioner of Food and Drugs implementing section 502(e)(1)(B) of the Federal Food, Drug, and Cosmetic Act, which requires prescription drug manufacturers to print the "established" (generic) name of a prescription drug prominently and in typeface at least half as large as that used for the "proprietary" (brand) name of the drug on labels and other

[99] *See infra* note 111 and accompanying text.

[100] 387 U.S. 136 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

printed materials for the drug.[101] The promulgated regulations required labels and advertisements for prescription drugs to bear the established name of the drug *every time* the proprietary name was used.[102] Although the regulations had not yet been enforced against the plaintiffs, the plaintiffs challenged them on the ground that the Commissioner exceeded his authority under the Act by promulgating them, and sought declaratory and injunctive relief.[103]

The Court first noted that "injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been *reluctant* to apply them to administrative determinations" in the absence of a ripe controversy.[104] Thus, the Court implicitly recognized the ripeness inquiry as a prudential limit rather than a constitutional mandate. The Court then set forth the modern standard for assessing ripeness. According to the Court, the ripeness inquiry "is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[105]

As to the first prong, the Court found that the issues were fit for judicial decision in part because the issue tendered by the parties—whether the Commissioner properly construed the Act to require use of the established name of the drug every time the proprietary name is used—was a "purely legal one,"[106] and thus did not require any further factual development.

As to the second prong, the Court held that "the impact of the regulations upon the [plaintiffs] is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage."[107] In so holding, the Court emphasized that the regulations would directly affect the day-to-day business of the plaintiffs.[108] If the plaintiffs were to comply with the regulations, they would incur significant costs in changing their promotional

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[101] *Id.* at 137–39.
[102] *Id.* at 138.
[103] *Id.* at 139.
[104] *Id.* at 148 (emphasis added).
[105] *Id.* at 149.
[106] *Id.*
[107] *Id.* at 152.
[108] *Id.*

materials and labels to meet the new requirements; if they were to not comply, they would risk serious criminal or civil penalties.[109] Either way, harm to the plaintiffs was certain to result. According to the Court, "[w]here the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted."[110]

Although early decisions utilizing the modern ripeness standard characterized ripeness as a prudential limit on courts' ability to hear cases, later courts treated ripeness, at least in part, as constitutionally mandated.[111] Still, courts continued to apply the two-pronged ripeness standard the same way. A more recent example of such a similar application is *Texas v. United States*.[112]

Texas v. United States centered around Chapter 39, a comprehensive scheme enacted by the Texas Legislature that is designed to hold local school boards accountable to the state for student achievement in public schools.[113] Under Chapter 39, the state commissioner of education may select from ten possible sanctions when a school district fails to meet the state's accreditation criteria, including appointing a master to oversee the district's operations or appointing a management team to direct the district's operations in certain areas.[114] Because Texas is a covered jurisdiction under section 5 of the Voting Rights Act of 1965, it must obtain preclearance prior to implementing any changes affecting voting.[115] When Texas submitted Chapter 39 for preclearance, the Assistant Attorney General did not object to the sanctions regarding the appointment of masters or management teams, but cautioned that, under certain circumstances, their implementation could result in a section 5 violation that would

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[109] *Id.* at 152–53.

[110] *Id.* at 153.

[111] *See* Nichol, *supra* note 15, at 162, 163 & n.65 (stating that "although the ripeness demand may have begun as an exercise in judicial discretion, it is now firmly planted in the Constitution" and compiling cases in which "the Court has conflated the ripeness inquiry and the case or controversy requirement of [A]rticle III" (footnote omitted)).

[112] 523 U.S. 296 (1998).

[113] *Id.* at 297–98.

[114] *Id.* at 298.

[115] *Id.* at 298–99.

require preclearance.[116] In response, Texas filed a complaint in district court seeking a declaration that section 5 would never apply to any application of the appointment sanctions.[117]

The Supreme Court affirmed the district court's dismissal of the case on ripeness grounds.[118] The Court first noted that "[a] claim is not ripe . . . if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[119] According to the Court, it was speculative whether Texas would appoint a master or management team as a sanction under Chapter 39 in the first place because such action was contingent on the occurrence of several events, including a school district failing to meet the accreditation criteria and the failure of less intrusive sanctions to remedy the issue.[120] Additionally, Texas did not point to any school district in which application of the appointment sanctions was foreseen or likely, and Texas itself hoped that there would be no need to impose such sanctions.[121] The Court held that this uncertainty as to whether or when the appointment sanctions would be ordered rendered the issue "not fit for adjudication."[122] Thus, the Court acknowledged that the "fitness of the issues" depended in part on whether the conduct bringing about the harm was sufficiently likely to occur.

The Court then explicitly considered the two-pronged ripeness inquiry. As to the "fitness" prong, the Court held that it did not have "sufficient confidence in [its] powers of imagination to affirm" Texas's contention that imposition of the appointment sanctions would never constitute a change affecting voting under section 5 in the abstract.[123] Instead, "[t]he operation of the statute is better grasped when viewed in light of a particular application."[124] Thus, further factual development was necessary. As to the "hardship" prong, the Court distinguished the case from *Abbott Laboratories*

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[116] *Id.* at 299.

[117] *Id.*

[118] *Id.* at 302.

