Standing, Ripeness, and Forest Plan Appeals

by

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I. INTRODUCTION

At the beginning of this decade, the Supreme Court issued two decisions that at first blush appeared to revolutionize the doctrine of standing and ripeness, especially for environmental-group plaintiffs.[1] Both *Lujan v. National Wildlife Federation* (*NWF*) and *Lujan v. Defenders of Wildlife* (*Defenders*) were authored by Justice Antonin Scalia, who has written extensively about his belief that standing doctrine has allowed too much access to the courts.[2] Scholars immediately began debating whether *NWF* and *Defenders* would significantly affect environmental law, but it was not until 1994 that the federal circuit courts of appeal split in their interpretation of the decisions.

The split took place in the context of challenges to Land and Resource Management Plans (forest plans) issued by the United States Forest Service under the National Forest Management Act (NFMA).[3] In 1993, the Ninth Circuit held that plaintiffs have standing to challenge forest plans.[4] In 1994, the Eighth Circuit Court of Appeals denied standing to similar plaintiffs.[5] In 1995, the Seventh Circuit followed the Ninth and held that plaintiffs have standing to challenge forest plans.[6]

In *Sierra Club v. Robertson*, the Eighth Circuit noted and criticized

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1. Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

2. *See* Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 [hereinafter Scalia, Vermont Yankee]; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881 (1983) [hereinafter Scalia, *Separation of Powers*]. *See also* Morrison v. Olson, 487 U.S. 654 (1988) (Scalia, J., dissenting).

3. 16 U.S.C. §§ 1600-1614 (1994) (amending the Forest and Rangeland Renewable Resources Planning Act).

4. Resources Ltd., Inc. v. Robertson, 8 F.3d 1394 (9th Cir. 1993) (relying on Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992) (holding that plaintiffs have standing to challenge the EIS accompanying a forest plan)).

5. Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994).

6. Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995).

the Ninth Circuit's holdings on standing.[7] The Eighth Circuit's opinion, however, incorrectly analyzes the holdings of both *NWF* and *Defenders*, and thereby incorrectly denies standing to the plaintiffs. Neither *NWF* nor *Defenders* mandates the holding in *Robertson*.

Part II of this Article will discuss standing and ripeness in American law, particularly under the Administrative Procedure Act[8] (APA) and in light of *NWF* and *Defenders*. Part III will describe and discuss the district and circuit court opinions addressing plaintiffs' standing to challenge forest plans and the ripeness of their claims, and will argue that neither *NWF* nor *Defenders* require denial of judicial review of forest plans.

II. STANDING AND ADMINISTRATIVE LAW: *NWF*, *DEFENDERS*, AND THE APA

A. *Standing and Ripeness: An Overview*

Neither NFMA nor the National Environmental Policy Act (NEPA)[9] contains a citizen-suit provision, as is found in many other environmental statutes.[10] Therefore, plaintiffs who turn to the courts for judicial review of an administrative decision that implicates NFMA or NEPA must sue under the APA.[11] The provision allowing such a suit states: "A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[12] To understand the meaning of this sentence—which is undeniably cryptic to the casual reader—it is necessary to know something of the history of the law of standing.

1. *The Private-Law Model*

As many commentators have noted, standing is a decidedly modern legal doctrine whose development coincided with the rise of the twentieth century administrative state.[13] Prior to this, in the so-called "private-law" era, the concept of standing as a self-contained jurisdictional doctrine did

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7. *Robertson*, 28 F.3d at 759-60.

8. 5 U.S.C §§ 551-559, 701-706 (1994).

9. 42 U.S.C. §§ 4321-4370 (1994).

10. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g)(1) (1994); Clean Water Act of 1976, 33 U.S.C. § 1365 (1994); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1994).

11. 5 U.S.C. §§ 551-559, 701-706.

12. 5 U.S.C. § 702.

13. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-25 (1988); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395-96 (1988); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUMBIA L. REV. 1432, 1434 (1988) [hereinafter Sunstein, *Privatization*].

not exist.[14] When *P* sued *D* for breach of a private duty owed her, the court did not perform a preliminary inquiry into whether *P* had suffered the sort of injury that entitled her case to be heard. Instead, courts resolved such questions by looking to the merits of the case, that is, by applying the relevant substantive law to the facts.[15] Thus, if *P* alleged and could prove that *D* had caused her to suffer an injury that the law recognized, for example by breaching a certain kind of promise to pay money, she was said to have "a cause of action," or a suit "with merit."[16] But if, for example, she could not prove that a promise had been supported by consideration, she had no cause of action. Regardless of how injured she might be because of the defendant's breach of the promise, she would not be said to have suffered damage to a "legal interest." In the eyes of the law, she would not have been harmed.[17]

Under this private-law model, the legal interests that courts recognized were generally limited to those protected by the common law—loss of money, bodily harm, loss of reputation, loss of the use of property.[18] As such, they tended to share certain characteristics. They were individualized, that is, they fell on certain people and not others.[19] They also tended to be economic in nature and thus tended to be measurable (though often imperfectly) in monetary terms. The ordinary remedy was damages.[20]

2. *Public Law, the APA, and the Legal Interest Test*

In the 1920s, and particularly the 1930s, Congress began enacting extensive schemes of public law. Typically, these schemes required companies to obtain licenses to engage in certain business activities, established regulatory agencies to issue the licenses, and prescribed broad duties and specific interests for the agencies to consider when issuing the licenses and developing general rules regulating business conduct.[21] This

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14. Fletcher, *supra* note 13, at 224-25.

15. *See* Sunstein, *Privatization*, *supra* note 13, at 1434-35.

16. Sunstein, *Privatization*, *supra* note 13, at 1434-35.

17. An illuminating discussion of this concept can be found in JOSEPH VINING, LEGAL IDENTITY 14-20 (1978).

18. Recognized interests did not have to come from the common law; they could also come from statutes creating common-law-like private rights. *See* Fletcher, *supra* note 13, at 224 n.21.

19. Fletcher, *supra* note 13, at 224 n.21.

20. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

21. *See, e.g.*, Federal Communications Act of 1934, 47 U.S.C. § 151-158, 201-224, 301-332, 351-362, 381-386, 390-399(b), 401-416, 501-510, 521, 522, 531-533, 541-547, 551-559, 601-613 (1988 & Supp. V 1993) (creating the Federal Communications Commission and granting it broadcast licensing authority in order to provide the public with "rapid, efficient . . . wire and radio communication service with adequate facilities at reasonable charges").

raised the question of who could sue to enforce the new agency duties. Under the private-law model, it was clear that regulated entities could challenge agency decisions denying them licenses or restraining their activities, since these actions directly implicated common-law rights.[22] Increasingly, however, businesses found they wanted to bring suits challenging agency approval of their *competitors'* activities on the grounds that the agencies had not properly weighed the statutorily mandated interests. The status of these suits was uncertain. Although a company could claim, plausibly enough, that it was harmed by the increased competition and loss of revenue that resulted from illegal agency approval of its rivals, the common law did not recognize a right to be free from increased competition.[23] Thus, in private-law terms, the companies had not suffered damage to a legal interest, and were said to have no more than an "abstract" interest in whether the agency had violated the law. In modern terms, they lacked standing.

