

January 2004

Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution

Philip Weinberg

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>

Recommended Citation

Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 Pace Envtl. L. Rev. 27 (2004)

DOI: <https://doi.org/10.58948/0738-6206.1231>

Available at: <https://digitalcommons.pace.edu/pelr/vol21/iss1/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution

PHILIP WEINBERG*

Introduction

Environmental protection in the United States has in large measure been achieved through the courts. The signal victories as early as the 1960s were judicial—most tellingly, the halting of the power project that would have defaced Storm King Mountain in New York's Hudson Highlands¹ and the Interstate highway that would have destroyed the integrity of Memphis's Overton Park.² These decisions were of first magnitude in themselves as well as for the precedents they established for future suits. They directly led to the numerous actions brought by concerned citizens and environmental advocacy organizations to review adverse governmental decisions and enjoin harmful activities. Without such recourse in the courts there would be scant leverage to overturn government actions, no matter how damaging to the environment they might be.

Unlike most other litigation, the issue of the plaintiffs' standing to bring the suit is often a major one in environmental suits brought by private parties—as is also the case in suits involving civil liberties and constitutional issues.³ Since standing in the federal courts is inextricably linked to the Constitution's provision that federal courts have jurisdiction over “cases” and “controver-

* Professor of Law, St. John's University School of Law; J.D., Columbia Law School 1958; Chair (1988-89), Environmental Law Section, New York State Bar Association; author of *Practice Commentary to New York Environmental Conservation Law* (McKinney 1997 and Annual Supps.), and a casebook, *Environmental Law: Cases and Materials* (3d ed. 2001), as well as co-author of *Environmental Impact Review in New York* (2000), *Environmental Law and Regulation in New York* (1996), and *Understanding Environmental Law* (1998). The author is indebted to Sophie Lambrou (St. John's University School of Law, 2004) for research assistance in preparing this article.

1. *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

2. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

3. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

sies,"⁴ those courts often treat it as a constitutional issue. This article will examine standing in that context.

Part I will trace the origins and evolution of the constitutional standing requirement. Part II will describe the expansion of standing in the federal courts in the 1960s and 1970s, both through judicial decisions and legislation providing for citizen suits in the major federal environmental statutes. Part III will discuss the assault on standing in the past decade or so, commencing with *Lujan v. National Wildlife Federation*,⁵ and its containment in *Friends of the Earth v. Laidlaw Environmental Services*.⁶ Parts IV and V will briefly contrast standing in the federal courts with state law and some decisions from other countries augmenting standing in environmental suits. I will contend that while the fundamental standing requirement is surely legitimate, some recent Supreme Court and state court decisions have unreasonably and improperly attempted to shut the courthouse doors to litigants with genuine environmental claims. Future decisions should cabin those rulings and ensure a forum for those seeking to enjoin unlawful government action that injures the environment and public health.

I. The Evolution of the Constitutional Standing Requirement

After several decades of litigation over the scope of standing, it is tempting to believe the standing issue has always been with us. That temptation should be resisted.

The English common-law courts were historically open to litigants without regard to their actual injury or threat of injury. Under *Articulo Cleri*, noted by Coke as a provision authorizing suits to restrain the ecclesiastical courts from exceeding their existing jurisdiction (largely limited to issues of family law and religious concerns), such suits could be brought "by the parties themselves, or by any stranger."⁷ The courts in Colonial America routinely furnished advisory opinions to legislative assemblies.⁸ That practice continues today in the Supreme Judicial Court of

4. U.S. CONST. art. III, § 2.

5. 497 U.S. 871 (1990).

6. 528 U.S. 167 (2000).

7. Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 819 (1969).

8. Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1723 (1998) ("In the beginning, there was advice.").

Massachusetts and the Supreme Court of New Hampshire.⁹ And clearly, “English practice at the time the Constitution was framed included resolution of some abstract disputes.”¹⁰

The Constitution’s framers discussed the role of the newly fledged federal courts at length. Since the new government was to be one with separation of powers, unlike the English system where Parliament ruled supreme, the federal courts, in James Madison’s view, had to be “limited to cases of Judiciary Nature.”¹¹ And of course Article III empowers those courts to decide “cases” and “controversies”—language the Supreme Court has seized on in our own time to rule that limits on standing are constitutionally mandated.¹² But what does the “case or controversy” wording of Article III actually mean?

There seems to be little or no evidence of the Framers’ concern that standing to sue be cabined. Charles Pinckney recommended that the Supreme Court issue advisory opinions to the President and Congress in line with the Massachusetts practice, and the Constitutional Convention never expressly rejected this suggestion.¹³ The Framers repeatedly sought a robust role for the federal courts in preventing “legislative despotism” and “tyranny” by Congress.¹⁴ James Iredell of North Carolina, soon to be a Supreme Court justice, described a statute “not warranted by the Constitution [as] barefaced usurpation.”¹⁵ If there was any clear pronouncement that the terms “case” and “controversy” were originally intended to impose constitutional restrictions on standing to sue, it seems to have eluded not only historians but also the fervent advocates of limiting standing.

9. See Op. of the Justices to the Sen. & House of Reps., 126 Mass. 557, 561 (1878) (Massachusetts “evidently had in view the usage of the English Constitution. . . .”). For modern examples, see Answer of the Justices to the Senate, 780 N.E.2d 444 (2002) and Opinion of the Justices (Tax Plan Referendum), 725 A.2d 1082 (1999).

10. Lee Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 300 (1979) (citing Berger, *supra* note 7).

11. 2 RECORDS OF FED. CONVENTION OF 1787, at 430 (Max Farrand ed. 1923) [hereinafter “Farrand”].

12. See, e.g., Allen v. Wright, 468 U.S. 737, 750 (1984) (explaining, “Article III of the Constitution confines the federal courts to adjudicating actual ‘cases’ and ‘controversies.’”); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (stating that to give a standing to a plaintiff who has no concrete injury would lead to possible abuse of the judicial process and disturb the separation of powers between the branches of government).

13. Katyal, *supra* note 8, at 1723 (citing Farrand, *supra* note 11, at 341).

14. Berger, *supra* note 7, at 832 (quoting James Wilson).

15. *Id.* at 833.

Shortly after the Constitution's adoption, Congress enacted the Invalid Pension Act,¹⁶ an aptly named law providing disabled Revolutionary War veterans with pensions.¹⁷ Eligibility was to be decided by the United States circuit courts, the trial courts of the day, on which Supreme Court justices then sat.¹⁸ However, the Secretary of War had power to overrule them.¹⁹ Several federal judges advised President Washington that the statute violated the separation of powers, without awaiting specific cases.²⁰ As one commentator put it, "the Justices declined to act as pension administrators. . . ."²¹ When the issue reached the Supreme Court in *Hayburn's Case*,²² that Court again informed the President the Act was unlawful.²³ Congress amended the statute to cure its defect, so the Court never ruled on its disability.²⁴

It was to be many decades before the federal courts would concern themselves with the standing of litigants. When they did, it was, ironically, the defenders of Progressive Era social and economic legislation who first played the standing card to defeat suits challenging those statutes.

