

Regulation and Standing to Sue

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I. Introduction

Standing is, generally, the legal ability to be a plaintiff in a lawsuit. Scott (1973) writes that standing is concerned with “what sort of interest is ‘sufficient’ for the plaintiff to be regarded as a proper party to bring the action.”¹ Standing has become a prominent issue in legal circles, primarily because of the importance of existing case law on standing to the enforcement of environmental regulations.

Governments seem to be increasingly relying upon private parties to enforce regulations of all types. In some areas of law, anonymous informants fill that need for regulatory agencies. In other areas, citizens (most often acting as organized pressure groups) are encouraged through a system of pecuniary rewards to file suit against law-breakers and even against the government itself for “underenforcement” of the law. Changes that have occurred in the case law of standing over the past three decades have made it easier than ever before for a citizen to file suit against a private party or the government without showing a specific, individualized harm. When the government is a defendant in these cases, but the prevailing outcome of such cases is to provide a judicial mandate that the agency become more stringent, less flexible, in its enforcement of regulation.

The vast quantity of regulation that exists (and, if more effectively enforced, could wreck the economy) adds urgency to the task of restoring traditional rules on standing to sue. Standing issues are perhaps more important now than ever before.

This paper provides, in section II, a history of standing case law. Section III covers recent developments in standing case law and shows why there is justifiable concern over the recent direction taken by the Supreme Court. Section IV provides theory and anecdotal evidence supporting our contention that standing, coupled with regulation,

can be used for acquiring profit by politically restricting competitors. Section V is a discussion of the “chairman’s problem” and the problem of judicial calculation, and briefly explains how standing issues can be sidelined through deregulation. We summarize and conclude the paper in Section VI.

II. History of Standing Case Law

Standing is a relatively recently developed doctrine; it appears nowhere in the U.S. Constitution and has no mention in federal case law until the 1920s. In the U.S. Supreme Court, the doctrine has its origin in *Frothingham v. Mellon*.² In this case, “a federal taxpayer challenged Congress’s decision to allocate federal funds for the assistance of mothers and their newborn infants.... The *Frothingham* Court held that the plaintiff had suffered no tangible injury that would confer standing to challenge the expenditure. Instead, the Court found that the plaintiff’s ‘liability as a taxpayer is unaffected by the disposition which Congress ... may make of the public revenues or property.’ The Court declined to adjudicate ‘abstract questions which do not appreciably or practically affect’ a plaintiff who alleges such minor and unredressable harm, that is, harm shared ‘in common with people generally....’³ That is, the *Frothingham* decision required that a would-be plaintiff demonstrate that the harm he suffered is unique compared to the costs shared by all citizens that stem from any public policy.

There are, essentially, two levels of standing: “prudential” standing, and Article III standing.⁴ Prudential standing is the common-law interpretation of the rather indistinct wording of Article III of the Constitution. In further developing the concepts in that part of the Constitution, the court imposes on itself certain limitations on jurisdiction. Prudential standing limitations have nothing to do with the existence or non-existence of a justiciable controversy, but only with the ability of a particular party to bring suit.

¹ Scott (1973), note 15, p. 647.

² 262 U.S. 447 (1923). Though the 1911 decision in *Muskraat v. United States* (219 U.S. 346) does not use the word “standing,” it may express an attitude toward standing that led to the formal expression of the doctrine.

³ Alpert (1988), p. 287.

⁴ E.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-2 (1981); *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Prudential standing has the common law as its foundation. Common law, as judge-made law, results from centuries of legal precedent and not statutes written by elected officials. Common law very often fleshes out statutory law, as has been the case with Article III standing. Prudential standing has resulted from the discovery of society's beliefs about who may bring suit; it is not legislated, but has found expression in case law.