In the *Chicago Junction Case*,[24] the Supreme Court held this reasoning did not apply when a plaintiff could point to a statute requiring an agency to consider its (the corporation's) interests. The Court upheld the standing of the plaintiff railroad to challenge the Interstate Commerce Commission's (ICC) approval of an acquisition by one of its rivals, noting that the Federal Transportation Act required the ICC to consider the effects of increased competition when approving the merger.[25] In a subsequent line of cases, the Court extended this reasoning and allowed entities to challenge agency action on the grounds that it violated duties owed not to the plaintiff, but to the general public. For example, a radio station could challenge a competitor's broadcast license on the grounds that the Federal Communications Commission failed to properly consider the interests of listeners.[26] This doctrine, sometimes called surrogate standing, became a standard basis for competitor suits.[27]

When Congress passed the APA in 1946, its intent was to codify the doctrines of standing that the Court had developed over the previous two

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22. The regulatory programs were generally designed to alter common-law understandings; therefore, businesses had a right to sue "to test the question whether there was statutory authorization for what would otherwise be a common-law wrong." Sunstein, *Privatization, supra* note 13, at 1434. To hold otherwise would probably have been thought to raise constitutional due process concerns. *Supra.*

23. Alabama Power Co. v. Ickes, 302 U.S. 464, 479-80 (1938).

24. Baltimore & O.R. Co. v. United States, 264 U.S. 258 (1924).

25. *Id.* at 262-69.

26. Federal Communications Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940).

27. *See, e.g., id.*; Scripps-Howard Radio, Inc. v. Federal Communications Comm'n, 316 U.S. 4, 14-15 (1942).

decades.[28] Thus, the APA recognized two basic sources for challenges to agency action: infringement of a common-law right ("a person suffering legal wrong"[29]), and infringement of a statutory interest ("a person . . . adversely affected or aggrieved within the meaning of the relevant statute"[30]).[31] The reference to "the relevant statute" recognized, as the Court had, that not every public law could serve as a basis for challenging agency action, but only those from which it plausibly could be inferred that Congress intended to create an enforceable statutory duty.[32] The term "person" was defined to include corporations,[33] which had litigated the lion's share of the Court's standing cases—even, through the doctrine of surrogate standing, the ones where public rights were at issue.

On the other hand, the word "person" also means people, and this raised the question of whether the APA gave individuals standing to enforce statutory rights on their own behalf. Beginning with *Reade v. Ewing*[34] in 1953, the federal circuit courts began to hold that it did.[35] By the late 1960s, suits by individual statutory beneficiaries became common; for example, television viewers had standing under the Federal Communications Act to protest a broadcast license renewal,[36] victims of housing discrimination had standing under the Housing Acts of 1949 and 1954 to sue an urban renewal agency,[37] and users of the environment had standing under the Federal Power Act to protect their interests against activities of a federal power agency.[38] In each of these cases, the court examined

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28. *See* Fletcher, *supra* note 13, at 226-27 (citing legislative history of the APA).

29. 5 U.S.C. § 702.

30. 5 U.S.C. § 702.

31. Professor Sunstein argues that the phrase "legal wrong" referred to both common-law and statutory rights, and that "aggravated or aggrieved" referred only to surrogate standing under statutes with their own judicial review provisions. *See* Sunstein, *Privatization, supra* note 13, at 1440-41. He may be right; certainly neither the APA nor its legislative history is a model of clarity. At this late date, the important concept is that the APA recognized that Congress could create judicially enforceable statutory rights, either explicitly or by implication.

32. *See* Sunstein, *Privatization, supra* note 13, at 1440-41. *See generally* Stark v. Wickard, 321 U.S. 288, 308 (1944) (holding that the existence of an implied right to judicial review varies with the statutory context).

33. 5 U.S.C. § 701(b)(2); 5 U.S.C. § 551(2).

34. 205 F.2d 630 (2d Cir. 1953) (upholding standing of consumer of oleomargarine to challenge regulations allowing synthetic vitamin A to be used in that product). Not coincidentally, the plaintiff was also a producer of natural vitamin A; however, the court expressly based standing on his status as a consumer. *Id.* at. 631-32.

35. Some support for the proposition can also be found in Associated Industries v. Ickes, 134 F.2d 694 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

36. Office of Communication of United Church of Christ v. Federal Communications Comm'n, 359 F.2d 994, 1000-06 (D.C. Cir. 1966).

37. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 932-37 (2d Cir. 1968).

38. Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 615-17 (2d Cir. 1965).

the relevant statute to determine whether Congress intended to create a judicially cognizable interest in the plaintiff.[39] This approach, based on the APA, became known as the "legal interest test."[40]

3. *Injury in Fact*

In a 1970 case, *Association of Data Processing Service Organizations v. Camp*,[41] the Supreme Court abandoned the legal interest test. The Court was quite explicit about its motive for doing this: It wished to continue the trend toward more expansive grants of standing, and feared that the legal interest test had become a formalistic impediment to plaintiffs with legitimate grievances.[42] From now on, the Court announced, standing would extend to all plaintiffs who could show an "injury in fact."[43] Once this rudimentary threshold had been met, courts were to examine the legal interests at stake as part of the merits.[44]

Ironically, the ink was hardly dry on *Data Processing* before the Court began to use that decision to restrict the law of standing. The first case, *Sierra Club v. Morton*,[45] seemed a relatively innocuous refinement of the injury-in-fact requirement, holding that the Sierra Club could not challenge a proposed ski development on environmental grounds because it had not alleged that any of its members actually "used," or visited, the area in question.[46] Beginning with *Warth v. Seldin*[47] however, the Court began to make the test harder by requiring injury to be "distinct and palpable"[48] and "actual or imminent, not 'conjectural or hypothetical.'"[49]

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39. *See, e.g., id.* at 613-16 (finding the Federal Power Act gave plaintiff a "legal right" to protect its recreation and aesthetic interests).

40. Some commentators, including Professor Sunstein, seem to interpret these cases as an expansion of the "legal wrong" language in the APA, and therefore sometimes refer to the expanded "legal wrong test." *See* Sunstein, *Privatization, supra* note 13, at 1441-42.

41. 397 U.S. 150 (1970).

42. *Data Processing*, 397 U.S. at 153, 156.

43. *Id.* at 152. The Court also required the plaintiff to satisfy a second element, that he have an interest "arguably . . . within the zone of interests" protected by the statute. *Id.* at 156. Although this element suggested a liberalized remnant of the legal interest test, in practice it has proved so lenient as to be essentially irrelevant. *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986). However, in recent years, courts have relied on this requirement to deny standing to ranchers and other "user-group" plaintiffs who have challenged agency actions under environmental statutes for alleged economic harms. *See, e.g.*, Nevada Land Action Ass'n v. Forest Service, 8 F.3d 713, 715-16 (9th Cir. 1993) (holding that economic injuries are not within the "zone of interests" protected by NEPA).

44. *Data Processing*, 397 U.S. at 153.

45. 405 U.S. 727 (1972).

46. *Morton*, 405 U.S. at 735. *But see* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) for an illustration of just how lenient the injury-in-fact test can be so long as a plaintiff alleges damage to a "use" interest. *See also infra* notes 103-09 and accompanying text for a discussion of the inherently manipulable nature of the injury-in-fact test.

47. 422 U.S. 490 (1975).

48. *Warth*, 422 U.S. at 501.