*Massachusetts v. Mellon*²⁵ was the first case in which the Supreme Court dismissed a suit for want of standing, in 1923.²⁶ The Court held a taxpayer could not challenge a federal statute since her "interest in the moneys of the Treasury . . . is shared with millions of others; [and] is comparatively minute and indeterminable. . . ."²⁷ It distinguished suits by municipal taxpayers, traditionally allowed, on the ground that their "interest is direct and immediate."²⁸ Relevant to our concerns, it went on to note that "[w]e have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may

16. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243, *repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324.*

17. *Id.*

18. *Id.*

19. *Id.*

20. 2 U.S. (2 Dall.) 409, 410 (1792).

21. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1869 (2001); *see also* Katyal, *supra* note 8, at 1731-34.

22. 2 U.S. (2 Dall.) 409 (1792).

23. *Id.* at 410-11.

24. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243, *repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324.*

25. 262 U.S. 447 (1923).

26. *Id.*

27. *Id.* at 487.

28. *Id.* at 486.

be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.”²⁹

Five years later, in *Willing v. Chicago Auditorium Association*,³⁰ the Court dismissed a suit for a declaratory judgment regarding the terms of a lease, ruling no “case or controversy” existed.³¹ But the Court noted that the plaintiff lessee had standing;³² that was not the problem. This decision antedated the Declaratory Judgment Act,³³ enacted in 1934 in response to this and similar rulings.³⁴

The Court had earlier, in *Muskrat v. United States*,³⁵ likewise dismissed a suit for want of controversy. Muskrat challenged one of the egregious allotment acts dividing the previously tribal property of American Indians into minute individual shares or “allotments.”³⁶ The Act provided for suit in the Court of Claims to “determine [its] validity.”³⁷ After discussing *Hayburn’s Case* and other early instances of Congressional attempts to place the federal courts in situations violative of separation of powers, the Court held no case or controversy existed here since there was, essentially, no party adverse to the plaintiffs, who objected to the reduction of their allotment by the legislation.³⁸ The Court cited an 1892 decision dismissing a suit on similar grounds, noting that “[i]t was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”³⁹ In more recent times, the Supreme Court has consistently expressed concern that standing genuinely exist, along with other jurisdictional requirements, in order to eschew rendering advisory opinions and collusive suits.⁴⁰

29. *Id.* at 488.

30. 277 U.S. 274 (1928).

31. *Id.*

32. *Id.* at 289.

33. 28 U.S.C. §§ 2201-2202 (2000).

34. See generally *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

35. 219 U.S. 346 (1911).

36. *Id.* at 348.

37. *Id.* at 350.

38. *Id.* at 361-62.

39. *Id.* at 359-60 (citing *Chicago & G.T.R.R. v. Wellman*, 143 U.S. 339, 345 (1892)).

40. See, e.g., *Rescue Army v. L.A. Mun. Ct.*, 331 U.S. 549 (1947); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

II. The Expansion of Standing in the Federal Courts

The 1960s and 1970s saw citizen standing expanded in the federal courts, both in environmental and constitutional litigation. The harbinger of increased citizen standing was *Scenic Hudson Preservation Conference v. Federal Power Commission*,⁴¹ in which the Second Circuit roundly rebuffed challenges to the standing of litigants seeking court review of the license issued to construct a pumped-storage hydroelectric plant atop Storm King Mountain in the Hudson Highlands. The court held the petitioners, conservation groups, their members, and neighboring towns, were “aggrieved” parties under the Federal Power Act,⁴² and had standing to obtain judicial review of the Commission’s licensing decision.⁴³ As it noted,

In order to insure that the . . . Commission will . . . protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of “aggrieved” parties under [the Act].⁴⁴

Citing Supreme Court decisions involving the Establishment Clause, the court ruled economic injury was not a prerequisite for standing.⁴⁵ As for Article III, it noted that “[a]lthough a ‘case’ or ‘controversy’ which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a ‘case’ or ‘controversy’”—a clear invitation to Congress to enact the citizen-standing provisions soon to be placed in the Clean Air Act, Clean Water Act, and other environmental statutes.⁴⁶

Shortly after *Scenic Hudson*, the Supreme Court ruled in *Flast v. Cohen*⁴⁷ that a federal taxpayer had standing to question funds spent by Congress allegedly in violation of the Establishment Clause, limiting the denial of standing to federal taxpayers

41. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

42. 16 U.S.C. § 825(b) (2000).

43. 354 F.2d at 616.

44. *Id.*

45. *Id.* at 615 (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engle v. Vitale*, 370 U.S. 421 (1962); *Zorach v. Clauson*, 343 U.S. 306 (1952)).

46. *Id.* at 615. These provisions are discussed *infra* text accompanying notes 58-72.

47. 392 U.S. 83 (1968).

in *Mellon*.⁴⁸ *Flast*, however, was itself limited in *Valley Forge Christian College v. Americans United for Separation of Church and State*,⁴⁹ a five to four decision rejecting the standing of citizens and taxpayers to challenge the conveyance of Government property (a closed veterans' hospital) to a sectarian school.⁵⁰ The majority ruled taxpayer standing inappropriate since the complaint was that the Government was giving away property, not appropriating tax funds.⁵¹ On that theory, conveying Yellowstone Park or the White House to a religious institution would presumably be beyond challenge.

While opening the courthouse doors partially to taxpayers, the Supreme Court continued to restrict citizen standing to judicial review of governmental decisions within the "zone of interest" of a particular statute who could demonstrate actual, or threatened, "injury in fact." The decisions are not easy to reconcile. The Court found that tenants seeking an integrated environment had standing to challenge racial discrimination in housing,⁵² but later denied standing to black parents of public school pupils who contended unlawful tax exemptions for white-only private schools would worsen public-school segregation.⁵³ It rejected the standing of persons claiming that exclusionary zoning prevented them from buying homes in a suburb where they sought to live, relying on the lack of a "case or controversy" under Article III,⁵⁴ but soon thereafter found standing on similar facts where one plaintiff alleged he worked in the town and would move there if affordable housing existed.⁵⁵

The Supreme Court has shown less tolerance for granting standing to those challenging more general governmental actions. It denied standing to citizens claiming the Central Intelligence Agency had failed to make its budget publicly available under a constitutional provision mandating "a regular Statement and Account of the Receipts and Expenditures of all public Money."⁵⁶

48. *Id.* at 103.

49. 454 U.S. 464 (1982).

50. *Id.* at 476-90.

51. *Id.* at 486.

52. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

53. *Allen v. Wright*, 468 U.S. 737 (1984).

54. *Warth v. Seldin*, 422 U.S. 490 (1975).

55. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977). *Warth* also rebuffed the standing of a builder of affordable homes on the ground that its application to rezone was not currently pending. 422 U.S. at 505-06.