For most of the twentieth century, courts have used a well-known set of guidelines presented by Justice Brandeis,⁵ as well as three prudential tests to determine if a would-be plaintiff has standing: the litigant must show: (1) that he has suffered personally some actual or threatened injury, (2) that the injury must be fairly traceable to the alleged illegal conduct of the defendant, and (3) that the injury must likely be redressed by a favorable decision.⁶ The Supreme Court has referred to the “injury-in-fact” standard as the “irreducible minimum” required by the Constitution.⁷ Without such standing requirements, courts are in danger of becoming “debating societies,” as one standing decision commented.⁸

Article III standing has its roots in the “cases and controversies” clause of the U.S. Constitution.⁹ As constitutional rules override common law, Article III standing has

⁵ Justice Brandeis, in a concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348, 56 S. Ct. 466, 482-484 (1937), wrote, “The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.” In part, the rules state,

“6. *The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. . . .* Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. . . .

“7. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. . . .” [emphasis added]

See also Alpert (1988), p. 288; Ducat (1996), pp. 69-70.

⁶ These three tests were explicitly stated in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Causation and redressability are required in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41-43 (1976). For a recent case in which the Supreme Court denied standing on the basis of nonredressability, see *Steel Co. v. Citizens for a Better Environment*, decided March 4, 1998.

⁷ Perino (1987), p. 141.

⁸ *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 477 (1981).

⁹ U.S. Constitution, art. III, § 2 provides, in relevant part:

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of Admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between citizens of different States;—

been the unmovable core of prudential standing. No prudential requirement may supersede the court's interpretation of Article III. The courts have allowed legislation to override prudential barriers to standing,¹⁰ but the less specific Article III barriers have been held to be inviolable by Congress. Article III, section 2 includes the "Cases and Controversies" clause (see note 17), which simply limits judicial power to cases and controversies as defined by the courts. The distinction between the two types of standing is important to understanding the ability of Congress to extend standing to new classes of plaintiffs.

The existence of these prudential and constitutional standards has not kept standing from being one of "the most amorphous [concepts] in the entire domain of public law" and a doctrine of "uncertain content."¹¹ The courts have not ruled consistently on standing issues, being more likely to grant standing to environmental advocates in environmental cases, as we show below.

Standing as Common Law vs. Statutory Law

The standing issue, in the environmental arena, is fundamentally a contest between two very different kinds of law, to which we alluded earlier: common law and statutory law. Environmental law can take the form of common law (as was

between Citizens of the same State claiming lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, and Subjects."

Berger (1969) has argued that the belief that there is an Article III component to standing has no historical basis, but Lossing (1978) notes that

"...this idea has been explicitly rejected in recent standing decisions...e.g. Singleton v. Wulff, 428 U.S. 106, 112 (1976); Warth v. Seldin, 422 U.S. 490, 498 (1975); Flast v. Cohen, 392 U.S. 83, 96 (1968)... There are, however, suggestions that an association may be granted standing without allegations of the fact of injury to itself in a problem 'sufficiently concrete' to satisfy the case or controversy requirement. Planned Parenthood v. Danforth, 428 U.S. 52, 62 n. 2 (1976)." [p. 1382 n. 133.]

Phelps v. Hamilton, 122 F.3d 1309, 1326 (10th Cir. 1997) shows that the Article III limitation of the jurisdiction of federal courts to actual cases or controversies embodies a limitation on standing. For more on Article III standing and the "case or controversy" requirement, see Brilmayer (1979).

¹⁰ See also the Supreme Court's recent decision in *Federal Election Commission v. Akins et al.*, S.Ct. No. 96-1590, June 1, 1998, in which a group of voters was granted standing under the Federal Election Campaign Act of 1971 to challenge the FEC's determination that the American Israel Public Affairs Committee is not a "political committee" fitting the definition of the FECA. The opinion, delivered by Justice Breyer, cited for support *Raines v. Byrd*, 521 U.S. ___, ___, n. 3 (1997) (slip op., at 8, n. 3), which states that an explicit legislative grant of authority to bring suit "eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch."