And in a line of cases that began with *Linda R.S. v. Richard D.*,[50] the Court added the closely related requirements of "causation" and "redressability" to the injury-in-fact analysis. *Linda R.S.* held that a woman could not bring an action seeking to compel criminal prosecution of the father of her illegitimate child for refusing to pay child support (such prosecutions were routinely brought against the fathers of legitimate children) because, the Court reasoned, even if the father were prosecuted, he might elect to go to jail rather than make the payments.[51] Thus, the failure to prosecute was not necessarily the cause of the failure to make payments; or, stated another way, there was no guarantee that a court-ordered prosecution would redress the plaintiff's injury.[52] Also in this vein were *Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO)*,[53] which denied the standing of indigents to challenge the Internal Revenue Service's removal of tax breaks for hospitals that served the poor, and *Allen v. Wright*,[54] which denied minority parents standing to challenge tax breaks for private segregated schools on the grounds that they indirectly hindered desegregation efforts. In each case, the Court reasoned that a favorable ruling would not necessarily produce the relief the plaintiffs sought—health care and integrated schools, respectively.[55]

The ideas behind the Court's heightened standing requirements were not new. A crude form of the redressability argument, for example, had been made over thirty years earlier in *Federal Power Commission v. Pacific Power & Light Co.*[56] What was new was the Court's increased fascination with the notion that restrictions on standing are constitutionally based. The injury-in-fact requirements were said to be necessary to satisfy the Article III "case or controversy" limitation on jurisdiction.[57] Perhaps more fundamentally, the Court seemed to fear that excessively liberalized standing would violate the principle of separation of powers by allowing courts to constantly second-guess agency judgment.[58] These ideas, too,

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49. Allen v. Wright, 468 U.S. 737, 751 (1984) (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

50. 410 U.S. 614 (1973).

51. *Linda R.S.*, 410 U.S. at 614-18.

52. *Id.*

53. 426 U.S. 26 (1976).

54. 468 U.S. 737 (1984).

55. *EKWRO*, 426 U.S. at 42-43; *Wright*, 468 U.S. at 758-59.

56. 307 U.S. 156, 159-60 (1939) (rejecting the argument that a court order vacating the ICC's decision not to approve a utility merger would not provide a remedy because only the agency itself could actually approve the merger: "For purposes of judicial finality there is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so.").

57. *See Wright*, 468 U.S. at 750-51.

58. *See id.* at 760.

were hardly novel—the latter had been a central theme of New Deal-era opinions by Justices Brandeis and Frankfurter, who sought to protect administrative agencies from judicial attempts to restrict regulatory and congressional action.[59] For the first time, however, the Court emphasized that injury in fact could be a limit on congressional power to create standing; that is, the Court could deny standing on Article III grounds even where Congress sought to create it.[60]

4. *Ripeness*

Besides standing, plaintiffs challenging agency action under the APA face one additional burden: The action must be a "final" agency action.[61] This requirement is often referred to as the ripeness doctrine.[62]

Ripeness is a jurisdictional requirement that is determined by the nature of the issue before the court,[63] whereas standing focuses on the plaintiffs rather than the issues. The primary purpose of ripeness is:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.[64]

Agency action is defined as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[65] According to the legislative history of the APA, agency action "includes the supporting procedures, findings, conclusions or statements of reasons or basis for the action or inaction."[66] According to the

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59. *See, e.g.*, Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). *See also* Winter, *supra* note 13, at 1455.

60. *See, e.g., Warth*, 422 U.S. at 501 ("Congress may grant an express right of action to persons . . . [o]f course Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself . . . .").

61. 5 U.S.C. § 704.

62. *See, e.g., NWF*, 497 U.S. at 890 n.2. *See also* Paul N. Sheridan, *The Injustice of Environmental Injusticiability*: Public Citizen v. Office of the United States Trade Representative, 17 FORDHAM INT'L L.J. 1115 (1994); Bridget A. Hust, *Ripeness Doctrine in NEPA Cases: A Rotten Jurisdictional Barrier*, 11 LAW & INEQ. J. 505 (1993).

63. Standing, ripeness, and exhaustion of administrative remedies all tend to overlap in their purpose and their requirements. For instance, *NWF* seems to be a ripeness case, but is cited in decisions analyzing standing. *See, e.g.*, Sierra Club v. Robertson, 28 F.3d 753, 758-59 (8th Cir. 1994). *See also* Hells Canyon Preservation Council v. Richmond, 841 F. Supp. 1039, 1044 (D. Or. 1993) (stating that the requirement for final agency action is also known as the exhaustion doctrine).

64. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

65. 5 U.S.C. § 551(13).

66. S. DOC. NO. 248, 79th Cong., 2d Sess. 255 (1946).

leading case on ripeness, *Abbott Laboratories v. Gardner*,[67] finality of the agency action is to be interpreted in a "pragmatic" way.[68] A reviewing court should "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[69] Like the separation of powers theory of standing, the notion of ripeness originated in the early public law period at the hands of judges who wished to protect the regulatory state from a largely hostile judiciary.[70]

At this point, we can summarize the law of standing and ripeness as it existed prior to *NWF* and *Defenders*. To have standing, a plaintiff must allege an injury in fact. This injury must be distinct, palpable, and imminent, not hypothetical or conjectural. In addition, the plaintiff must show that the defendant caused the injury, and that a favorable ruling would redress it. Finally, a plaintiff challenging agency action under the APA, rather than under a substantive statute with its own provisions for judicial review, must show that the action is a final agency action.

B. NWF *and* Defenders

1. Lujan v. National Wildlife Federation

In *NWF*,[71] an environmental organization challenged the Bureau of Land Management's (BLM) "land withdrawal review program."[72] Plaintiffs averred that reclassification of certain lands used by its members would result in those lands being mined, which would thereby result in environmental damage.[73] This case arose under the Federal Land Policy and Management Act of 1976 (FLPMA)[74] and NEPA, neither of which contain a citizen-suit provision. Judicial review therefore arose under the APA.[75] The Court made two general holdings: first, that two of plaintiff's member's affidavits were not specific enough as to the areas being used,[76] and second, that the "land withdrawal review program" was not

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67. 387 U.S. 136 (1967).

68. *Abbott Laboratories*, 387 U.S. at 149-50.

69. *Id.* at 149.

70. *See, e.g.*, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 49-50 (1938). *See also* Sunstein, *Privatization*, *supra* note 13, at 1437.

71. Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

72. *Id.* at 875.

73. *Id.* at 879-80.

74. 43 U.S.C. §§ 1701-1784 (1988 & Supp. V 1993).

75. *NWF*, 497 U.S. at 882.

76. *Id.* at 882-89. In one affidavit, the affiant asserted that she used the South Pass-Green Mountain area in Wyoming. The district court observed that the BLM reclassification decision as to that area opened up to mining approximately 4,500 acres in a two-million acre area. The court held that asserting use of lands in the vicinity of such a large area was only a "bare allegation of injury," insufficient to overcome summary judgment. *Id.* at 887-88 (citing the district court opinion, National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 331 (D.D.C. 1988)). The Supreme Court agreed. *NWF*,

an agency action under section 702 of the APA, let alone a final agency action under section 704.[77] It is this second holding that is implicated in forest plan challenges.[78]

In *NWF*, the Court held that the land withdrawal review program was not an agency action because it did not "refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations."[79] *Abbott Laboratories* was mentioned in *NWF* only as an exception to the general rule that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review" until it has been "fleshed out, by some concrete action."[80] The balancing test enunciated in *Abbott Laboratories* was not mentioned. In a footnote, the Court distinguished the land withdrawal review program from other judicially reviewable actions:

> If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review . . . it can of course be challenged under the APA by a person adversely affected.[81]

The Court went on to discuss ripeness as occurring when "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by *some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.*"[82] Here, the Court found, the BLM was engaging in "rules of general applicability[,]" some of which might threaten plaintiffs in the future and some of which might not.[83] In an extensive footnote, the Court discussed the speculative nature of plaintiff's harm, noting that until a mining permit was actually granted, "[I]t is impossible to tell where or whether mining activities will occur."[84] "Indeed," the Court continued, "it is often impossible to tell from a classification order alone whether mining activities will even be permissible."[85] The Court also quoted a BLM

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497 U.S. at 888.