56. *United States v. Richardson*, 418 U.S. 166, 168 (1974); see U.S. CONST. art. I, § 9, cl. 7.

Similarly, where members of Congress held commissions in the military reserves allegedly in violation of the Constitution's ban on legislators "holding any office under the United States,"⁵⁷ the Court concluded that the plaintiff citizens lacked standing to challenge the asserted conflict.⁵⁸ To the Court, this was "injury in the abstract," since the plaintiffs' interest was "'undifferentiated' from that of all other citizens."⁵⁹ Finding a lack of a case or controversy under Article III, the Court dismissed the suit.⁶⁰ In doing so, the Court overturned the district court's finding of standing based on the rationale that if the plaintiffs could not seek review, "then as a practical matter no one can."⁶¹ The Court dryly observed that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."⁶²

In the environmental arena, litigants, encouraged by the expansive standing sustained in *Scenic Hudson* and similar decisions, brought numerous suits challenging a variety of governmental actions.⁶³ In this dawn of broad public awareness of environmental concerns, before wide enforcement of regulatory statutes, these suits tended to be, like *Scenic Hudson* and *Overton Park*,⁶⁴ actions to enjoin highways, power plants, and other projects viewed as environmentally harmful. In *Sierra Club v. Morton*,⁶⁵ the Sierra Club, doubtless viewing itself as the Nation's premier conservation advocate, attempted to push the envelope by arguing that it needed no specific assertions of injury to obtain standing to challenge a federal agency's actions.⁶⁶ In *Sierra Club*, the Supreme Court emphatically rebuffed that claim, holding quite sensibly that "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."⁶⁷ Therefore the Sierra Club was not

57. U.S. CONST. art. I, § 6, cl. 2.

58. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974).

59. *Id.* at 217.

60. *Id.* at 226-27.

61. *Id.* at 227.

62. *Id.* (citing *United States v. Richardson*, 418 U.S. 166, 179 (1974)).

63. *See, e.g., Citizens Comm. for Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970); *Env'tl. Def. Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

64. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

65. 405 U.S. 727 (1972).

66. *Id.* at 732-33.

67. *Id.* at 738.

"aggrieved" as required by the Administrative Procedure Act⁶⁸ for review of a federal agency's final determination.

Was the Sierra Club deliberately trying to obtain a permanent pass as to standing as a self-styled "representative of the public"?⁶⁹ The gambit did not succeed. It was here that Justice Douglas, in his long-standing role as the Court's environmental knight-errant, argued in dissent that such suits ought "to be litigated in the name of the inanimate object about to be despoiled," urging "the conferral of standing upon environmental objects to sue for their own preservation."⁷⁰

The Douglas approach would have rapidly led to a *reductio ad absurdum*. Who is to decide who ought to actually represent a mountain, forest, or river? Its owner is generally the very governmental or private entity whose acts assertedly threaten the resource. The nearby residents often favor developing the area for economic reasons, and in any event, they have no greater rights to publicly owned property than the rest of us.

The Court in *Sierra Club v. Morton* made clear that assertions of individualized injury to the plaintiff organization or its members would suffice, and a year later, in *United States v. Students Challenging Regulatory Agency Procedures* ("SCRAP"),⁷¹ reached the apex of citizen standing. The Court ruled that a group of students could seek to judicially review freight rates, then subject to federal government approval through the Interstate Commerce Commission, which favored newly minted metal over recycled scrap.⁷² SCRAP's claim to standing were that its members encountered discarded metal beer cans and the like while hiking, which, it argued, was dumped in the woods because of the disparity in shipping charges.⁷³ Justice Stewart, author of *Sierra Club v. Morton*, wrote for the Court in *SCRAP* that this sufficed to confer standing.⁷⁴ (The court went on to reject the claim on the merits, reversing the lower court.)⁷⁵

68. 5 U.S.C. § 702 (2000).

69. *Sierra Club*, 405 U.S. 727, 736 (quoting *Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2d Cir. 1970)).

70. *Id.* at 741-42 (Douglas, J., dissenting) (citing Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972)).

71. 412 U.S. 669 (1973).

72. *Id.* at 689-90.

73. *Id.* at 685.

74. *Id.* at 689-90.

75. *Id.* at 698-99.

While this augmentation of standing to embrace non-economic injury was occurring in the federal courts, Congress was enacting the National Environmental Policy Act (NEPA)⁷⁶ as well as the first comprehensive environmental regulatory statutes, the Clean Air Act and Clean Water Act.⁷⁷ NEPA, which requires federal agencies to weigh the environmental impacts of and alternatives to actions they perform, fund, or license, contains no express provision for judicial review. However, the courts have from the start heard challenges to non-compliance with NEPA and have consistently held that environmental injury conferred standing.⁷⁸ In contrast, economic injury alone, though a traditional basis for standing,⁷⁹ does not provide standing in NEPA litigation, oddly enough.⁸⁰ (This anomaly was doubtless a factor in the New York courts adopting the same view as to standing to challenge non-compliance with New York's State Environmental Quality Review Act (SEQRA) in the much-debated *Society of Plastics Indus., Inc. v. County of Suffolk* decision,⁸¹ discussed in Part IV of this article.)

The Clean Air Act was the first federal environmental regulatory statute to contain a citizen-suit provision, in its § 304. Designed to finesse the standing disputes that had delayed or hamstrung plaintiffs in environmental litigation, this statute provides that "any person may commence a civil action" in federal district court to enjoin violations of emission standards or limitations, as well as enforcement orders and certain types of permit violations.⁸² Plaintiffs must give sixty days' notice to the EPA, the state and the alleged violator.⁸³ Commencement and "diligent[] prosecut[ion]" of an enforcement action bars a citizen suit.⁸⁴ Although the statute speaks of enforcement actions in court as a bar

76. 42 U.S.C. §§ 4321-4370 (2000).

77. 42 U.S.C. §§ 7401-7671 (2000); 33 U.S.C. §§ 1251-1387 (2000).

78. *Comm. for Auto Responsibility v. Solomon*, 603 F.2d 992 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); *Overseas Shipholding Group, Inc. v. Skinner*, 767 F. Supp. 287 (D.D.C. 1991).

79. *See, e.g., Bennett v. Spear*, 520 U.S. 154 (1997); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

80. *Nev. Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713 (9th Cir. 1993); *Cent. S.D. Coop. Grazing Dist. v. Sec'y of United States Dep't of Agric.*, 266 F.3d 889 (8th Cir. 2001). *But see Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979) (holding that injury to broadcaster through interference from power transmission lines, though economic, resulted from environmental impacts and provided standing under NEPA).

81. 573 N.E.2d 1034 (N.Y. 1991), discussed *infra* text accompanying notes 187-95.

82. 42 U.S.C. § 7604(a) (2000).

83. *Id.* § 7604(b)(1)(A).