[119] *Id.* at 300 (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580–81 (1985)) (internal quotation marks omitted).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 301.

[124] *Id.*

because the potential preclearance requirement did not directly and immediately impact the day-to-day business of Texas—Texas would not have to go through the time-consuming preclearance process unless and until it implemented the sanctions on its own.[125]

As indicated by the cases above, courts throughout the last century have applied the ripeness doctrine in similar ways and have emphasized similar factors. The most prominent factors are the need for further factual development, the likelihood that the conduct bringing about the harm will occur, and whether the challenged conduct will directly and immediately impact the plaintiff. As this Note will show, these factors perform the same function as the modern standing requirements, which renders the ripeness doctrine obsolete.

III. ANALYSIS

Both the standing and ripeness doctrines have changed since their formation over a century ago. Standing has experienced the greater substantive change by transitioning from an extremely restrictive "legal right" model, to an expansive "injury in fact model," to the more restrictive but complex doctrine utilized today.[126] Ripeness, on the other hand, has undergone little change in function but some change in form due to the formulation of the two-pronged standard for assessing ripeness and the doctrine's transition from a purely prudential doctrine to one grounded, in part, in Article III.[127] This Note argues that the changes standing and ripeness have experienced over the last century have rendered their functions practically identical, such that only one of the doctrines—standing—is necessary for assessing justiciability. Accordingly, this Part will first discuss the merging of standing and ripeness's functions. Next, this Part will consider the Supreme Court's recognition of the similarity in function between the standing and ripeness inquiries and its preference for utilizing

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[125] *Id.*

[126] *See supra* Part II.A.

[127] *See supra* Part II.B.

standing to assess justiciability. Finally, this Part will argue that ripeness should dissolve into standing, and not vice versa.

A. STANDING AND RIPENESS HAVE MERGED

Standing and ripeness as currently constructed perform substantially similar functions toward determining justiciability. This idea conflicts with the widely accepted theoretical distinction between the functions performed by the two doctrines—that standing determines whether the party bringing suit is proper, whereas ripeness determines whether the suit is being brought at the proper time.[128] To be sure, the standing and ripeness doctrines as originally formulated adhered to this theoretical distinction and asked distinct yet complementary questions to assist courts in determining whether a claim was justiciable. As Part II of this Note shows, however, the doctrines have evolved over time. Standing in particular has undergone monumental substantive changes which, when coupled with small changes to ripeness, have resulted in the standing and ripeness inquiries merging on an abstract and practical level.

The earliest versions of the standing and ripeness doctrines performed significantly different functions. Under the "legal right" model of standing, standing depended only on whether the plaintiff alleged an injury to a "legal right," or a right recognized by the common law, a statute, or the Constitution.[129] The sole focus of the standing inquiry was whether the specific type of injury alleged was proper, not whether the alleged injury was being asserted at the proper time. The early ripeness doctrine, on the other hand, focused on temporality by asking whether the action was sufficiently "mature" to warrant judicial consideration based on the appropriateness of the issues for review and the hardship to the litigants in denying review.[130] Thus, the doctrines asked distinct, complementary questions and adhered to their separate theoretical functions—standing assured that the party was proper by making sure the injury was proper, whereas

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[128] *See supra* notes 6, 16, 75.

[129] *See supra* notes 29–30 and accompanying text.

[130] *See supra* notes 90–91 and accompanying text.

ripeness assured that the action was being brought at the proper time.

The transition from the "legal right" model to the "injury in fact" model of standing significantly expanded plaintiffs' ability to gain standing, but standing and ripeness still retained their independent functions. Standing under the "injury in fact" model hinged on whether the plaintiff asserted an injury in fact and whether the interest she sought to protect was arguably within the zone of interests of the statute or constitutional guarantee in question.[131] Although the injury in fact requirement differed from the former requirement that a plaintiff allege injury to a legal right, the injury in fact requirement acted purely as an expansion of the legal injury requirement to include economic, aesthetic, recreational, and conservational harm as injuries that would suffice to establish standing,[132] and did not impose any temporal restrictions on plaintiffs asserting these types of injuries. Ripeness, of course, continued to address the issue of timing through the two-pronged standard articulated in *Abbott Laboratories*.[133] Thus, the standing and ripeness doctrines still posed the same distinct questions and performed the same complementary functions as they did prior to the expansion of the standing doctrine.

Although the standing and ripeness doctrines performed distinct, complementary functions throughout the "legal right" and "injury in fact" eras of standing, their functions have merged primarily due to the additional requirements of and limitations to standing imposed under the modern standing doctrine. Under the modern standing doctrine, a plaintiff must not only show that she has suffered an injury in fact, but must also demonstrate that the injury was caused by the defendant's challenged conduct and would likely be redressed by a favorable decision.[134] Additionally, a plaintiff must satisfy a much more restrictive injury in fact

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[131] Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152–53 (1970).

[132] *Id.* at 154.

[133] *See* Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967) (stating that in determining ripeness, the Court must evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding review), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977); *supra* notes 83–84 and accompanying text.

[134] *See supra* note 22 and accompanying text.

standard, which requires that the alleged injury be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[135] While the causation and redressability requirements of modern standing certainly address some aspects of the ripeness inquiry, the imminence component of injury in fact is of particular significance to the merging of standing and ripeness.