77. *Id.* at 890.

78. This is not to say that plaintiffs' affidavits do not have to be specific; they do. But the Forest Service's challenges to plaintiffs' standing have not generally addressed the specificity of plaintiffs' affidavits; instead, the agency usually contends that forest plans are not "final agency actions."

79. *NWF*, 497 U.S. at 890.

80. *Id.* at 891.

81. *Id.* at 891 n.2.

82. *Id.* at 891 (emphasis added).

83. *Id.* at 892.

84. *Id.* at 892-93 n.3.

85. *Id.*

official's uncontested affidavit, which stated that the "subsequent discretionary actions [that may lead to mining or some other outcome] require separate and independent decisionmaking that, obviously, are divorced from the prior revocation decision."[86]

The general rule as stated in *NWF* is that "[e]xcept where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect."[87] That determination is made on a case-by-case basis.[88]

2. Lujan v. Defenders of Wildlife

Two years after *NWF* the Court issued a second opinion with far more profound effects on administrative law. *Defenders*, like *NWF*, was authored by Justice Scalia.[89] Unlike *NWF*, *Defenders* appeared to forge new ground in standing law, or more accurately, to return to very old, discarded ground.

In *Defenders*, plaintiffs sued under the citizen-suit provision of the Endangered Species Act (ESA)[90] to enjoin regulations that no longer required federal agencies to consult with the United States Fish and Wildlife Service prior to funding overseas projects. In their affidavits, plaintiffs stated that they had visited particular areas and intended to return for personal and professional reasons, but could not say when they intended to return.[91] The *Defenders* Court held that these "'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."[92] Although the Court conceded that "imminence" is a "somewhat elastic concept," it is "stretched beyond the breaking point" when a plaintiff's only alleged injury is at a future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's control.[93] A "high degree of immediacy"[94] is necessary to ensure that there truly is a "case" or "controversy" as required by Article III.

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86. *Id.*
87. *Id.* at 894.
88. *Id.*
89. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
90. 16 U.S.C. § 1540(g) (1994).
91. *Defenders*, 504 U.S. at 563-64.
92. *Id.* at 564.
93. *Id.* at 564-65 n.2.
94. *Id.*

The Court did not think it relevant to the harm inquiry that Congress had included a citizen-suit provision in ESA; try as it might, Congress cannot eradicate the Article III injury-in-fact requirement.[95] If it could, it would violate Article II:

> [T]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[96]

Defenders stands as the Court's strongest articulation of the injury-in-fact and separation-of-powers concepts to date.

Justice Scalia's opinion in *Defenders* also includes a section on redressability that employs reasoning strongly reminiscent of *Linda R.S.* Even if the Court ordered the Secretary of the Interior to amend its regulations to require federal agencies to consult with the Fish and Wildlife Service before engaging in overseas projects that could affect endangered species, the Justice reasoned, there could be no guarantee that those agencies would comply with the new regulation.[97] Because those agencies were not party to the *Defenders* suit, "there is no reason [why] they should be obliged to honor an incidental legal determination the suit produced."[98] Importantly, only four justices joined this section of the opinion, making it of questionable value as precedent.

The general rule from *Defenders* is that "[w]here there is no actual harm, . . . its imminence (though not its precise extent) must be established."[99] If no actual or imminent harm can be established, then a plaintiff has no standing, even if Congress has attempted to provide standing by means of a citizen-suit provision.[100]

3. *Criticisms of* NWF *and* Defenders

a. *NWF*

Although *NWF* has been widely criticized,[101] it is generally treated

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95. *Id.* at 576-78. *See also supra* text accompanying notes 57-60.
96. *Id.* at 577.
97. *Id.* at 568-69.
98. *Id.* at 569.
99. *Defenders*, 504 U.S. at 564 n.2.
100. *Id.* at 576-78.
101. For an interesting discussion of the implications of the injury-in-fact test and the *NWF* "use" requirement for principles of civic republicanism, see Jonathan Poisner, *Environmental Values and Judicial Review after* Lujan: *Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991). *See also* Hust, *supra* note 62, at 506.

as more of an annoyance than an actual problem for litigators. The main objection to its ripeness holding, simply stated, is that it defines agency action not by looking at what an agency does, but instead at the agency's characterization of its own actions.[102] Potentially, at least, this provides a loophole through which agencies can evade scrutiny of their actions. The degree to which agencies have successfully used this loophole is uncertain. As for *NWF*'s holding on standing, the consensus seems to be that it amounts to a heightened pleading requirement. If the reported cases are any guide, it has had little or no effect on environmental groups' ability to bring suits.

b. *Defenders*

Before *Defenders*, a leading commentator noted that standing was becoming "one of the most criticized aspects of constitutional law."[103] After *Defenders*, this trend appears to have accelerated. Although it is not possible in this space to discuss the subtleties of the myriad criticisms that have been leveled at *Defenders* and the injury-in-fact and separation-of-powers analyses in general, some of the major themes deserve mention.

Commentators have pointed out that the concept of injury in fact—and its corollaries, causation and redressability—are highly manipulable, and have questioned whether it even makes sense to speak of injury solely "in fact."[104] They point out that plaintiffs, in their own minds, always believe they have been injured. To say that this feeling rises to the level of "fact" is to make a normative judgment that the plaintiff *deserves* to feel injured, that he has suffered the sort of harm that society recognizes as legally valid. This inquiry cannot be made without reference to the controlling law, and the outcome—particularly with regard to the causation/redressability analysis—often depends entirely on how the injury is characterized.[105]

If one is tempted to dismiss this as a hyperacademic objection from the ivory tower, a glance at the Court's own decisions should suffice to show that it is not. In equal protection decisions, the Court has adopted the position that the lost *opportunity* to compete on equal terms constitutes an injury in fact. In *Regents of the University of California v. Bakke*,[106]

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102. *See* Hust, *supra* note 62, *passim*.

103. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 109-10 (2d ed. 1988).

104. *See, e.g.*, Fletcher, *supra* note 13, at 231-33; Cass R. Sunstein, *What's Standing After* Lujan*: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188-90 (1992) [hereinafter Sunstein, *Standing After* Lujan]; TRIBE, *supra* note 103, at 130 (noting that causation is one of the most confusing and manipulable concepts in the entire field of law).

105. *See* Sunstein, *Standing After* Lujan, *supra* note 104, at 189-90.

106. 438 U.S. 265 (1978).

for example, the Court held that the plaintiff had standing to challenge a medical school's racial set-aside program, having been injured by the university's failure to allow him "to compete for all 100 places in the class."[107] This analysis was necessary because the plaintiff could not demonstrate that he would have been admitted to the school in the absence of the program; therefore, if the Court had considered the "real" injury to be denial of admission to medical school, it would have had to deny standing for lack of causation and redressability. In *Defenders*, the Court could easily have characterized the plaintiffs' harm as loss of the opportunity to view endangered species.[108] Similarly, in *Havens Realty Corporation v. Coleman*,[109] the Court faced the problem of how to grant standing to professional "testers" who had been falsely told, because of their race, that housing was unavailable when the apartment owner had no intention of actually renting the apartments in question. The Court found that Congress had created a statutory right to "truthful housing information."[110] In *Defenders*, the Court could have found a statutory right not to have the government contribute to the destruction of species. If *Havens Realty* and *Defenders* are distinguishable in this regard, the Court did not say how.