¹¹ *Hearing on S. 2097 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Congress, 2nd Session 498 (1966). Justice Frankfurter once referred to standing as "this

predominantly the case until the early 1970s), or it can be legislated as statutory law. Standing rules are drastically different for the two types of law. At common law, a plaintiff must demonstrate damages and link the damages to the polluter to obtain standing. Under statutory law, a plaintiff has only to demonstrate that a statute has been violated.¹²

Common law makes use of the idea of *nuisance*. Nuisance is a tort involving annoyance or inconvenience to a neighbor or to the public, and resulting from unreasonable or unlawful use of one's property. A nuisance may be intentional or reckless. Meiners writes,

While sometimes difficult to apply, since scientific evidence of harm is required, the concept of nuisance is generally commonsensical. As Justice Sutherland said, 'Nuisance may be merely a right thing in a wrong place, like a pig in the parlor instead of the barnyard' (*Village of Euclid*, 1926). Causes of action for nuisance claims can be either public or private, but nuisances may be combined public and private nuisances.¹³

Public nuisance is a generalized harm, for which private citizens normally have no standing to sue. Private nuisance is a harm to a particular individual or group, for which only that individual or group would have standing to sue.¹⁴ Yandle writes,

A public nuisance is an action that causes inconvenience or damage to the public health or public order, or an act which constitutes an obstruction of public rights.... For example, a firm that discharges emissions that damage the health of citizens in a city could be charged with public nuisance. Normally, only public officers (attorneys general or district attorneys) have standing to sue to abate public nuisances. However, individuals who show they suffer harm distinctly different from that suffered by the general public may also be granted standing to sue to abate a public nuisance.¹⁵

complicated speciality of federal jurisdiction." *U.S. ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953). See also Alpert (1988), p. 287; Lossing (1978), p. 1411, n. 294.

¹² Of course, courts have often required common law injury requirements to supplement any claim to statutory standing. This study concerns the extent to which proof of injury in fact, i.e. proof of common law injury, has been required by the courts at various times.

¹³ Meiners (1995), pp. 273, 274.

¹⁴ The distinction between public and private nuisance was carefully drawn in the district court's decision in *Kirwin v. Mexican Petroleum Co.* (267 F. 460, D. R.I., 1920). The defendant, which discharged oil into the Providence River, was found to generate a private nuisance when the oil washed ashore on the plaintiff's beachfront resort property. Kirwin could therefore sue for the loss of business. Because the beach up to the high-water mark was considered public property, a public nuisance was also generated. Kirwin was held to have riparian rights to use of the river, and Mexican Petroleum Co. was required to stop its pollution. No statute prohibiting oil release was necessary to achieve this result. See Yandle (1997), pp. 98, 99; Meiners (1995), p. 279.

¹⁵ Yandle (1997), pp. 91, 92.

This view is centuries old. Blackstone defined nuisance as “anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another.”¹⁶ Enjoining a nuisance required proof of injury different from that sustained by the rest of the population: “[W]here a private person suffers some extraordinary damage, beyond the rest of the queen’s subjects, by a public nuisance...he shall have a private satisfaction by action.” Further, “[T]he damage being common to *all* the queen’s subjects, no *one* can assign his particular portion of it; or, if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions.”¹⁷

Importantly, common law allows contracting around the rule.¹⁸ A case brought on common law grounds may result in an injunction and damages to the plaintiff. Regardless of the decision of the court, however, polluters and holders of environmental rights can exchange rights freely. Under statutory law, such exchanges are forbidden. Penalties are imposed, with no provisions for damages to affected property owners.

From Hohfeldian Standing to Universal Standing

The conservative, common law approach to standing, which demands strict adherence to the three prudential tests discussed above, is also known as Hohfeldian standing.¹⁹ The Hohfeldian plaintiff must have a substantial stake in the outcome of the decision, as “... one who has been concretely damaged by the defendants’ actions and therefore seeks to advance his own interests by litigation.”²⁰

Generally, federal courts have held that individuals or organizations do not have standing to sue when the injury they claim is one shared by all members of the public.²¹

¹⁶ Blackstone (1879), vol. 3, p. 190.

¹⁷ *Ibid.*, p. 193, quoted in Brubaker (1995).

¹⁸ Epstein (1995, p. 27) thinks of the ability to contract around the rule as a kind of “safety hatch” preventing rules from being needlessly complex and incomprehensible: “In practice, the most ubiquitous legal safety hatch adds three words to the formal statement of any rule: *unless otherwise agreed*. Any rule that explicitly begins with these three words cannot in my view constitute a complex rule, for those who do not like what it provides will run and hide from its application.”