84. *Id.* § 7604(b)(1)(B).

to citizen suits, the courts have sensibly ruled that an administrative enforcement action similarly bars citizen suits if the relief sought by the government agency is substantially similar to that which could be sought in a citizen suit.⁸⁵ In addition to injunctive relief in citizen suits, civil penalties are also available, payable to the United States, not the citizen plaintiff.⁸⁶ An important innovation enables parties to recover reasonable attorneys' and expert witnesses' fees,⁸⁷ a mechanism to help furnish a level playing field when citizens or advocacy groups challenge corporate and governmental defendants with greater resources.

The citizen suit provision has in fact widened access to the courts in air-quality cases. The courts have generously construed it. In one notable and enlightened decision, *Friends of the Earth v. Carey*,⁸⁸ the court sustained a citizen suit and enjoined violations of a State Implementation Plan adopted by New York pursuant to the Clean Air Act, noting that "[i]n enacting [the citizen-suit provision], Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests. . . . Thus the Act seeks to encourage citizen participation rather than treat it as a curiosity or a theoretical remedy."⁸⁹ Quoting an earlier case, the court noted: "Fearing that administrative enforcement might falter or stall, 'the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.'"⁹⁰

The federal courts have consistently viewed § 304 as a broad grant of jurisdiction obviating battles over the directness of the injury inflicted. But they nonetheless recognized the limits imposed by Article III, and found § 304 did not confer standing on plaintiffs that failed to assert any cognizable injury, such as pro-industry advocacy groups, or business competitors, seeking to assert environmental injury.⁹¹ This pattern continued with the en-

85. *Baughman v. Bradford Coal Co.*, 592 F.2d 215 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979).

86. 42 U.S.C. §§ 7604(a), (g) (2000).

87. *Id.* § 7604(d).

88. 535 F.2d 165 (2d Cir. 1976).

89. *Id.* at 172.

90. *Id.* at 172 (citing *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975)).

91. *Pac. Legal Found. v. Gorsuch*, 690 F.2d 725 (9th Cir. 1982); *Kaiser Cement Corp. v. San Diego Air Pollution Control Dist.*, 19 ERC 2100 (S.D. Cal. 1982).

actment of citizen suit provisions in the Clean Water Act,⁹² Endangered Species Act,⁹³ Resource Conservation and Recovery Act,⁹⁴ and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),⁹⁵ the last two of which have proved to be a foundation for numerous suits to compel cleanup of hazardous waste sites (though often brought by plaintiffs with economic injury who would likely have standing in any event).⁹⁶

III. The Assault on Standing

In a series of decisions in the 1990s, the Supreme Court first cabined, then actively sought to truncate, standing in environmental litigation. The majority in this campaign, led by Justice Scalia, was not at all inhibited by the congressional enhancement of standing in the citizen-suit enactments discussed.

Justice Scalia fired the opening salvo in *Lujan v. National Wildlife Federation*.⁹⁷ The suit was brought to challenge actions of the Secretary of the Interior taken under the Federal Land Policy and Management Act (FLPMA),⁹⁸ which authorizes the Department of the Interior to review withdrawals of government-owned land from mining and similar commercial uses.⁹⁹ The National Wildlife Federation (NWF), a respected conservation group, and several of its members, contended the cancellation of some of these withdrawals was done in violation of the FLPMA by failing to adopt land-use plans, and without the environmental impact review contemplated by NEPA.¹⁰⁰

The Court ruled the plaintiffs were not "aggrieved" as required by the Administrative Procedure Act.¹⁰¹ Although they were within the zone of interests of the FLPMA, which the Court agreed the Act was written to protect, the affidavits of the two members of the NWF submitted to show standing were, it ruled, too broad to satisfy the requirement of particular injury.¹⁰² The

92. 33 U.S.C. §§ 1251-1387 (2000); see § 1365.

93. 16 U.S.C. §§ 1531-1544 (2000); see § 1540(g).

94. 42 U.S.C. §§ 6901-6992k (2000); see § 6972.

95. 42 U.S.C. §§ 9601-9675 (2000); see § 9659.

96. See, e.g., *United States Dep't. of Energy v. Ohio*, 503 U.S. 607 (1992); *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413 (M.D. Pa. 1989).

97. 497 U.S. 871 (1990).

98. 43 U.S.C. §§ 1701-1785 (2000).

99. *Id.*

100. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 875.

101. 5 U.S.C. § 702; see also *Nat'l Wildlife Fed'n*, 497 U.S. at 883.

102. *Nat'l Wildlife Fed'n*, 497 U.S. at 886-87.

affidavits referred to areas of millions of acres, of which only a few thousand were being removed from the Act's protection.¹⁰³ As the district court had concluded, "[t]here is no showing that [the plaintiff's] recreational use and enjoyment extends to the particular 4,500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination."¹⁰⁴

Though the plaintiff relied on *SCRAP* to show its standing, the Court airily rejected that decision as one "whose expansive expression of what would suffice for . . . review under its particular facts has never since been emulated by this Court. . . ."¹⁰⁵ It is not easy to understand why these affidavits did not suffice to show the plaintiff was aggrieved. Why should it matter that they depicted larger tracts of federal land than those that were stripped of protection? This truly exalts form over substance.

The Court likewise rebuffed the supplemental affidavits challenging the agency's reevaluation of formerly protected lands. It held the "so-called 'land withdrawal review program'" was not an identifiable agency action at all, but rather a series of separate actions to declassify parcels.¹⁰⁶ And, it concluded, one "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."¹⁰⁷ This adumbrated the majority's real concern—one more explicitly voiced in later decisions—that the courts ought not, under separation-of-powers principles, set aside programs set in motion by Congress and the Executive—as if courts had not overturned such programs innumerable times when they found them unconstitutional or otherwise unlawful.¹⁰⁸

Justice Blackmun wrote for the four dissenters. He maintained that the affidavits "averred that [the affiants'] 'recreational use and aesthetic enjoyment of federal lands . . . have been and

103. *Id.* at 887-88.

104. *Id.* at 887 (citing *Nat'l Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 331 (D.D.C. 1998)).

105. *Id.* at 889.

106. *Id.* at 890.

107. *Id.* at 891. The majority, also perhaps more defensibly, found these affidavits had been submitted so late in the game that they were correctly not considered by the district court. *Id.* at 897-98.

108. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954) (segregation in D.C. schools); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President's seizure of steel mills).

continue to be adversely affected in fact by the unlawful actions of the . . . Department.”¹⁰⁹ As he sensibly noted, “[t]he areas harmed or threatened by mining and associated activities may extend well beyond the precise location where mining occurs.”¹¹⁰ The dissent went on to point out that the majority’s denial that a “program” to declassify federal lands exists is not only inaccurate—“[e]veryone associated with this lawsuit recognizes that the [Department], over the past decade, has attempted to develop and implement a comprehensive scheme for the termination of classifications and withdrawals”¹¹¹—but also irrelevant since it “bears on the scope of the relief ultimately to be awarded . . . rather than on the jurisdiction of the District Court to entertain the suit. . . .”¹¹²

Just two years later, the Court, in *Lujan v. Defenders of Wildlife*,¹¹³ took an even greater swipe at standing, this time undeterred by a citizen-suit statute. The suit challenged a Department of the Interior regulation limiting to United States territory the applicability of the Endangered Species Act provision requiring federal agencies to consult with the Department to “insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction . . . of [its critical] habitat. . . .”¹¹⁴ The plaintiff conservation group and its members contended the new rule, which replaced a rule applying the statute to federally-funded or performed actions worldwide, contradicted the statute, which contained no geographic limits, and the lower court had so held.¹¹⁵

Justice Scalia again wrote for the Court. He noted that Article III standing requires injury in fact, traceable to the defendant’s actions, and likely (“as opposed to merely ‘speculative’”) to be redressable by the court.¹¹⁶ He went on to emphasize that these “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case,” and must be supported with evidence.¹¹⁷ And here, the Court concluded, the plaintiff failed to

109. *Nat’l Wildlife Fed’n*, 497 U.S. 871, 902-03 (Blackmun, J., dissenting).

110. *Id.* at 904 n.5.

111. *Id.* at 914-15.

112. *Id.*

113. 504 U.S. 555 (1992).

114. 16 U.S.C. § 1536(a)(2) (2000). The regulation is at 50 C.F.R. § 402.01 (2002).

115. See *Defenders of Wildlife v. Lujan*, 658 F. Supp. 43 (D. Minn. 1987), *rev’d*, 851 F.2d 1035 (8th Cir. 1988), *rev’d*, 504 U.S. 555 (1992).

116. *Defenders of Wildlife*, 504 U.S. at 560-61.

117. *Id.* at 561.

show “injury in fact.”¹¹⁸ Affidavits by two members of Defenders asserted that they were wildlife biologists interested professionally in endangered or threatened species—the Nile crocodile, the Asian elephant and leopard—whose critical habitat was at risk through United States funded construction projects: a dam in Egypt and a development project in Sri Lanka.¹¹⁹ The members alleged that they had visited those sites and intended to return to study those species, but were concerned lest their habitat be damaged before then.¹²⁰ But, the Court found, “‘some day’ intentions [to return] do not support a finding of the ‘actual or imminent’ injury that our cases require.”¹²¹ In short, a plaintiff must “show that he will soon expose *himself* to the injury.”¹²² It went on to reject the plaintiffs’ further claim that as zoologists they had sufficient interest in these species’ habitat to confer standing, coolly observing that

Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason.¹²³

Nor, in the eyes of Justice Scalia, was there redressability.¹²⁴ (However, this portion of the opinion was a plurality only, not concurred in by Justices Kennedy and Souter.)¹²⁵ The plaintiff argued AID was required to consult with the Secretary of the Interior before acting, but the suit was against the Secretary, not AID.¹²⁶ This seems hypertechnical. Surely an injunction reinstating the extraterritorial reach of the Act would require the agencies to obey the law, and AID could surely be added as a defendant if that became an issue. Further, AID participated in this litigation and could hardly ignore its outcome. The majority parried this point by insisting that “standing is to be determined as of

118. *Id.* at 568.

119. *Id.* at 563.

120. *Id.* at 563.

121. *Id.* at 564.

122. *Defenders of Wildlife*, 504 U.S. at 564 n.2 (emphasis in original).

123. *Id.* at 566.

124. *Id.* at 568.

125. *Id.* at 579 (Kennedy, J., concurring).

126. *Id.* at 568-69.

the commencement of suit,"¹²⁷ a truism, but one that does not meet the argument that AID became a party and therefore subjected itself to redress.

What of the Act's citizen suit provision, explicitly authorizing "any person" to "commence a civil suit . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision" of the Act?¹²⁸ Justice Scalia thought it "remarkable" that the Court of Appeals had found this established a basis for this suit, since it finessed in his eyes the plaintiff's "inability to allege any discrete injury flowing from the failure" of the AID to consult with Interior as the Act requires.¹²⁹ But to authorize suits such as this was the very purpose of the citizen suit provision, as its plain meaning and legislative history both show.

How the Court steered clear of *Japan Whaling Ass'n v. American Cetacean Society*,¹³⁰ a 1986 ruling in which whale-watching groups were found to have standing to challenge a governmental inaction allegedly in violation of a treaty, is noteworthy. The majority here blithely noted that the "whale watching and studying of their members w[ould] be adversely affected by continued whale harvesting," claims virtually identical to those asserted in *Defenders*.¹³¹ But, adhering to its view that the plaintiffs had failed to assert injury, the majority improperly analogized their suit to the generalized grievances rejected in earlier taxpayer and citizen cases where no citizen-suit statute provided standing.¹³²

Tellingly, the majority concluded that to permit this suit to proceed "would enable the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department'" and "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. . . .'"¹³³

127. *Id.* at 571 n.5.

128. 16 U.S.C. § 1540(g) (2000).

129. *Defenders of Wildlife*, 504 U.S. at 572.

130. 478 U.S. 221 (1986).

131. *Defenders of Wildlife*, 504 U.S. at 573 n.8 (quoting *Japan Whaling*, 478 U.S. at 230-31 n.4).

132. See *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982).

133. *Defenders of Wildlife*, 504 U.S. at 577 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923)).

Justice Stevens concurred only because he found the Act did not apply overseas. He believed the plaintiffs had standing since they "visited the critical habitat of an endangered species [and had] a professional interest in preserving the species and its habitat, and intend[ed] to revisit them in the future. . . ." ¹³⁴ Justice Blackmun, joined by Justice O'Connor, dissented. They maintained the majority likely "will resurrect a code-pleading formalism," offering examples of future suits that might be rejected under the Court's narrow view of standing. ¹³⁵

Defenders was clearly designed to impose barriers to standing despite the plain intent of Congress in enacting citizen-suit legislation. The assault appeared likely to succeed. ¹³⁶ In fact, the Court's next significant decision on standing in environmental suits extended *Defenders* somewhat, relying heavily on the redressability argument that had failed to convince a majority in *Defenders*.

Steel Co. v. Citizens for a Better Environment ¹³⁷ also involved a citizen suit, this time, in contrast to *Defenders*, against a company that had concededly and blatantly violated environmental laws designed to safeguard public health. ¹³⁸ The defendant had for eight successive years failed to submit reports of its storage and release of hazardous chemicals as required by the Emergency Planning and Community Right-to-Know Act (EPCRA). ¹³⁹ Once it received the required 60-day notice of impending citizen suit, however, the company hastily filed the required reports. ¹⁴⁰ Again leading the charge, Justice Scalia concluded this belated compliance went beyond rendering the action moot, and actually deprived the plaintiff of standing to commence the suit. ¹⁴¹

The Court first ruled that whether the district court had jurisdiction is an issue to be decided initially, before turning to the merits, viewing this as mandated by the case or controversy re-

134. *Id.* at 582 (Stevens, J., concurring).

135. *Id.* at 593 (Blackmun, J., dissenting).