Critics of the separation of powers theory also abound.[111] Several, armed with an impressive body of research, have questioned whether the notion of injury in fact as an Article III requirement is even historically defensible.[112] As for Article II, "[t]he Take Care Clause . . . is a duty, not a license."[113] If it is the President's duty to execute the laws, it is the Court's duty to say what the law is.[114] If Congress has dictated certain agency action, the Court should be empowered to ensure that congressional will is enforced. If, on the other hand, the agency's actions fall into a gray area arguably within its statutory authority—as will surely often be

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107. *Bakke*, 438 U.S. at 280-81 n.14.

108. Sunstein, *Standing After* Lujan, *supra* note 104, at 204.

109. 455 U.S. 363 (1982).

110. *Havens Realty*, 455 U.S. at 374; *see* Sunstein, *Standing After* Lujan, *supra* note 104, at 189-90 ("It cannot be right to say that the plaintiff in *Havens Realty* suffered no injury before Congress had acted, and that the civil rights statute somehow conjured up an injury ('in fact'!)."). *See also* Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) (recognizing a statutorily created interest in living in a racially integrated community); *but see Warth*, 422 U.S. at 504-07 (no standing for lost opportunity to live in ethnically and economically integrated community).

111. *See, e.g.*, Gene R. Nichol, *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Richard J. Pierce, Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Poisner, *supra* note 101.

112. *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?* 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269-82 (1961); Sunstein, *Standing After* Lujan, *supra* note 104, at 168-79.

113. Sunstein, *Privatization*, *supra* note 13, at 1471.

114. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See also* Sunstein, *Privatization*, *supra* note 13, at 1471-72.

the case—a court can pay proper respect to agency autonomy and technical expertise through deference on the merits.

Perhaps the fundamental irony of *Defenders*, and the post-*Data Processing* cases in general, is that the injury-in-fact test was supposed to simplify the standing inquiry but has instead vastly complicated it. It forces courts to engage in potentially burdensome fact finding simply to determine a jurisdictional question. Whatever the merits of a return to a law-based standing inquiry might be, it seems hard to argue that it would produce greater doctrinal confusion than the present analysis.

Given the fragmented nature of the *Defenders* Court and the presence of several disclaimers in the opinion, it is important to establish what the decision does *not* hold, to avoid misapplying the law in the lower courts. First of all—we repeat—the redressability section is probably not good law. One would hope it is not, resting as it does on the rather extreme view that federal agencies would ignore a ruling of the Court.[115] Second, *Defenders* does not hold that Congress cannot create broad, judicially enforceable statutory rights. Although the majority opinion hints that Justice Scalia would have the Court take a substantial step backward toward the days when only individualized rights were judicially cognizable,[116] Justices Kennedy and Souter wrote separately to emphasize that "we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition," and that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[117] Third, by the majority's own admission, *Defenders* does not limit the judicial enforcement of procedural rights, provided a concrete interest is at stake.[118] Indeed, plaintiffs alleging procedural rights are exempt from having to show redressability and immediacy.[119] In other words, one can sue for failure to prepare an EIS or, presumably, failure to allow public comment on a forest plan, without having to show that following the proper procedure will produce different environmental results.[120] These last two holdings amount to something of an admission that rights in the administrative context can legitimately be intended to remedy widespread, systemic failures.

Finally, *Defenders* does not hold that an injury in fact must occur

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115. *See Defenders*, 504 U.S. at 585 (Stevens, J., concurring in the judgment).

116. *Id.* at 576-77.

117. *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

118. *Id.* at 572-73 & n.8.

119. *Id.* at 572 n.7.

120. *Id.* The opinion even seems to leave open the possibility that a biologist with a plane ticket could enforce a procedural right to interagency consultation under the ESA.

close in time to the challenged agency action. The unfortunate use of the word "imminent" as part of the injury-in-fact test creates a prime opportunity to confuse standing with ripeness. The majority opinion makes clear that the plaintiffs' imminence problem in *Defenders* rested on the fact that they could not say with certainty that they would *ever* return to the affected areas; thus, the alleged harm might never materialize.[121] Proximity in time did not appear relevant. Indeed, by all appearances, all the plaintiffs in *Defenders* lacked for standing was a plane ticket.[122]

Having discussed the state of the law on standing and ripeness, we now turn to the implications these doctrines have had, and should have, on forest plan appeals.

III. STANDING TO CHALLENGE FOREST PLANS: A REVIEW OF THE DECISIONS

NFMA creates procedural duties on the part of the Forest Service to develop forest plans, as well as substantive duties to refrain from clearcutting and to provide for animal and plant diversity.[123] It differs from wholly procedural statutes such as NEPA in that it has substantive requirements that impose affirmative duties on the Forest Service.[124]

A forest plan is akin to a zoning map, with entire forests divided into various zones or "Management Areas." Each Management Area contains standards and guidelines that control the type of activity that may occur. For example, on the Beaverhead National Forest in southwestern Montana, there are Management Areas denoted for wildlife winter range, riparian areas, semi-primitive recreation, and timber production/wildlife.[125] In some areas timber harvest is forbidden, while in others, it is the dominant use. The forest plan also contains standards and guidelines that cover the entire forest. Every forest must have a forest plan, and they must be revised every fifteen years.[126] All activities in the forest—permits, con-

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121. *Id.* at 564-65 n.2 ("[Imminence] has been stretched beyond the breaking point when, as here, the plaintiff allege only an injury at some *indefinite* future time, *and* the acts necessary to make the injury happen are at least partly within the plaintiff's own control.") (emphasis added).

122. *See, e.g. Defenders*, 504 U.S. at 579 (Kennedy, J., concurring in part and concurring in the judgment) (defending the suggestion that standing could be based on something as "trivial" as a plane ticket).

123. *See* 16 U.S.C. § 1604.

124. *See generally* Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1 (1985); Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53 (1994).

125. FOREST SERVICE, U.S. DEP'T OF AGRIC., BEAVERHEAD NATIONAL FOREST PLAN ch. III (1986).

126. 16 U.S.C. § 1604(f).

tracts, and other plans—must be consistent with the forest plan.[127]

In addition to mandating the forest planning process, NFMA sets forth unprecedented substantive restrictions on timber harvesting. For example, clearcutting is recognized as a legitimate method of timber harvest, but may be used only where it is determined to be the "optimum method."[128] Strict limitations are placed on the size of clearcuts, soil and watersheds must be protected,[129] harvest units must regenerate within five years,[130] and the plans must provide for diversity of plants and animals.[131] Violations of these substantive requirements generally form the basis of plaintiffs' lawsuits.

In arguing against plaintiffs' standing to challenge forest plans the Forest Service has characterized forest plans as "programmatic" documents that have no impact until a "site-specific" project, such as a timber sale, is planned.[132] From this perspective, plans have been referred to as "thought without action."[133] Plaintiffs, though, have argued that by creating an overall direction for the forest and determining goals such as timber harvest levels and road densities, forest plans have very real impacts that cannot be adequately measured or remedied at the project stage.[134] By creating Management Areas that allow specific types of activities (recreation, logging, mining), forest plans are far more specific than the BLM's "land withdrawal review program" in *NWF*, according to plaintiffs, and are clearly ripe for judicial review.

A. *The Split in the Circuits: Which Interpretation Is Correct?*

1. *The Ninth Circuit*

a. *Idaho Conservation League v. Mumma*

The Ninth Circuit decided *Mumma*[135] in February 1992, then issued an amended decision on May 6, 1992. *Defenders* was issued by the United States Supreme Court on June 12, 1992, and was therefore not considered in the Ninth Circuit's opinion. *NWF*, however, was decided in 1990; the Ninth Circuit distinguished *NWF* from *Mumma* in its discussions of both

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127. 16 U.S.C. § 1604(i).

128. 16 U.S.C. § 1604(g)(3)(F)(i).