¹⁹ The Hohfeldian doctrine is discussed critically by Louis Jaffe, “The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,” (1968) 166 U. Pa. L. Rev. 1033. See also Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” (1913) 23 Yale Law J. 16; and Jensen et al., p. 209.

²⁰ Note, “Standing to Challenge Exclusionary Land Use Devices in Federal Courts after *Warth v. Seldin*,” (1977) 29 Stan. L. Rev. 323, 325 n. 15. See also Jensen et al., p. 209.

²¹ An important exception to the denial of standing to taxpayers is *Flast v. Cohen*, in which taxpayers were granted standing to contest federal expenditures on certain religion-affiliated organizations. However, the

This is the doctrine laid out in *Frothingham v. Mellon*, when taxpayer status was deemed insufficient interest to warrant standing to sue for a different distribution of the tax revenues.²²

Hohfeldian standing was the rule for much of this century. However, as early as the 1930s, federal courts began taking a liberal approach to standing, though legislatively universalized standing was decades away. In the late 1960s and through the better part of the two decades that followed, federal courts, in tandem with Congress and state legislatures, substantially liberalized standing requirements.²³ This liberalization was taken to varying extents, but the logical conclusion is the abolition of all limitations on standing.²⁴

Under the common law criteria, some “economic interest” in the case was deemed necessary to have standing.²⁵ In 1965, with *Scenic Hudson Preservation Conference v.*

generalization about federal courts denying standing to taxpayers holds, because subsequent cases have held to the old doctrine on taxpayer standing. In context, *Flast* appears to be an aberration.

Subsequent cases include *Schlesinger v. United States v. Richardson*, 418 U.S. 166 (1974), in which litigants were denied standing as taxpayers to challenge legislation that allegedly violated Article I, Sec. 9, cl. 7; and *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982), in which an organization advocating the removal of state support from all Christian institutions was denied standing to challenge an executive decision to donate surplus federal property to a Christian college.

Flast is differentiated from *Frothingham* in that the plaintiff in *Flast* sought to show that the law violated specific constitutional limitations (the establishment clause of the First Amendment) placed upon Congress’ power to tax and spend. *Frothingham* presented only a general allegation that the Tenth Amendment had been violated.

²² A subsequent case illustrating this point is *Schlesinger v. Reservists Committee to Stop the War*, in which a group of citizens contended that members of Congress serving in the military reserves were violating Art. I, Sec. 6, cl. 2 of the Constitution prohibiting individuals from simultaneously “holding any Office under the United States [and being] a Member of either House.” The group was denied standing because the alleged violation “would adversely affect only the generalized interest of all citizens in constitutional governance.” 418 U.S. 208 (1974). See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940).

²³ See Greve (1996), p. 42; Jensen et al. (1986), p. 209.

²⁴ Mark Tushnet, in “The New Law of Standing: A Plea for Abandonment,” (1977) 62 Cornell L. Rev. note 41, p. 1706, writes, “[t]he ‘liberal’ position is that the law of standing, as it is developed and applied by courts, serves no useful purpose.” Professor Christopher Stone argues that courts should “give legal rights to forests, oceans, rivers and other so-called natural objects in the environment—indeed, to the natural environment as a whole.” (“Should Trees Have Standing?—Toward Legal Rights for Natural Objects,” [1972] 45 S. Calif. L. Rev. 450, 456.) In *Sierra Club v. Morton*, Justice Douglas cited Professor Stone approvingly (405 U.S. 727, 741 [1972], dissenting), and Justices Blackmun and Brennan called for “...an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona-fide, and well-recognized attributes and purposes in the area of the environment, to litigate environment issues.” (*Ibid.*, p. 757, dissenting.) See also Jensen et al. (1986), p. 210.

²⁵ Ironically, until *Bennett v. Spear* (1997), “economic interest” was often deemed unnecessary and insufficient grounds for standing in environmental cases.