136. See Stanley E. Rice, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in Lujan v. Defenders of Wildlife*, 38 ST. LOUIS U. L.J. 199 (1993); Brandon D. Smith, *Lujan v. Defenders of Wildlife: A Slash-and-Burn Expedition Through the Law of Environmental Standing*, 28 U.S.F.L. REV. 859 (1994).

137. 523 U.S. 83 (1998).

138. *Id.* at 87-88.

139. *Id.* at 87-88; 42 U.S.C. §§ 11001-11050 (2000).

140. *Steel Co.*, 523 U.S. at 87-88.

141. *Id.* at 110-11.

quirement of Article III.¹⁴² Emphasizing that standing entails injury, causation, and redressability, the Court concluded that redressability was lacking here.¹⁴³ The plaintiff sought judgment declaring the defendant in violation of the law, an injunction mandating compliance, and the civil penalty provided for by the Act.¹⁴⁴ The Court rejected each of these. It found a declaratory judgment that the defendant violated EPCRA “worthless” since the defendant had filed the reports, and there was no dispute over whether it had to do so.¹⁴⁵ And of course courts will not issue injunctions to mandate acts that have already occurred.

But what of the civil penalties for the defendant’s eight years of violations? The Court concluded they “might be viewed as a sort of compensation or redress to [the plaintiff] if they were payable to [the plaintiff]. But they are not.”¹⁴⁶ Since “[t]hese penalties . . . are payable to the United States Treasury,” the plaintiff “seeks not remediation of its own injury . . . but vindication of the rule of law—the ‘undifferentiated public interest’ in faithful execution of EPCRA.”¹⁴⁷ And “[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.”¹⁴⁸

Concurring, Justice Stevens, largely joined by Justices Souter and Ginsburg, limited his agreement to the view that “EPCRA . . . does not confer jurisdiction over citizen suits for wholly past violations,” and would thus “leave the constitutional question for another day.”¹⁴⁹ This, in his view, cut the Gordian knot, since the Court had earlier ruled that the Clean Water Act’s citizen-suit statute did not support actions “for wholly past violations.”¹⁵⁰

Rebuffing the majority’s undue reliance on the asserted want of redressability, Justice Stevens observed that “[r]edressability,” of course, does not appear anywhere in the text of the Constitution. Instead, it is a judicial creation of the past 25 years—a judicial interpretation of the ‘Case’ requirement of Article III.”¹⁵¹

142. *Id.* at 102-03.

143. *Id.* at 105.

144. 42 U.S.C. § 11046(c).

145. *Steel Co.*, 523 U.S. at 106.

146. *Id.*

147. *Id.* (quoting *Defenders of Wildlife*, 504 U.S. at 577).

148. *Id.*

149. *Id.* at 112 (Stevens, J., concurring).

150. *Id.* at 114 (Stevens, J., concurring) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52 (1987)).

151. *Steel Co.*, 523 U.S. at 124 (Stevens, J., concurring) (citations omitted).

One might have thought an apostle of plain meaning and original intent like Justice Scalia might have hesitated to rely so heavily on such a recently sculpted doctrine without textual basis. Further, previous decisions based on lack of redressability were suits asserting some indirect injury, as in *Defenders*, and suits against government agencies, triggering the separation of powers concerns voiced in *Defenders* and again by the majority, inappropriately, in this case.

In any event, as the concurrence notes, why is payment to the United States not redress? "History supports the proposition that punishment or deterrence can redress an injury."¹⁵² And state and local governments can enforce EPCRA, even though the penalties flow to the United States.¹⁵³ Does this holding, Justice Stevens rightly asks, undermine their standing too?¹⁵⁴ The entire majority opinion rests on a narrow, grudging, indeed hostile, reading of Congress's citizen-suit provisions. As for the separation of powers concerns that undergird the majority's ruling, Justice Stevens aptly notes that "[i]t is this Court's decision, not anything that Congress or the Executive has done, that encroaches on the domain of other branches of the Federal Government."¹⁵⁵

Ironically, the Court, shortly before *Steel Co.*, had actually read a citizen-suit statute expansively to allow a suit by plaintiffs asserting economic rather than environmental injury, in *Bennett v. Spear*.¹⁵⁶ Not only was the statute the same one involved in *Defenders* (though the injury alleged was far more specific), but the author was once again Justice Scalia. Whether this was a genuine retreat from *Defenders* and *National Wildlife Federation*, or a manifestation of greater concern for business interests alleging economic harm from government, depends on one's degree of skepticism. Certainly economic injury is a traditional basis for standing. On the other hand, as noted earlier,¹⁵⁷ the courts have required environmental harm, and rejected economic injury, in NEPA litigation.

Just two years after *Steel Co.*, a decision widely viewed as the bombardment prior to the final assault on citizen standing, the

152. *Id.* at 127 (Stevens, J., concurring).

153. *See* 42 U.S.C. § 11046(a)(2).

154. *Steel Co.*, 523 U.S. at 129 (Stevens, J., concurring).

155. *Id.* at 130 (Stevens, J., concurring).

156. 520 U.S. 154 (1997).

157. *See supra* text accompanying notes 53-55.

Court swung decisively to the opposite direction.¹⁵⁸ The *Laidlaw* decision firmly supported standing under a citizen-suit provision, retreating from the earlier line of cases, and rebuffed claims of lack of standing as well as mootness.¹⁵⁹

Laidlaw was a suit for an injunction and civil penalties under the Clean Water Act against a waste-water treatment plant operator, asserting it was discharging pollutants in violation of its permit into a South Carolina river.¹⁶⁰ The plaintiff environmental organizations submitted affidavits from members claiming the defendant's discharges interfered with their use and enjoyment of the waterway for fishing, swimming, and the like.¹⁶¹ The district court found these claims asserted injury in fact.¹⁶² More than two years after suit was brought, *Laidlaw* came into compliance with its permit, as it had agreed to do in settling a suit brought by the State.¹⁶³ (Significantly, *Laidlaw* had asked the State to sue it in a vain attempt to derail the impending citizen suit on the ground that a State action had been brought against it.¹⁶⁴ The ploy failed when the district court ruled the State's suit had not been "diligently prosecuted" so as to be a defense to a citizen suit under the Clean Water Act.)¹⁶⁵

The district court awarded a civil penalty, but denied an injunction since *Laidlaw*'s violations had ceased.¹⁶⁶ The Fourth Circuit reversed, ruling the case moot since "the only remedy currently available to [the plaintiffs]—civil penalties payable to the government—would not redress any injury [they had] suffered."¹⁶⁷

The Supreme Court reversed that ruling, finding the case not moot since "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."¹⁶⁸ Justice Ginsburg, writing for the Court, criticized the Fourth Circuit's reliance on *Steel Co.* to find mootness, and noted

158. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167 (2000).

159. 528 U.S. 167.

160. *Id.* at 175-76.

161. *Id.* at 181-83.

162. *Id.* at 183.

163. *Id.* at 177-78.

164. *Id.* at 177-78.