129. 16 U.S.C. § 1604(g)(3)(F)(iv),(v).

130. 16 U.S.C. § 1604(g)(3)(E)(ii).

131. 16 U.S.C. § 1604(g)(3)(B).

132. *See, e.g.*, Sierra Club v. Robertson, 764 F. Supp. 546, 553 (W.D. Ark. 1991); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1515-16 (9th Cir. 1992).

133. Sierra Club v. Marita, 46 F.3d 606, 611 (7th Cir. 1995).

134. *See, e.g.*, Resources Ltd., Inc. v. Robertson, 8 F.3d 1394 (9th Cir. 1993); Nevada Land Action Ass'n v. Forest Service, 8 F.3d 713 (9th Cir. 1993).

135. Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992).

standing and ripeness.[136]

The *Mumma* plaintiffs challenged the Idaho Panhandle Forest Plan and its accompanying EIS, but the *Mumma* decision addresses only one part of that challenge: the Forest Service decision to recommend against wilderness designation for forty-three of forty-seven roadless areas in the forest.[137] Although it affirmed the district court's grant of summary judgment to the defendants on the merits, the Ninth Circuit reversed the lower court's decision that the plaintiffs lacked standing and that the plan was not ripe for adjudication.[138]

The Ninth Circuit began its standing discussion by referring to the legal interest test, that is, "in cases of statutory rights, courts should eschew any abstract 'injury-in-fact' inquiry and merely 'look[ ] to the underlying 'relevant' statute to determine whether the would-be plaintiff has standing."[139] This test, as discussed earlier, had been the dominant determinant of standing prior to *Data Processing*, when it was replaced by the injury-in-fact test.[140] The Ninth Circuit did not use the term "legal interest," but the underlying concept is evident by the court's description: "Insofar as the statute defines the duty, it characterizes the injury and, if not explicitly, implicitly describes those who are entitled to enforce it."[141] The court acknowledged that the Supreme Court has not adopted this approach toward statutory standing, but noted that the Court has approved a law review article advocating such an approach.[142] The court indicated it would rely on the three-prong test articulated in *Allen v. Wright*,[143] the first prong of which is injury in fact.[144] The court then noted that judicial review arose under the APA, and that standing therefore required injury in fact, and injury arguably within the zone of interests protected by the relevant statute.[145]

Ultimately, though, the court could not resist using the legal interest test. Evaluating the first prong of the *Allen* test, which the court called "personal injury," the court said, "Where, as here, Congress is the source of the purportedly violated legal obligation, we look to the statute to de-

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136. *Id.* at 1513-19.

137. *Id.* at 1510.

138. *Id.* at 1518-19.

139. *Id.* at 1513 n.10 (quoting Fletcher, *supra* note 13, at 264-65).

140. *See supra* notes 34-43 and accompanying text.

141. *Mumma*, 956 F.2d at 1513 n.10.

142. *Id.* (referring to Fletcher, *supra* note 13, *cited with approval* in Primate Protection League v. Tulane Educ. Fund, 500 U.S. 72 (1991)).

143. 468 U.S. 737 (1984).

144. *Mumma*, 956 F.2d at 1514 & n.10 ("In the absence of a more definite resolution of these questions, and despite the appeal of such alternative approaches, we adhere to the more traditional *Allen* analysis.").

145. *Id.* at 1514 n.12.

fine the injury."[146] "From this perspective," the court noted, implicitly acknowledging that this is not the only way to approach the question, "the right claimed by appellants is . . . the right to have agencies consider all reasonable alternatives before making a decision affecting the environment."[147] This has been called a "procedural injury,"[148] that is, a right to insist that the government follow certain prescribed procedures in its actions. The court found that the plaintiff would be adversely aggrieved as defined by NEPA,[149] and that plaintiff's injury was caused by the defendant's actions and would be redressable by a favorable court decision.[150]

It is essential to recognize the heart of the Ninth Circuit's reasoning: An individual has a legally protected interest in federal agencies' correct application of the law—here, for example, NFMA and NEPA. The injury suffered by such an individual is personal, as opposed to one generally suffered by the public, assuming that the individual actually uses an area affected by the agency action. Further, the injury is caused by the agency's failure to follow the law, and is redressable by a court order requiring the agency to adjust its actions. This reasoning reflects wholesale acceptance of regulatory harms as individual injuries, and simultaneously rejects a private-law model of standing that recognizes common-law harms as the only species of legally cognizable cases and controversies. It does not accept the cynical notion of redressability articulated in *Defenders*, but is otherwise not inconsistent with that case.

b. *Seattle Audubon Society v. Espy*

In *Seattle Audubon Society*,[151] the Ninth Circuit characterized the *Defenders* Court as having found insufficient evidence to support imminent injury or redressability based on the plaintiffs' inability to state when or if they would return to the overseas sites.[152] In contrast, the *Seattle Audubon Society* plaintiffs had supplied declarations describing "their proximity to owl-inhabited forests, the frequency with which they visit these forests, and their aesthetic and scientific interest in the owl."[153] Unlike *Defenders*, then, there was no question of the plaintiffs' geographical

146. *Id.* at 1514 (citing Fletcher, *supra* note 13).

147. *Id.*

148. *See Defenders*, 504 U.S. at 571.

149. *Mumma*, 956 F.2d at 1514-15.

150. *Id.* at 1517-18.

151. Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

152. *Id.* at 702. Such a characterization of *Defenders* implicitly recognizes that Justices Kennedy and Souter would have found standing had the plaintiffs simply bought airline tickets to the affected countries; it does not completely or correctly state Justice Scalia's position.

153. *Id.* at 703.

nexus with the affected area. Significantly, the fact that logging might not occur because of intervening circumstances was not considered relevant to standing. The injury as characterized by the court was "that environmental consequences might be overlooked."[154] Such an injury was not only imminent, but redressable.[155]

c. *Resources Limited, Inc. v. Robertson*

In *Resources Limited*,[156] plaintiffs sued the Forest Service over the Flathead National Forest Plan and its accompanying EIS. The district court held that plaintiffs did not have standing because the threatened injury was too remote from the forest plan.[157] It further held that the plan was not ripe for review because there was no "actual or immediately threatened effect."[158] The Ninth Circuit reversed both of these holdings.[159]

The Ninth Circuit's discussion of standing was surprisingly brief. Even more surprising, although it cited *Defenders* for the three-part constitutional standing test,[160] it did not discuss *Defenders* or explain why it did not apply. Instead, it simply referred to *Mumma* and *Seattle Audubon Society* for its rejection of the Forest Service's argument that *Defenders* and *NWF* "establish a new, stricter burden on plaintiffs to establish with specificity an injury-in-fact caused by a challenged government action."[161] Although the *Resources Limited* plaintiffs could not "point to the precise area of the park where their injury will occur[,]" the Ninth Circuit stated it did not require that level of specificity.[162]

The ripeness discussion was similarly terse, citing earlier cases in which the court refused to hold that a plaintiff is without any remedy against an overall plan and must wait until a specific project, such as a timber sale, is proposed.[163]

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154. *Id.* (quoting *Mumma*, 956 F.2d at 1518).

155. *Id.* This is an example of "recharacterizing" the injury, as described by Professor Sunstein. Sunstein, *Standing After* Lujan, *supra* note 104, at 207 ("[W]hether an injury is redressable depends on how it is characterized."). If the plaintiffs' injury is that logging will occur, then redressability is questionable because forcing the Forest Service to follow the law does not ensure that logging will not take place. But if the plaintiffs' injury is, as here, that environmental consequences might be overlooked, or under NFMA, that certain limitations on forest management were not observed, then the injury is clearly redressable.