When considered on an abstract, theoretical level, the imminence component to the injury in fact requirement of standing eviscerates the distinction between the functions performed by the standing and ripeness doctrines. The theoretical function of standing is to determine whether the party bringing suit is proper, whereas the theoretical function of ripeness is to determine whether the suit is being brought at the proper time.[136] The imminence requirement of injury in fact, however, injects a temporality consideration into the standing inquiry—a plaintiff will not have standing if she brings her claim too early, before her alleged injury is "certainly impending."[137] Thus, standing's function is no longer to determine only whether the party bringing suit is the proper party, but also to determine whether the suit is being brought at the proper time. As a result, standing and ripeness theoretically do not perform independent, complementary functions toward assessing justiciability.

The argument that the standing and ripeness doctrines have merged, however, is not solely grounded on an abstract blending of the two doctrines' theoretical functions. Rather, it is primarily based on the observation that the injury in fact, causation, and redressability requirements of modern standing completely address the factors courts take into account in determining ripeness. In other words, satisfaction of the modern standing requirements necessarily renders a claim ripe, which obviates the need for an independent ripeness doctrine.

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[135] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (internal quotation marks omitted).

[136] *See supra* text accompanying note 128.

[137] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (holding that a " 'threatened injury must be *certainly impending* to constitute [an] injury in fact' " (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990))).

In order to demonstrate the substantial overlap between the modern Article III standing requirements and the factors courts consider in ripeness decisions, it is necessary to determine exactly what those factors are. Although the modern two-pronged standard for determining whether a claim is ripe as articulated in *Abbott Laboratories* requires courts to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration,"[138] these two considerations can be seen as conclusions based on courts' evaluations of a number of other factors, and do not necessarily indicate what makes a claim ripe on their own. Thus, it is more useful to consider the underlying factors courts evaluate in determining whether the issues are "fit" or whether the parties will suffer substantial "hardship."

Perhaps the primary factor that courts consider in determining whether a claim is ripe is whether the plaintiff will suffer some immediate harm as a result of the challenged conduct.[139] Unlike other ripeness factors, which are linked to individual prongs of the ripeness standard (such as the need for further factual development, which is linked to the "fitness" prong), the "immediate harm" factor[140] appears to be incorporated into both prongs of the ripeness standard.

In many ripeness cases, such as *Abbott Laboratories*, the Court has evaluated the hardship to the parties of withholding judicial consideration by considering whether the challenged conduct would have a "sufficiently direct and immediate" impact on the plaintiffs.[141] Moreover, the Court has previously stated while analyzing the "hardship" prong that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.

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[138] 387 U.S. at 149.

[139] *See* Chemerinsky, *supra* note 8, at 682 ("Ripeness . . . asks whether the plaintiff has suffered or imminently will suffer an injury.").

[140] This Note calls this factor the "immediate harm" factor to avoid any confusion that could result from use of the word "imminence" in both the standing and ripeness contexts. As this Note will show, however, the immediate harm factor of ripeness and the imminent injury in fact requirement of standing are practically identical.

[141] 387 U.S. at 152; *see also, e.g.*, Texas v. United States, 523 U.S. 296, 301–02 (1998) (holding that the hardship to the plaintiffs would be "insubstantial" after emphasizing that the challenged conduct would not have a direct effect on the plaintiff's conduct).

If the injury is certainly impending, that is enough."[142] Accordingly, a number of commentators associate the immediate harm factor with the "hardship" prong of the ripeness standard.[143]

The immediate harm factor, however, is not confined to a single prong. In several ripeness decisions, the Court has evaluated the fitness of the issues for judicial review by considering whether the conduct that would bring about the harm was sufficiently likely to occur.[144] Recall, for example, *Texas v. United States*, where the Court held that the issue of whether Texas's imposition of statutorily-authorized sanctions on school districts would ever constitute a change affecting voting under the Voting Rights Act of 1965 was "not fit for adjudication" because it was entirely speculative whether Texas would ever impose the sanctions to begin with.[145] In that case, the issue was not fit primarily because the conduct which would bring about Texas's harm of having to comply with preclearance procedures—the imposition of the sanctions—was not sufficiently likely to occur. While a consideration of the likelihood that the conduct bringing about the harm will occur may not facially resemble a consideration of whether the plaintiff will suffer immediate harm, the former consideration is functionally identical to the latter. By asking whether the conduct that will bring about the harm is likely to occur, the Court indirectly asks whether the harm itself is likely to occur, and therefore considers whether the plaintiff will suffer immediate harm. Thus, the immediate harm factor can be linked to the "fitness" prong as well.

Regardless of whether the immediate harm factor is utilized in the context of the "hardship" prong, the "fitness" prong, or

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[142] Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581 (1985) (quoting Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 143 (1974)) (internal quotation marks omitted).

[143] *See, e.g.*, Hessick, *supra* note 16, at 64 (stating that "parties that do not face an imminent threat" of injury "do not face a hardship rendering their claim ripe").

[144] *See, e.g.*, Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162–63 (1967) (holding that the plaintiffs' pre-enforcement challenge to a regulation was not fit for adjudication in part because the Court had "no idea whether or when" the regulation would be enforced against the plaintiffs).