165. *Laidlaw*, 528 U.S. at 176-78 (citing 33 U.S.C. § 1365(b)(1)(B) (2000)).

166. *Id.* at 178.

167. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 149 F.3d 303, 306-07 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000).

168. *Laidlaw*, 528 U.S. at 189 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).

that “the Court of Appeals confused mootness with standing”—*Steel Co.* had ruled the plaintiffs lacked standing since the defendant there had complied before suit commenced.¹⁶⁹

Turning to the plaintiffs’ standing, the Court found it existed on the strength, as noted, of their members’ loss of recreational use of the waterway.¹⁷⁰ It found this perfectly consistent with the earlier decisions restricting standing, each of which acknowledged that standing exists where plaintiffs allege, “recreational values of the area will be lessened.”¹⁷¹

Erasing some of the graffiti of *Steel Co.*, the Court expressly held the plaintiffs showed redressability in seeking civil penalties, even though the funds are payable to the government.¹⁷² Congress itself found civil penalties “deter future violations,” a “determination [that] warrants judicial attention and respect.”¹⁷³ It was “likely, as opposed to merely speculative, that the penalties would redress [the plaintiffs’] injuries by abating current violations and preventing future ones. . . .”¹⁷⁴

Predictably, Justice Scalia dissented, joined by Justice Thomas. He urged that citizen-suit plaintiffs must assert harm to the environment, not just to themselves, and these plaintiffs had not done so.¹⁷⁵ This, of course, would subvert the entire premise of the standing requirement, consistently insisted on by Justice Scalia himself, that plaintiffs show particularized, individual harm.¹⁷⁶ He went on to conclude that there was in any event no redressability, relying on the dubious motion advanced in *Steel Co.* that a penalty paid to the government furnished no benefit to a private-citizen plaintiff.¹⁷⁷ This, as noted earlier, totally ignores the deterrent value of the penalty, as well as the very purpose of citizen suits to compel compliance with environmental laws.

The Court’s welcome bolstering of citizen standing in *Laidlaw* soon bore fruit. In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,¹⁷⁸ the same Fourth Circuit that had derailed the *Laidlaw* suit sustained a similar Clean Water Act citizen action.

169. *Id.*

170. *Id.* at 181-82.

171. *Id.* at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

172. *Id.* at 185-86.

173. *Id.* at 185.

174. *Laidlaw*, 528 U.S. at 187.

175. *Id.* at 198-99 (Scalia, J., dissenting).

176. See, e.g., *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990).

177. *Laidlaw*, 528 U.S. at 202.

178. 204 F.3d 149 (4th Cir. 2000).

The district court had dismissed the suit for lack of standing, despite assertions of injury quite similar to those in *Laidlaw*, and the Fourth Circuit had affirmed.¹⁷⁹ Following *Laidlaw*, though, the Fourth Circuit, en banc, reversed and found standing.¹⁸⁰ It specifically rejected the district court's insistence that the plaintiffs assert, and show, increased pollution of the waterway caused by the defendant's discharges as a prerequisite to standing, noting that amounted to "creating evidentiary barriers to standing that the Constitution does not require and Congress has not embraced."¹⁸¹ And, the court noted, "threatened injury . . . is by itself injury in fact."¹⁸² There was no need at the standing stage of a suit for "laboratory analysis of the chemical content, salinity, or ecosystem of Shealy's lake"; that "would necessitate the litigation of complicated issues of scientific fact that are entirely collateral to the question Congress wished resolved—namely, whether a defendant has exceeded its permit limits."¹⁸³ Standing under a citizen-suit statute does not, in short, mandate a pre-trial trial to show the very violations the plaintiff must later prove.

Though the assault on standing in environmental suits has been rebuffed, the battle is not over. Bills have been proposed (though not yet introduced) to restrict standing in NEPA litigation.¹⁸⁴ The current climate in Congress and the Administration clearly calls for vigilance against such attempts.

IV. New York's Standing Restrictions

New York's courts have created peculiar, and unjustifiable, restrictions on standing in environmental litigation that its legislature never envisaged. While a few states have enacted citizen-suit statutes like those adopted by Congress,¹⁸⁵ New York has not; rather, it requires a particularized injury, as do the federal courts under *Sierra Club v. Morton*.¹⁸⁶ However, a 1991 Court of Appeals decision, *Society of the Plastics Industry, Inc. v. County of*

179. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999), *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000).

180. *Gaston Copper*, 204 F.3d at 151.

181. *Id.* at 156.

182. *Id.* at 160.

183. *Id.* at 162.

184. Carl Pope, *Forward into the Past: Bush Pushes for the Return of Secret Government*, *SIERRA*, Mar.-Apr. 2003, at 88.

185. See, e.g., MICH. COMP. LAWS § 324.1701 (1999); MASS. GEN. LAWS ANN. ch. 214, § 7(A) (West 1989).

186. See *Douglaston Civic Ass'n v. Galvin*, 324 N.E.2d 317 (N.Y. 1974).

Suffolk,¹⁸⁷ narrowed standing in New York to an unwarranted extent. This 4-to-3 ruling concerned a challenge to a county law restricting the use of certain plastic containers.¹⁸⁸ The plaintiffs, a plastic industry association and one of its members, claimed the law had been adopted in violation of the State Environmental Quality Review Act (SEQRA),¹⁸⁹ the state statute modeled on NEPA.¹⁹⁰ The court ruled both parties lacked standing since their asserted injuries were not “different from that of the public at large.”¹⁹¹ The industry association failed because its constituents were “entities whose economic interests are not served by bans on plastic products[,]” so that the environmental concerns it raised—increased contamination of groundwater from greater bulk in landfills if paper replaced plastic, increased truck traffic and the like—were not “germane to the purposes of this nationwide trade organization.”¹⁹² And the local plastics manufacturer too was found to lack standing since the harms it claimed were “tenuous” and “ephemeral.”¹⁹³ This decision contrasts starkly with the Supreme Court’s recognition that economic injury alone suffices for standing in environmental cases.¹⁹⁴

Dissenting, Judge Hancock, joined by Judges Simons and Titone, aptly noted that the decision effectively barred challenging environmental injury suffered by all area residents, unless the plaintiff can somehow show injury unique to itself. This, he asserted, “establishes criteria so restrictive as to present a virtual bar to SEQRA challenges . . . having such area-wide environmental effects.”¹⁹⁵

Sure enough, *Society of Plastics* led to overly restrictive rulings denying standing to SEQRA plaintiffs alleging genuine harm unless they could show that harm to somehow be unique. In *Otsego 2000, Inc. v. Planning Board*,¹⁹⁶ a local conservation group was denied standing to contest town approval of a large residential subdivision on a scenic lake near historic Cooperstown since

187. 573 N.E.2d 1034 (N.Y. 1991).

188. *Id.* at 1034-35.

189. N.Y. ENVTL. CONSERV. LAW §§ 8-0001-8-0117 (McKinney 2002).

190. *Soc’y of Plastics*, 573 N.E.2d at 1034-35.