In the end, according to Professor Sunstein, courts should ask, "What is the harm that Congress sought to prevent?" when characterizing the injury of a plaintiff suing with a claim to statutory rights. *Supra*. That appears to be the approach so far taken by the Ninth Circuit.

156. Resources Ltd., Inc. v. Robertson, 8 F.3d 1394 (9th Cir. 1993).

157. Resources Ltd., Inc. v. Robertson, 789 F. Supp. 1529, 1533-34 (D. Mont. 1991).

158. *Id.* at 1534 (quoting *NWF*, 497 U.S. at 894).

159. *Resources Ltd.*, 8 F.3d at 1398.

160. *Id.* at 1397.

161. *Id.* at 1398.

162. *Id.*

163. *Id.* (citing *Mumma*, 956 F.2d at 1518-19; *Seattle Audubon Soc'y*, 998 F.2d at 703; Lane

2. *The Eighth Circuit:* Sierra Club v. Robertson

a. District Court

As in *Resources Limited*, the *Robertson*[164] plaintiffs sued the Forest Service under NFMA and NEPA, challenging a forest plan and EIS.[165] The district court held that plaintiffs had standing and the plan was ripe for review.[166] It found that "the injury alleged here is not of a speculative type as it arises directly from the Forest Service's approval of the allegedly invalid Forest Management Plan."[167]

The *Robertson* district court engaged in a detailed standing analysis. It first laid out the APA test—(1) final agency action that (2)(a) caused a legal wrong or (b) adversely affected or aggrieved plaintiff[168]—and then analyzed whether plaintiffs met that test. Since plaintiffs were not asserting a legal wrong, the court looked at whether they had been adversely affected or aggrieved, which requires that a plaintiff establish that his injury falls within the "zone of interests" sought to be protected by the relevant statute. Because NEPA and NFMA are designed to protect recreational use and aesthetic enjoyment, the test was met.[169] The court then looked at *NWF*, which it determined required specificity in plaintiffs' affidavits. Because the affidavits were specific enough in their descriptions of plaintiffs' interests as well as the ways in which those interests would be affected by defendants' actions, the court held that plaintiffs were sufficiently aggrieved.[170]

The district court then addressed whether the programmatic nature of the forest plan either made plaintiff's injury too remote or made the plan not ripe for review. Comparing the case before it to *NWF*, the court noted that there was no actual "program" in *NWF*, and therefore no reviewable agency action.[171] Here, in contrast, the court had a forest plan, which under NFMA must include guidelines for managing the forest and monitoring the effects of management.[172] In addition, the forest plan EIS stated in its body that it "is used to make decisions about how the vegetation management program on the national forests in the Ozark/Ouachita moun-

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County Audubon Soc'y v. Jamison, 958 F.2d 290 (9th Cir. 1992)).

164. Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994).

165. *Id.* at 756.

166. Sierra Club v. Robertson, 764 F. Supp. 546, 550-54 (W.D. Ark. 1991).

167. *Id.* at 551.

168. *Id.* at 552.

169. *Id.*

170. *Id.* at 552-53.

171. *Id.* at 553-54.

172. *Id.* at 554 (citing 36 C.F.R. § 219.11).

tains is conducted."[173] The court therefore found that plaintiffs had standing and the case was ripe for judicial review.[174]

b. Eighth Circuit

The Eighth Circuit reversed the district court on standing and ripeness. The court found that plaintiffs' claim failed because they did not assert an "actual or imminent" injury in fact.[175] The court agreed with the Forest Service's characterization of the forest plan as a programmatic document that "does not effectuate any on-the-ground environmental consequences."[176] In addition, the court noted, several intervening events would have to occur between the plan and a site-specific project, such as a timber sale, which made any injury from the plan "speculative."[177]

The Court then turned to *NWF* and *Defenders*. It relied on *Defenders* for the proposition that an injury must "proceed with a high degree of immediacy."[178] It did not quote the preceding sentence, though, that created the context in which such immediacy was required: when "the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control."[179] Plaintiffs who appeal forest plans have no control over future timber sales and other projects within a national forest. The Eighth Circuit did not address how significantly that fact might distinguish *Defenders* from a forest plan appeal.

The Eighth Circuit then focused on *NWF* to illustrate the need for immediacy, thereby confusing ripeness with standing. It found the defendant's actions in *NWF* analogous to the forest plan, in that in *NWF*, the BLM would have had to approve mining plans before issuing any permits, at which time there would be an agency action that plaintiffs could challenge. In the case before it, the Eighth Circuit found a similar situation: plaintiffs may seek judicial review of specific timber sales when they are proposed. The court then referred to *Defenders* ("such 'some day' intentions" cannot support injury), *O'Shea v. Littleton*,[180] which the *Defenders* Court also cited, and *United States v. Students Challenging Regulatory Agency Procedures*,[181] which the court acknowledged is

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173. *Id.*

174. *Id.* ("The Supreme Court in [*NWF*] clearly did not intend to preclude review of a plan simply because a project level decision, in this case a particular timber sale, has not been made.").

175. *Sierra Club*, 28 F.3d at 758.

176. *Id.*

177. *Id.*

178. *Id.* (quoting *Defenders*, 504 U.S. at 564 n.2).

179. *See Defenders*, 504 U.S. at 564 n.2.

180. 414 U.S. 488 (1974).

181. 412 U.S. 669 (1973).

"[p]ossibly the most expansive interpretation of standing."[182] It then cited and criticized the Ninth Circuit's holdings in *Resources Limited*, *Mumma*, and *Seattle Audubon Society*.[183]

3. *The Seventh Circuit:* Sierra Club v. Marita

The Seventh Circuit has engaged in the most persuasive analysis of all of the circuits so far.[184] In *Marita*, the court held that plaintiffs had standing to challenge a forest plan and its EIS, and that the issues were ripe for review.[185] The court first found that a forest plan can cause imminent harm, regardless of its programmatic nature. It did so by relying on specific facts: first, that the regulations guiding forest planning are mandatory; second, that the plans direct "all natural resources management activities and establish management standards and guidelines for the National Forest System;" third, that the plans determine management practices, resource production levels, and suitability of land for timber production; and finally, that all permits, contracts, and licenses issued for a forest must be consistent with the plan.[186] Quoting the Supreme Court, the *Marita* court noted, "[O]ne does not have to await the consummation of threatened injury to obtain preventive relief."[187]

The court further noted that *Defenders* specifically recognized a plaintiff's right to sue for procedural injury as long as a concrete injury existed, thereby making the Forest Service's arguments particularly weak with regard to the plaintiffs' NEPA claims.[188] Most importantly, the Seventh Circuit recognized that "[t]he lack of standing in *Defenders* hinged on the speculative nature of plaintiffs' interests; they did not regularly visit these foreign places and had no immediate plans to return there."[189] In other words, the *Defenders* Court was concerned that the plaintiff's interests might not materialize, making the Court's opinion merely advisory.

In its analysis of ripeness, the *Marita* court first looked at the policy behind the doctrine, as articulated in *Abbott Laboratories*: "[T]o protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[190] The court distinguished *NWF* on the basis that the Forest Ser-

182. *Sierra Club*, 28 F.3d at 759.

183. *Id.* at 759-60 ("[W]e have difficulty discerning that a 'concrete and particularized' injury in fact was alleged in any of these cases.").

184. Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995).

185. *Id.* at 613-14.

186. *Id.* at 611-12.

187. *Id.* at 612 (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)).

188. *Id.* (citing *Defenders*, 504 U.S. at 573 n.7).

189. *Id.* at 612-13.