[145] 523 U.S. at 299–300.

independently,[146] the consideration of whether the plaintiff will suffer immediate harm is of primary importance in ripeness decisions. This consideration, however, is already completely addressed via the injury in fact requirement of modern standing. Standing requires that the plaintiff suffer an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[147] Ripeness decisions hinge on whether the challenged conduct will have a "direct and immediate" impact on the plaintiff and whether the conduct giving rise to the harm—and thus the harm itself—is likely to occur, and not speculative.[148] Despite utilizing different language, the terms of the injury in fact requirement and the immediate harm factor are synonymous. "Concrete and particularized" could easily be substituted for "direct"; "imminent" could be substituted for "immediate"; and "not conjectural or hypothetical" could be substituted for "not speculative." Thus, it is easy to see that the injury in fact requirement of standing and the immediate harm factor of ripeness are substantially similar. In fact, many courts and commentators have suggested that they are identical.[149] Accordingly, a plaintiff's satisfaction of the injury in fact requirement of standing would necessarily demonstrate that the plaintiff will suffer some immediate harm from the challenged conduct, and therefore would fulfill the primary consideration of ripeness.

A plaintiff's satisfaction of the injury in fact requirement would not only satisfy the immediate harm factor, but would necessarily

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[146] *See, e.g., Union Carbide*, 473 U.S. at 580–81 (holding that the claim did not rest on uncertain contingent future events before considering the "fitness" and "hardship" prongs).

[147] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (internal quotation marks omitted).

[148] *See supra* text accompanying notes 141–46.

[149] *See, e.g.*, Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272, 280 (6th Cir. 1997) (holding that ripeness requires an injury in fact that is certainly impending); Nat'l Treasury Emps. Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) ("Ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending."); Hessick, *supra* note 16, at 64 (stating that "the constitutionally mandated imminence requirement is the same for ripeness and standing"); Nichol, *supra* note 15, at 172 ("In measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing analysis.").

satisfy the entire "hardship" prong of the ripeness analysis as well. This conclusion, of course, could be based on the fact that the Court evaluates the hardship to the parties of withholding judicial consideration primarily by considering whether the plaintiff will suffer some immediate harm—a consideration which is identical to the injury in fact requirement. The same conclusion may be reached, however, by observing the relationship between the injury in fact requirement and the "hardship" prong at a much more general level. Recall that an injury must be both "concrete and particularized" and "actual or imminent" to constitute an injury in fact.[150] It seems to be a matter of common sense that a plaintiff meeting these requirements would face substantial hardship if judicial consideration were withheld. A plaintiff who will suffer a "concrete and particularized" injury will certainly experience hardship at some point in the future, and if the injury is "imminent," the hardship will be suffered relatively soon unless an outside force—the court—intervenes to prevent the injury. Thus, a plaintiff alleging such an injury would necessarily experience hardship if judicial review is withheld. Accordingly, satisfaction of the injury in fact requirement would necessarily satisfy the "hardship" prong of ripeness.

Because satisfaction of the injury in fact requirement would necessarily demonstrate hardship sufficient to render a claim ripe, the only remaining question regarding the overlap between standing and ripeness is whether satisfaction of the Article III standing requirements would also necessarily render the issues fit for judicial review. As previously discussed, the Court has frequently employed the immediate harm factor in determining whether the issues are fit for review by asking whether the conduct that would bring about the harm is likely to occur.[151] The immediate harm factor, of course, is identical to standing's injury in fact requirement.[152] Thus, to the extent that the "fitness" prong is influenced by the likelihood of the conduct bringing about the

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[150] *Lujan*, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (internal quotation marks omitted).

[151] *See supra* notes 144–45 and accompanying text.

[152] *See supra* text accompanying notes 147–49.

harm occurring, demonstration of an injury in fact would satisfy that prong.

The "fitness" prong, however, is influenced by an additional consideration: whether there is a need for further factual development to clarify the issues.[153] When it comes to addressing this factor, a showing of injury in fact alone may fall short. Although the facts of a case are much more likely to be fully developed in circumstances in which the plaintiff can prove that she has suffered a concrete, particularized, imminent injury than in cases in which the plaintiff cannot, the presence of such an injury does not necessarily mean that the facts surrounding it are clear enough that the court can hand down a properly informed decision. The consideration of whether the factual record is sufficiently developed, however, is adequately addressed by the two other requirements of modern Article III standing—causation and redressability. Again, this conclusion seems to be a matter of common sense. If a plaintiff comes to court and is able to prove not only that she will suffer a concrete, particularized injury that is "certainly impending,"[154] but also that the defendant's conduct caused the injury and that the injury would be alleviated by a favorable decision, it seems rather farfetched to believe that the court could need any more information to make an adequate decision. After all, courts have to engage in some fact finding in order to decide a case. Accordingly, a plaintiff who meets the Article III requirements of standing will necessarily satisfy both the immediate harm and factual development components of the "fitness" prong, and the issues will be fit for judicial review.

Thus, satisfaction of the Article III requirements of standing will necessarily render a claim ripe. It is important to note, however, that this conclusion does not imply that a plaintiff who satisfies the factors involved in modern ripeness decisions will necessarily have standing. The significance of this idea is

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[153] *See, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (holding that the "fitness" prong was met because there was no need for further factual development).