191. *Id.* at 1041-43.

192. *Id.* at 1043.

193. *Id.*

194. *Bennett v. Spear*, 528 U.S. 167 (1997).

195. *Soc’y of Plastics*, 573 N.E.2d at 1046 (Hancock, J., dissenting).

196. 575 N.Y.S.2d 584 (App. Div. 1991), *appeal denied*, 589 N.E.2d 1263 (N.Y. 1992).

the group and its members did not actually use the property or own land nearby.¹⁹⁷ More recently, in *Save Our Main Street Buildings v. Greene County Legislature*,¹⁹⁸ town residents did not have standing to challenge the demolition of buildings in a historic district "because their residences are not within sight of the Project and as a result, any effects on scenic view would be no different for them than for the public at large."¹⁹⁹

Some New York courts have, more logically, upheld standing in SEQRA cases where the plaintiffs could satisfy the talisman of injury different from that of the public at large. A plaintiff alleging contamination of his drinking water and a neighborhood group claiming damage to a park its members used "much more frequently than members of the general public" have succeeded in surmounting the *Society of Plastics* hurdle.²⁰⁰

One can only hope New York's Court of Appeals will soon take a belated second look at standing under SEQRA and limit *Society of Plastics* to its facts. Alternatively, legislation to provide standing in SEQRA litigation could redress the problem.

V. Standing in Other Nations' Environmental Litigation

It is somewhat ironic that the highest courts of three developing countries far from our shores, all with legal systems based on Anglo-American principles, have ruled that plaintiffs have standing in environmental litigation without having to negotiate the barriers imposed by American courts. We have much to learn from these recent decisions rendered by Asian courts.

The Philippines' highest court, in *Oposa v. Factoran*,²⁰¹ upheld the standing of minors and the Philippine Ecological Network, Inc. to sue to cancel licenses to extract timber from that

197. *Id.* at 585.

198. 740 N.Y.S.2d 715 (App. Div. 2002), *appeal denied*, 775 N.E.2d 1288 (N.Y. 2002).

199. *Id.* at 718. See Joan Leary Matthews, *Unlocking the Courthouse Doors: Removal of the "Special Harm" Standing Requirement under SEQRA*, 65 ALB. L. REV. 421 (2001); Philip Weinberg, *Are Standing Requirements Becoming a Great Barrier Reef Against Environmental Actions?*, 7 N.Y.U. ENVTL. L.J. 1 (1999).

200. *Comm. to Preserve Brighton Beach & Manhattan Beach, Inc. v. Planning Comm'n*, 695 N.Y.S.2d 7, 11 (App. Div. 1999). See also *Long Island Pine Barrens Soc'y, Inc. v. Town of Islip*, 690 N.Y.S.2d 95 (App. Div. 1999).

201. G.R. No. 101083 (Philippines 1993), reported in UNITED NATIONS ENVIRONMENT PROGRAMME/UNITED NATIONS DEVELOPMENT PROGRAMME, 1 COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS 22-36 (1998), available at <http://www.unep.org/padeli/publications/jud.dec.nat.pre.pdf> [hereinafter MATTERS RELATED TO ENVIRONMENT].

country's pristine rainforest.²⁰² The action was based on a constitutional provision that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology."²⁰³ The court ruled the minor plaintiffs could sue on their own behalf as well as for future generations, since "the minors' assertion of their right to sound environment constitutes, at the same time, the performance of [the defendants'] obligation to ensure the protection of that right for the generations to come. . . ."²⁰⁴

Pakistan's Supreme Court likewise held in *Zia v. WAPDA* (Water and Power Development Authority)²⁰⁵ that citizens had standing to sue to enjoin construction of a power transmission grid without alleging special or individual injury, because of asserted health concerns from electromagnetic fields.²⁰⁶ This suit was based on that nation's due process clause, which reads similarly to our own.²⁰⁷ The court held that:

[W]here life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people the court in exercise of its jurisdiction under Article 184(3) of the *Constitution* may grant relief to the extent of stopping the functioning of units which create pollution and environmental degradation.²⁰⁸

That article empowers the Pakistani Supreme Court to issue orders to enforce the fundamental rights, including due process rights, enumerated earlier in the constitution.²⁰⁹

Similarly, the High Court Division of Bangladesh ruled in *Farooque v. Bangladesh*²¹⁰ that the Bangladesh Environmental Lawyers' Association could challenge the lack of environmental impact assessments for several development projects.²¹¹ The

202. ASIAN DEVELOPMENT BANK, 1 CAPACITY BUILDING FOR ENVIRONMENTAL LAW IN THE ASIAN AND PACIFIC REGION: APPROACHES & RESOURCES 720-21 (Donna G. Craig, Koh Kheng-Lian, & Nicholas A. Robinson eds., 2003) [hereinafter CAPACITY BUILDING].

203. PHILIPPINES CONST. art. II, § 16 (1987).

204. CAPACITY BUILDING, *supra* note 202, at 728.

205. PLD, 1994, Sup. Ct. 693 (1994), *reported in* MATTERS RELATED TO ENVIRONMENT, *supra* note 201, at 323-34.

206. CAPACITY BUILDING, *supra* note 202, at 730.

207. PAK. CONST. art. 9 (1973).

208. CAPACITY BUILDING, *supra* note 202, at 730.

209. PAK. CONST. art. 184(3) (1973).

210. Civil Appeal no. 24 of 1995, 17 BLD (AD) 1997, Vol. XVII, pp. 1-33; 1 BLC (AD) (1996), pp. 186-219, *reported in* MATTERS RELATED TO ENVIRONMENT, *supra* note 201, at 37-45.

211. CAPACITY BUILDING, *supra* note 202, at 739.

court specifically noted that “[i]f a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him alone. It is enough if he shares that right in common with others.”²¹²

Conclusion

Our courts have abused the historic rules of standing and thrust needless obstacles before environmental litigants. Although the *Laidlaw* decision has for now halted the Supreme Court’s assault on standing, the threat of further rulings like those that preceded it remains. And the New York experience shows that even without the federal courts’ debatable reliance on Article III, courts are quite capable of unduly restricting standing in environmental cases.

This issue is not just one of procedural niceties or judicial economy. Limiting standing in environmental litigation gives government agencies and industry carte blanche to violate laws enacted to safeguard public health and protect natural resources. For all the pieties mouthed about the need to ensure the separation of powers—see the language of Justice Scalia in *Defenders of Wildlife*²¹³—the true separation of powers concern is the need for the courts, as always, to curb abuses by the other two branches, a need voiced as early as *Marbury v. Madison*²¹⁴ and many times since. It is still, as was true two centuries ago, “emphatically the province and duty of the judicial department to say what the law is.”²¹⁵ This can only happen if litigants are free, within reasonable and historic limits, to enter the courthouse.

212. *Id.* at 736.

213. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

214. 5 U.S. (1 Cranch) 137 (1803).

215. *Id.* at 177. See also *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).