Federal Power Commission,²⁶ the Second Circuit held that an economic interest was “not required by the ‘case’ or ‘controversy’ requirement of Article III, §2 of the Constitution....”²⁷ Five years later, with *Data Processing Association v. Camp*, the Supreme Court confirmed that, as in *Scenic Hudson*, damage to “aesthetic, conservational, and recreational” interests would merit standing.²⁸

*United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*²⁹ marks the greatest expansion of standing to environmental advocates allowed by the Supreme Court. In the *SCRAP* case, George Washington University law students were granted standing under the National Environmental Policy Act to sue the federal government’s railroad rate-setting bureau on grounds that a surcharge on shipments of freight produced a price differential between recycled and nonrecycled products. This, the students alleged, would lead to decreased use of recyclables. Through a long chain of events environmental harm could result in the form of increased litter in public places and air pollution from having to manufacture new materials.

Certainly, in a general equilibrium context, higher railroad freight rates might impose non-psychic costs on the students, as well as many other people. The common-law concept of standing, however, is intended to keep out those who suffer harms no different from those suffered by the general public. Hoberg (1992) writes that in the *SCRAP* case,

the Supreme Court held that the size of the affected interest was not important—in fact, “an identifiable trifle is enough for standing.” The Court went on to give further support to diffuse interests by declaring that “to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody.” The effect of the liberalized rules has been to make the granting of standing in environmental cases virtually a routine matter.³⁰

Statutory Liberalization of Standing

One of the most striking liberalizing trends in standing is apparent in environmental statutes and court cases concerning those statutes. Almost all major federal

²⁶ 354 F.2d 608 (2nd Cir., 1965), *cert. denied*, 384 U.S. 941 (1966). The decision used as its principal precedent *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509, 511-12 (7th Cir., 1954).

²⁷ Sive (1995), p. 50.

²⁸ 397 U.S. 150, 153 (1970).

²⁹ 412 U.S. 669 (1973).

³⁰ Hoberg (1992), p. 50.

environmental statutes contain citizen suit provisions that purport to grant *universal* standing, that is, standing regardless of whether the plaintiff meets the injury-in-fact standards outlined by the Supreme Court. Michael Greve (1990) notes that “[t]he only major federal environmental statute without a citizen suit provision is the Federal Insecticide, Fungicide, and Rodenticide Act.”³¹ Similar citizen suit provisions are found in non-environmental statutes³² and in state statutes.³³

Typical of these citizen suit provisions is section 304 of the Clean Air Act. As with the other environmental statutes listed, the section uses the term “any person” in specifying who is entitled to bring suit under the Act. This grants every person the status of a “private attorney general,”³⁴ which, if interpreted literally, eliminates all standing requirements.

Before the 1970s, citizen suits were exceptional.³⁵ However, moves toward citizen standing had begun in state law by the 1890s. The first citizen suit provision in the United States was a part of Article XIV of the New York state constitution, enacted in 1894. This “Forever Wild” article permanently set aside state-owned forest lands, preventing them from being “leased, sold or exchanged, or [being] taken by any corporation, public or private,” or from having any timber on those lands “sold, removed, or destroyed.” The article allowed “any person” to sue to restrain any violation of its intent, subject to the consent of the state’s Appellate Division and with notice to the attorney general.³⁶

The move toward statutory citizen suit provisions in *federal* law began in 1946, with the passage of the Administrative Procedures Act.³⁷ The APA gave standing to anyone “aggrieved within the meaning of the relevant statute,” whether or not the traditional common law criteria were met. However, even the APA required a harm to a

³¹ 7 U.S.C. § 3136 (1988). This statute is an older one, dating back to 1947. The National Environmental Policy Act (NEPA) is also without a citizen suit provision, but this statute is a procedural one. This has not been an obstacle to standing to sue under NEPA, apparently (see *United States v. SCRAP*, 412 U.S. 669), and the 1946 Administrative Procedures Act seems to fill in NEPA’s gap in this regard.

³² For example, the Federal Communications Act, the Consumer Product Safety Act of 1972, and the Civil Rights Act of 1968.

³³ Jensen et al. (1986), p. 210.