[154] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (holding that a " 'threatened injury must be *certainly impending* to constitute [an] injury in fact' " (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990))).

discussed in greater detail later.[155] For now, it is enough to conclude that the functions of standing and ripeness have merged.

B. THE SUPREME COURT PREFERS STANDING OVER RIPENESS

As discussed above, the functions of the modern standing and ripeness doctrines are substantially similar.[156] This substantial similarity, however, is not just theoretical. The Supreme Court itself has explicitly acknowledged that "[t]he justiciability problem that arises" in many cases "can be described in terms of standing . . . or in terms of ripeness."[157] The Court's acknowledgement of the similarity between standing and ripeness, however, does not do much on its own to support the idea that the modern standing and ripeness doctrines are so similar as to warrant a dissolution of ripeness into standing. Rather, it only indicates that the Court agrees with the many commentators who have noticed the overlap between the doctrines.[158] That is not to say, however, that the Court has not provided direct support for this Note's conclusion in practice. Throughout the modern standing era, the Court has routinely applied its standing analysis to cases in which its ripeness analysis would also be appropriate.[159] Additionally, the Court's opinions suggest not only that the two doctrines function almost identically in practice, but also that the Court *prefers* to utilize standing over ripeness.[160] Thus, the Court has provided substantial support for the conclusion that ripeness should dissolve into standing.

Perhaps the clearest example of the Court's recognition of the substantial similarity between standing and ripeness and its preference for utilizing standing to assess justiciability is the Court's recent unanimous decision in *Susan B. Anthony List v. Driehaus*, a case which involved a pre-enforcement challenge to an

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[155] *See infra* Part III.C.

[156] *See supra* Part III.A.

[157] MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007).

[158] *See supra* note 7 and accompanying text.

[159] *See, e.g.*, Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392 (1988) (discussing standing when the defendant argued that the plaintiffs' suit was "premature").

[160] *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 81 (1978) (stating that the ripeness inquiry "need not long detain us" after extensively discussing standing).

Ohio statute that makes it a crime for any person to knowingly make a false statement about the voting record of a candidate for public office or a public official, or to disseminate a false statement about a candidate knowing it to be false or with reckless disregard as to its falsity.[161] According to the statute, anyone can file a complaint alleging a violation with the Ohio Elections Commission, which refers the complaint to a commission panel for a determination as to whether there is probable cause to believe the violation occurred.[162] If the panel finds probable cause, the full commission holds a hearing and, upon finding that the violation occurred, refers the matter to a prosecutor.[163]

During the 2010 election cycle, plaintiff Susan B. Anthony List (SBA), a pro-life advocacy organization, issued a press release stating that politicians who voted for the Patient Protection and Affordable Care Act voted in favor of a "bill that includes taxpayer-funded abortion."[164] Congressman Steve Driehaus, who was named in the press release, filed a complaint with the commission alleging that SBA violated the false statement statute, and a commission panel found probable cause.[165] Although Driehaus eventually withdrew his complaint prior to the full commission hearing, SBA filed suit in federal court, seeking declaratory and injunctive relief on the ground that the statute was unconstitutional.[166] SBA alleged that it "intend[ed] to engage in substantially similar [speech] in the future," and that its "speech and associational rights [would be] chilled and burdened" because anyone could file a complaint with the commission and force SBA "to expend time and resources defending itself."[167] SBA's suit was later consolidated with a similar constitutional challenge to the statute brought by plaintiff Coalition Opposed to Additional Spending and Taxes (COAST), which alleged that it desired to make statements conveying a message similar to SBA's, but was deterred from doing so because it feared that it would be subject to

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[161] 134 S. Ct. 2334, 2338 (2014).

[162] *Id.*

[163] *Id.* at 2338–39.

[164] *Id.* at 2339 (internal quotation marks omitted).

[165] *Id.*

[166] *Id.* at 2339–40.

[167] *Id.* at 2340 (internal quotation marks omitted).

the same commission proceedings SBA was previously subjected to.[168]

The issue before the Court was whether the plaintiffs' pre-enforcement challenge was justiciable.[169] The Sixth Circuit had previously held that the suits were nonjusticiable on ripeness grounds by analyzing (1) the likelihood that the plaintiffs' alleged harm would occur; (2) whether further factual development was necessary; and (3) the hardship to the parties of withholding judicial review.[170] The Court, however, framed the issue in terms of standing rather than ripeness, and explained its decision to do so in a footnote:

> The doctrines of standing and ripeness "originate" from the same Article III limitation. As the parties acknowledge, the Article III standing and ripeness issues in this case "boil down to the same question." Consistent with our practice in [other pre-enforcement review cases], we use the term "standing" in this opinion.[171]

After reciting the modern standing requirements set forth in *Lujan*, the Court noted that the case concerned the injury in fact requirement.[172] Specifically, the question was whether the plaintiffs' alleged injury—the threatened enforcement of the statute against them in the future—was sufficiently imminent to constitute an injury in fact.[173] According to the Court, a plaintiff seeking pre-enforcement review of a statute satisfies the injury in fact requirement by alleging " 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.' "[174] Upon applying this test, the Court

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[168] *Id.*

[169] *Id.* at 2338.