190. *Id.* at 614 (quoting *Abbott Laboratories*, 387 U.S. at 148-49).

vice had issued a final, appealable plan.[191] Quoting the Ninth Circuit, the court noted that because timber management plans "predetermine the future," the plaintiffs' injury is concrete.[192]

B. *Analysis of the Holdings*

While the Ninth Circuit's errors are errors of omission—it failed to fully analyze and explain *Defenders* in particular—the Eighth Circuit's errors are more blatant. It simply analyzed and applied both *NWF* and *Defenders* incorrectly, completely confusing the issues of standing and ripeness, and reaching a conclusion that was, in the end, unsupported by the cited authorities. The Seventh Circuit not only reached the correct conclusion, it did so with analytical precision.

To begin with, *NWF* is immediately and crucially distinguishable from *Robertson* and all other forest plan appeal cases in that forest plans unquestionably represent "final agency actions" that are ripe for judicial review. The APA defines agency action quite broadly, as "the whole or a part of an agency rule [or] order."[193] Forest plans are concrete documents that, although subject to revision and amendment, represent the final decision of the agency with respect to that forest's planning process. When the Forest Service releases a forest plan, the Chief of the Forest Service issues a Record of Decision. The administrative appeals process is then triggered.[194] This is factually distinct from the "land withdrawal review program" at issue in *NWF*. Even the title of that program did not "derive[] from any authoritative text."[195] Moreover, it did not "refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations."[196] In other words, there was no concrete decision that the plaintiffs could identify and the court could review. The *NWF* Court explained, "If there is in fact some specific order or regulation, applying some particular measure across the board . . . and if that order or regulation is final, and has become ripe for review . . . it can of course be challenged under the APA by a person adversely affected."[197] The Court then explained that a regulation becomes "ripe for review" when it is translated into concrete action that harms or threatens to harm the plaintiff.[198]

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191. *Id.*
192. *Id.* (quoting *Mumma*, 956 F.2d at 1519).
193. 5 U.S.C. § 551(13).
194. See 36 C.F.R. § 217 (1995).
195. *NWF*, 497 U.S. at 890.
196. *Id.*
197. *Id.* at 890-91 n.2.
198. *Id.* at 891.

Plaintiffs appealing forest plans are not challenging a regulation; instead, they are challenging a concrete product of those regulations. Plaintiffs are not challenging the Forest Service's day-to-day operations; they are challenging a decision made by the agency, in the form of a plan, finalized by a Record of Decision. These factual distinctions show that forest plan appeals are final agency actions that fall outside of *NWF*'s purview.

NWF also held that some plaintiffs, although challenging final agency actions, were not adversely affected.[199] This holding requires specific allegations of use and harm by plaintiffs. In *NWF*, it was insufficient to "state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action."[200] However, an affidavit averring use of a specific area would appear to meet the requirements of *NWF*.

Second, neither *NWF* nor *Defenders* mandates the conclusion that an agency action authorizing future actions, as opposed to implementing past decisions, is immune from judicial review. Such a definition of agency action is simply wrong under the APA, and is even wrong under *NWF* itself. Justice Scalia's own language makes clear that actions taken by agencies in response to their implementing statutes and regulations *are* agency actions for the purpose of judicial review under the APA.[201]

Similarly, the requirement that an injury be "imminent" does not work against plaintiffs who are appealing forest plans as easily as the Eighth Circuit seems to think it does. As explained by Justice Scalia in *Defenders*, the purpose of the imminence requirement is "to insure that the alleged injury is not too speculative for Article III purposes."[202] That is, it is necessary so that courts do not issue advisory opinions. It is *not* a temporal requirement.[203] The injuries that plaintiffs may suffer as a result of a particular activity allowed by a forest plan are concrete—for example, an inability to recreate in a particular area, or to watch wildlife, or to enjoy the solitude of the forest. Therefore, even if a plaintiff's harm is "procedural"—that is, caused by the agency's failure to follow the law—*Defenders* specifically states that standing may lie.[204] And more

199. *Id.* at 887-89.

200. *Id.* at 889.

201. *See id.* at 890-91 n.2 ("If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review . . . , it can of course be challenged under the APA by a person adversely affected . . . ."); *see also supra* text accompanying note 81.

202. 504 U.S. at 564 n.2.

203. *See supra* notes 121-22 and accompanying text.

204. *Defenders*, 504 U.S. at 573 n.8 (stating that an individual "assuredly can [enforce procedur-

importantly, even if the harm is threatened, according to Justice Scalia, it may still be actual and imminent.[205]

It is possible to come to this conclusion even if one is unsure whether a regulatory harm—the agency's failure to follow the law in preparing a forest plan—is an individual injury rather than a "generalized grievance." If one *does* accept that notion, as the Ninth Circuit apparently has, then standing is easy. But even if one does not, the fact that an injury may be threatened and still be imminent leads to the conclusion that plaintiffs have standing to challenge forest plans, as long as they have a real interest in the area at stake. It is simply irrelevant that timber sales may not occur for several years, or that the boundaries of a sale have not yet been set. The logging, or the injury, is threatened by the existence of the plan, and the threat is heightened by the requirement that all activities in the forest must be consistent with the plan.[206] These facts were crucial to the Seventh Circuit, as they countered the Forest Service argument that the plan is merely "thought without action."[207]

IV. CONCLUSION

The Seventh and Ninth Circuits have correctly concluded that plaintiffs who can demonstrate use of a national forest have standing to challenge a forest plan, and that forest plans are ripe for judicial review. Although those courts came to the same conclusion, they did so by notably different routes. Other courts can take note: Not only is it possible to grant plaintiffs standing to challenge forest plans under *NWF* and *Defenders*, it is possible to do so by either accepting that regulatory harms can produce individual injuries, or by refusing to follow the logic of the Forest Service and the Eighth Circuit—that a threatened injury is *per se* not imminent—and instead focusing on whether the forest plan does indeed threaten injury, and if so, whether the plaintiff is someone who will suffer.

Although *Defenders* is revolutionary in regards to citizen-suit provisions and redressability, its holding on injury in fact is relatively straightforward and fact-driven. It is important to rely on the decisions as written rather than on the reputation, previous writings, or dicta of their author, Justice Scalia.

It is equally important to keep in mind the outcomes of these cases: More often than not, courts that upheld plaintiffs' standing held for the defendants on the merits.[208] Justice Scalia has characterized judicial re-

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al rights], so long as the procedures in question are designed to protect some *threatened* concrete interest of his that is the ultimate basis of his standing") (emphasis added).

205. *Id.*

206. *See supra* note 127 and accompanying text.

207. *Marita*, 46 F.3d at 611-13.

208. *See, e.g.*, Sierra Club v. Robertson, 764 F. Supp. 546, 555 (W.D. Ark. 1991) (holding that

view as "undemocratic"[209] and a violation of the separation of powers.[210] However, "Far from being an enemy of the democratic process, judicial review is its indispensable ally, since it ensures administrative fidelity to public desires expressed in legislative commands."[211] In our system of government, which guarantees citizens access to the courts and encourages citizen participation in government, it is crucial to develop judicial policies that, at the very least, do not discourage these goals.

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plaintiffs have standing); Sierra Club v. Robertson, 810 F. Supp. 1021, 1031 (W.D. Ark. 1992) (granting judgment for defendants); Resources Limited, Inc. v. Robertson, 8 F.3d 1394, 1402 (holding that plaintiffs have standing, but remanding ESA claim to Forest Service for further study).

209. Scalia, *Separation of Powers, supra* note 2, at 894.

210. *See* Sunstein, *Standing After* Lujan, *supra* note 104, at 215.

211. Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 522.