³⁴ This phrase was coined by Judge Jerome Frank in *Associated Industries, Inc. v. Ickes*, 134 F.2d 694, 704 (2nd Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

³⁵ See Greve (1990), p. 343.

³⁶ Sive (1995), p. 50. The Appellate Division, historically, has almost always granted permission to sue.

³⁷ 5 U.S.C. 701 et seq.

“legal interest,” perhaps an economic injury. Thus the APA did not institute universalized standing, which would take nearly twenty years to appear at the federal level.

When the *SCRAP* case appeared in 1973, citizen suits became entrenched in federal court precedent. *SCRAP* was not a citizen suit filed for violation of an environmental law, yet it weakened the common law of standing that stood in the way of citizen suits. *SCRAP* set the tone for the better part of the next two decades. Injury-in-fact was certainly much less of an obstacle to citizen suits after *SCRAP*. Walker and Jacobs (1997) reveal that under EPCRA, a statute under which a large number of citizen suits have been filed, “injury-in-fact” has been established by such allegations as the following:

- Violation of the right to know about the chemicals used and released at a facility
- Concern regarding the health and safety of the plaintiff, his family, and community based on uncertainty regarding the chemicals present at a non-compliant facility
- Harm to the ability of the State Emergency Response Commission and the Local Emergency Planning Committee to prepare an adequate emergency response plan and thereby protect the safety of the plaintiff and his family
- Denial of necessary information to the plaintiff relative to whether his family should continue to live in the area
- Violation of the plaintiff’s right to know who the polluters are in the area³⁸

By 1970, when the 1970 Clean Air Act and subsequent environmental legislation (like the Clean Water Act and EPCRA) had brought citizen suit provisions into the mainstream, it was not the individual citizen who was bringing most of the lawsuits. From the beginning, the plaintiffs filing citizen suits have usually been large, nationally organized environmental organizations.³⁹ Despite the grant of “private attorney general” status for citizens, individuals typically do not have the resources to monitor firms for

³⁸ Walker and Jacobs (1997), p. 15. Environmental groups may sometimes be granted standing in their own behalf, Walker and Jacobs note:

In *Delaware Valley Toxics Coalition v. Kurz-Hastings* [813 F.Supp. 1132 (ED Pa. 1993)], the Delaware Valley Toxics Coalition (DVTC) undertook a computer study to determine if any local companies failed to submit required EPCRA reports. This study required the DVTC to purchase certain items and incur at least 250 hours of staff time. This expenditure of time reduced the availability of staff to perform its primary function; that is, disseminating information to educate and train others. The court found that this constituted injury in fact, fairly traceable to the defendant’s actions (or lack of), and likely to be redressed by a favorable decision.

³⁹ See Adler (1995), p. 42, 44, 45.

violations of the law and build the base of evidence necessary to prove those violations in court.

From Universal Standing to Hohfeldian Standing

In the 1990s, it appeared that the era of liberal standing for environmentalist causes was drawing to a close. Two key opinions Justice Scalia wrote for the Court increased the costs to environmental advocacy groups of using the courts to transfer property rights, and a third decision lowered the cost to landowners of using the courts to resist the transfer of property rights. Once on the bench of the Supreme Court, Scalia apparently abandoned his circuit court positions granting easy standing to environmental groups. However, with the third case Scalia reverts to liberal standing, though for environmental resource owners instead of environmental advocacy groups.

The Court's decisions in *Lujan v. National Wildlife Federation* and *Lujan v. Defenders of Wildlife* marked the first significant judicial turnaround on standing since the trend toward universal standing began in the late 1960s. The 1997 *Bennett v. Spear* decision mentioned in the introduction appears to further the trend toward transferring property rights back to environmental resource owners. With *National Wildlife* and *Defenders of Wildlife*, the Supreme Court made steps toward the Hohfeldian view of standing, or at least away from universal standing. *Bennett v. Spear* could have the same effect as *National Wildlife* and *Defenders of Wildlife*, but in a very different way. By *expanding* standing to landowners, it worked against environmental advocacy groups and government environmental agencies.