[170] *Id.* at 2340.

[171] *Id.* at 2341 n.5 (citations omitted) (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007)) (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335 (2006)).

[172] *Id.* at 2341.

[173] *Id.* at 2342.

[174] *Id.* (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

held that the plaintiffs had alleged a credible threat of enforcement sufficient to satisfy the injury in fact requirement of Article III standing.[175]

After concluding that the plaintiffs alleged an imminent injury in fact sufficient to support standing, the Court noted that the Sixth Circuit "considered two other factors"—whether the factual record was sufficiently developed and whether the parties would face hardship if judicial relief were denied—in determining that the plaintiffs' claims were not justiciable.[176] The defendants argued that "these 'prudential ripeness' factors" indicated that the plaintiffs' claims were not justiciable, but the Court took a different view:

> [W]e have already concluded that [plaintiffs] have alleged a sufficient Article III injury. To the extent [defendants] would have us deem [plaintiffs'] claims nonjusticiable "on grounds that are 'prudential,' rather than constitutional," "[t]hat 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.' "[177]

The Court continued by holding that, "[i]n any event, we need not resolve the continuing vitality of the prudential ripeness doctrine in this case" because the issue presented was purely legal and did not require further factual development, and because the plaintiffs would suffer substantial hardship if judicial review were to be denied.[178]

The Supreme Court's opinion in *SBA* indicates that the Court may no longer consider the ripeness doctrine necessary in light of the modern standing doctrine. First, the Court explicitly recognized the similarity of standing and ripeness in footnote five, where it stated that "the Article III standing and ripeness issues

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[175] *Id.* at 2346.

[176] *Id.* at 2347.

[177] *Id.* (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014)).

[178] *Id.*

in this case 'boil down to the same question.' "[179] The Court, however, went far beyond simply noticing this overlap.

In determining whether the case was justiciable on ripeness grounds, the Sixth Circuit below considered three factors: (1) "the likelihood that the alleged harm would come to pass," (2) the need for factual development, and (3) the hardship to the parties.[180] The Supreme Court's justiciability determination, on the other hand, focused on whether the alleged injury was sufficiently imminent to satisfy the injury in fact requirement of Article III standing. After concluding that the injury in fact requirement was met, the Court stated that the Sixth Circuit had "separately considered two *other* factors"—the need for factual development and the hardship to the parties—in its ripeness analysis.[181] The Court therefore equated the Sixth Circuit's consideration of the "likelihood of harm" in the ripeness context with the injury in fact requirement of standing, and suggested that ripeness depends in part on whether the plaintiff has suffered an injury in fact. Moreover, the Court deemed the two "other" ripeness factors the Sixth Circuit considered to be "prudential," not constitutional.[182] Thus, the Court implicitly held that a claim is *constitutionally* ripe if the injury in fact requirement of Article III standing is met.

SBA was not the first case in which the Court implicitly held that satisfaction of the Article III standing requirements renders a claim constitutionally ripe. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, the Court assessed the justiciability of the plaintiffs' challenge to the Price-Anderson Act, which limited the liability of federally-licensed private nuclear power plants in the event of a nuclear accident,[183] on both standing and ripeness grounds.[184] After holding that the plaintiffs satisfied the "Art[icle] III requisites for standing,"[185] the Court began its discussion of ripeness by stating that "[t]o the extent that issues of

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[179] *Id.* at 2341 n.5 (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007)).

[180] *Id.* at 2340.

[181] *Id.* at 2347 (emphasis added).

[182] *Id.*

[183] 438 U.S. 59, 63–67 (1978).

[184] *Id.* at 72–82.

[185] *Id.* at 72.

ripeness involve, at least in part, the existence of a live [c]ase or [c]ontroversy," the Court's earlier determination that the plaintiffs would suffer an immediate injury that would be redressed by the requested relief in the context of its standing analysis was sufficient to satisfy that requirement.[186] In other words, the Court held that any constitutional dimension of ripeness was satisfied when the plaintiffs met the Article III standing requirements.[187] Thus, the Court recognized that standing and ripeness are substantially similar when it comes to determining whether an action is an Article III case or controversy. The recognition of the similarity between the doctrines, however, was limited to the similarity between the Article III standing requirements and the *constitutional* dimension of ripeness. The Court later emphasized that the *prudential* dimension of ripeness was not necessarily satisfied upon the plaintiffs' showing of Article III standing when it separately held that "[t]he prudential considerations embodied in the ripeness doctrine" also supported a finding that the plaintiffs' claims were ripe.[188] These "prudential considerations" were that further factual development in the form of a nuclear accident was unnecessary to decide the legal issues presented and that delaying resolution of the claim would cause the plaintiffs hardship.[189] In sum, the *Duke Power* opinion suggested that Article III standing and the constitutional dimension of ripeness perform substantially similar functions, but that the prudential dimension of ripeness performs a function distinct from that of Article III standing and serves as an independent bar to justiciability, which may cut against the idea that ripeness serves no unique purpose in light of modern standing. Thus, *Duke Power* both supports and undermines this Note's conclusion.

Although the *SBA* Court's implicit holding that a showing of Article III standing renders a claim constitutionally ripe could be considered a simple reiteration of the *Duke Power* Court's similar

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[186] *Id.* at 81 (quoting Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 138 (1974)) (internal quotation marks omitted).

[187] *See* Jonathan D. Varat, *Variable Justiciability and the* Duke Power *Case*, 58 TEX. L. REV. 273, 298 (1980) ("[T]he Court held the constitutional dimension of ripeness satisfied by the imminence of the injury that gave plaintiffs standing . . . .").

[188] *Duke Power*, 438 U.S. at 81.

[189] *Id.* at 81–82.

implicit holding, the Court in *SBA* went a step further. The *Duke Power* opinion suggested that the "prudential considerations" of ripeness were not satisfied by a showing of Article III standing and could independently render a constitutionally ripe claim unripe. The *SBA* Court, however, expressed concern about the idea that a constitutionally justiciable claim could be rendered nonjusticiable on prudential grounds, since "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[190] Thus, while the *SBA* Court did not feel the need to "resolve the continuing vitality of the prudential ripeness doctrine,"[191] it is clear that doubt about its continuing vitality exists. When paired with the Court's implicit holding that the constitutional dimension of ripeness is satisfied upon a showing of Article III standing, the Court's doubt regarding the vitality of the prudential dimension of ripeness supports the notion that ripeness may no longer perform a function distinct from that of standing, and thus no longer serves a useful purpose. Ripeness is established upon a showing of standing.

Additionally, the *SBA* court both implicitly and explicitly indicated its preference toward utilizing standing over ripeness to assess justiciability. The Court implicitly showed its preference toward standing by employing it to assess justiciability despite the fact that the Sixth Circuit had previously evaluated justiciability on ripeness grounds. The Court explicitly indicated its preference toward standing in footnote five, where it stated that although standing and ripeness presented similar inquiries, "[c]onsistent with our practice . . . we use the term 'standing' in this opinion."[192] Thus, even if the ripeness doctrine is still relevant, the Court has expressed its intention to utilize standing instead.

C. RIPENESS SHOULD DISSOLVE INTO STANDING

Thus far, this Note has demonstrated that the standing and ripeness doctrines have evolved to a point where they now perform

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[190] Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014)) (internal quotation marks omitted).

[191] *Id.*

[192] *Id.* at 2341 n.5.

substantially similar functions in determining whether a claim is justiciable, and that the Supreme Court has acknowledged this similarity in function.[193] The question that has yet to be addressed, of course, is why, if the standing and ripeness doctrines perform substantially similar functions, should ripeness dissolve into standing? If the functions performed by both doctrines are the same, and one of the doctrines needs to go, it certainly seems wiser to get rid of the doctrine that "has produced an incoherent and confusing law of federal courts"[194] instead of the doctrine whose modern standard of analysis "has met with consistent approval,"[195] regardless of the Supreme Court's preference toward utilizing the former.

Indeed, if this Note's conclusion was solely based on the doctrines' substantially similar functions and the Court's apparent preference toward utilizing standing over ripeness, it would have no staying power—the Court could blow apart its conclusion in one term by denying justiciability on ripeness grounds in a few cases. Accordingly, there are further grounds for concluding that the ripeness doctrine should dissolve into the standing doctrine, and not vice versa. Although standing and ripeness perform substantially similar functions, their respective terms and requirements interact in such a way as to render ripeness obsolete in justiciability determinations. In other words, a claim will never be nonjusticiable solely on ripeness grounds, even if the court dismissing the claim only applies the ripeness doctrine.

Recall that in order for a claim to be justiciable, it must satisfy all of the justiciability doctrines.[196] Thus, plaintiffs must show that they have standing to bring their claims *and* that their claims are ripe. As discussed above, a plaintiff's satisfaction of the modern Article III standing requirements would necessarily satisfy the factors courts consider in determining whether a claim is ripe.[197] That is not to say, however, that satisfaction of the ripeness factors will necessarily satisfy the Article III standing

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[193] *See supra* Part III.A–B.

[194] Hessick, *supra* note 27, at 276.

[195] Nichol, *supra* note 15, at 155.

[196] SULLIVAN & FELDMAN, *supra* note 4, at 34.

[197] *See supra* Part III.A.

requirements. In fact, it is foreseeable that a plaintiff would be able to satisfy the ripeness factors without meeting the Article III standing requirements. For example, a plaintiff could very well show that she will suffer substantial hardship if judicial consideration is withheld without demonstrating that she will suffer an injury that is "certainly impending."[198] Similarly, the facts could be sufficiently developed enough for the court to make a well-informed decision on the merits without the plaintiff demonstrating causation and redressability. Thus, a showing of Article III standing will necessarily render a claim ripe, but a determination of ripeness will not necessarily establish standing. In short, despite their substantially similar functions, standing and ripeness are not coextensive.

So what does all of this mean in terms of the continued utility of the ripeness doctrine? The answer is best expressed through a simple logical progression. If a plaintiff establishes Article III standing, her claim will necessarily be ripe and, assuming the other justiciability doctrines are satisfied, justiciable. If a plaintiff cannot establish Article III standing, her claim may still be ripe, but it will not be justiciable due to the lack of standing. It logically follows that if a plaintiff's claim is ripe, she still may not have standing. Most importantly, if a plaintiff's claim is not ripe, the plaintiff will necessarily lack standing.

The final strand of the logical progression above is the most critical to this Note's conclusion. If a plaintiff's claim is not ripe, the plaintiff necessarily will lack standing. Accordingly, if a claim is dismissed for lack of ripeness, it should also be dismissed for lack of standing. Thus, a claim will never be nonjusticiable solely on ripeness grounds—it will necessarily be nonjusticiable on standing grounds as well. The ripeness doctrine, then, logically does not and cannot act as an independent bar to justiciability. The standing doctrine, on the other hand, does act as an

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[198] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (holding that a " 'threatened injury must be *certainly impending* to constitute [an] injury in fact' " (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990))). For example, a plaintiff could assert a threatened future harm that, despite being less than likely to occur, would be so severe if it did occur that the court would find substantial hardship. Because the threatened injury would not be imminent, however, the plaintiff would not be able to demonstrate injury in fact.

independent bar to justiciability; a dismissal for lack of standing does not necessarily mean that the plaintiff's claim must also be dismissed for lack of ripeness. For this reason, ripeness should dissolve into standing, not vice versa.

The Court, of course, has dismissed claims for lack of justiciability solely on ripeness grounds without even mentioning standing.[199] These cases do not disprove the logical conclusion that the ripeness doctrine does not act as an independent bar to justiciability; in each case, the action could have been dismissed on standing grounds. Take, for example, *Texas v. United States*, where the Court affirmed the district court's dismissal of Texas's claim that its imposition of certain statutorily-authorized sanctions on school districts would never require preclearance under the Voting Rights Act of 1965 on ripeness grounds.[200] Recall that the Court emphasized that the issues were not fit for adjudication because it was speculative whether Texas would impose the sanctions, and thus would have to seek preclearance, in the first place—Texas could not point to a school district in which the imposition of the sanctions was "currently foreseen or even likely," and hoped that it would never have to impose them.[201] Instead, Texas effectively claimed that it *could* impose the sanctions in the future, and that if it did it would suffer hardship by having to comply with the preclearance procedures.[202] Although the Court framed its justiciability decision solely in terms of ripeness, it could have easily framed it in terms of standing. Because Texas failed to point to any school district in which the imposition of the sanctions was foreseeable or likely, its threatened injury of having to comply with the preclearance procedures would not have been sufficiently imminent to constitute an injury in fact. As the Court in *Lujan* held, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our

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[199] *See, e.g.*, Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 160–61 (1967) (dismissing action on ripeness grounds without mentioning standing).

[200] 523 U.S. 296, 298–99, 302 (1998).

[201] *Id.* at 300.

[202] *Id.* at 299–300.

cases require."[203] Thus, even though the Court exclusively utilized ripeness to dismiss the claim, ripeness did not act as an independent bar to justiciability.

In sum, although the standing and ripeness doctrines perform substantially similar functions when determining whether a claim is justiciable, they are not equally useful. Modern Article III standing acts as a distinct hurdle to litigants seeking access to the federal judiciary, and renders claims that may otherwise fulfill the requirements of the other justiciability doctrines—such as ripeness—nonjusticiable. Ripeness, on the other hand, only renders nonjusticiable those claims that would already be nonjusticiable under the standing doctrine. Thus, the ripeness doctrine is wholly superfluous, and should no longer factor into the justiciability determination.

IV. CONCLUSION

Standing and ripeness were created to perform, and initially did perform, distinct, complementary functions to assist federal courts in determining whether a claim was a justiciable "case" or "controversy" under Article III. Standing's function was to determine whether the party bringing a claim was the proper party to litigate it, whereas ripeness's function was to determine whether the claim was being brought at the proper time. Over time, however, standing and ripeness evolved in such a way as to blur the distinction between their functions. As currently constructed, standing and ripeness each evaluate both the propriety of the parties and the timing of their claims.

Because standing and ripeness perform substantially similar functions, it is unnecessary for courts to continue employing both when assessing justiciability. Accordingly, it is the ripeness doctrine—not the standing doctrine—that should meet its end.

As a logical matter, ripeness does not serve a distinct, useful purpose in light of the modern standing doctrine. Because a plaintiff's satisfaction of the Article III standing requirements will necessarily render a claim ripe, a claim that is dismissed on

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[203] Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992).

ripeness grounds should necessarily be dismissed for lack of standing as well. Thus, ripeness only renders nonjusticiable those claims that would already be nonjusticiable under the standing doctrine, and is a completely unnecessary doctrine. Standing, on the other hand, does serve a distinct, useful purpose. Because a showing of ripeness does not necessarily establish Article III standing, a dismissal for lack of standing does not necessarily entail a dismissal for lack of ripeness. Thus, standing renders claims that may otherwise be justiciable under the ripeness doctrine nonjusticiable, and is a valuable component of justiciability law.

Given the difference in utility between standing and ripeness, courts should exclusively use standing to assess justiciability moving forward, and should no longer utilize ripeness. Although disposing of the ripeness doctrine may seem like a dramatic change to the law of justiciability, the benefit gained by reducing unnecessary complexity in justiciability determinations far outweighs the drawback of eliminating a doctrine that no longer serves a useful purpose.

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