National Wildlife Federation (1990)

The Court's ruling in the *National Wildlife Federation* case "signaled a tightening of environmental standing and cast doubt on the continued validity of some prior environmental standing decisions."⁴⁰ It "undermines the basis upon which much environmental litigation since 1970 has been premised"⁴¹ and thus reduces the power of environmental advocacy groups to transfer property rights through the courts.

⁴⁰ Greve (1996), p. 47.

⁴¹ Macfarlane (1990), p. 867, quoted in Greve (1996), p. 52.

The plaintiffs in *National Wildlife Federation* complained that the Bureau of Land Management's "land withdrawal review program" violated the 1969 National Environmental Policy Act and the 1976 Federal Land Policy and Management Act. This program assessed federal lands previously withdrawn from any use to determine whether they should be returned to commercial or private use. The National Wildlife Federation, alleging improper administration of the program, sought the prohibition of future releases of land, and the return of previously released lands to federal management. For standing, the NWF relied upon the testimony of two members who claimed aesthetic and recreational use of land "in the vicinity" of two of the 1,250 tracts of land falling under the BLM review program.⁴²

The Supreme Court's decision dealt a severe blow to environmental advocacy groups which engaged in "programmatically" litigation as a method of changing environmental policy and thereby redistributing property rights. In his decision for the Court, Scalia wrote that a plaintiff can only challenge *final agency actions*, not an entire agency policy. A plaintiff

cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department [of the Interior] or in the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm.⁴³

This means that to effectively change policy, an environmental advocacy group must find, *for every final action of the agency*, individuals who meet the injury-in-fact requirements for standing. Greve writes, "The underlying notion is that a particular hiker's loss of the enjoyment of a particular park—as a consequence of a determination made under the land withdrawal review program—is a tangible, meaningful 'harm,' whereas the National Wildlife Federation's concerns over the entire program are not."⁴⁴ *National Wildlife Federation* imposed a high cost on environmental advocacy groups seeking to effect a more rigorous enforcement of environmental regulations, or to accomplish other broadly stated goals through the courts.

⁴² See Greve (1996), pp. 46, 47.

⁴³ *National Wildlife Federation*, 497 U.S., at 891, quoted in Greve (1996), p. 48.

⁴⁴ Greve (1996), p. 48.

Defenders of Wildlife (1992)

The *Defenders of Wildlife* case indicated that the Supreme Court had indeed made a substantive change in its approach to citizen suits and standing to sue in environmental cases. Members of the *Defenders of Wildlife* advocacy group, who had traveled to Egypt and Sri Lanka to observe wildlife, asserted that they were being deprived of the opportunity to observe endangered species in these countries at some point in the future because of the threat to those species posed by U.S. government-funded development projects.

The Court's opinion, again delivered by Justice Scalia, emphatically denied the plaintiffs the standing they sought. Nexus theories advanced by the plaintiffs were dismissed as incompatible with *National Wildlife Federation* and "beyond all reason."⁴⁵ Further, the opinion included a restatement of the "separation of powers" argument against universal standing:

To 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," Art. II, §3.⁴⁶

And, further,

"The province of the court," as Chief Justice Marshall said in *Marbury v. Madison*... "is, solely, to decide on the rights of individuals." Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.⁴⁷

Especially notable is the apparent rejection of Congress' power to manufacture standing rights. The judiciary, the *Defenders of Wildlife* decision indicates, need not grant standing merely because Congress has granted such a right through legislation:

[T]here is absolutely no basis for making the Article III injury turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts, rather than of the political branches..⁴⁸

⁴⁵ *Defenders of Wildlife*, 112 S. Ct. at 2139, quoted in Greve (1996), p. 53.

⁴⁶ *Ibid.*, at 2145, quoted in Greve (1996), p. 54.

⁴⁷ *Ibid.*, at 2145.

⁴⁸ *Ibid.*, at 2144-45.

If the concrete injury requirement has the separation of powers significance we have always said, the answer must be obvious: to 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," Art. II, 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and coequal department," *Massachusetts v. Mellon*, 262 U.S., at 489, and to become "virtually continuing monitors of the wisdom and soundness of Executive action." *Allen*, 468 U.S., at 760.... We have always rejected that vision of our role.⁴⁹

The "concrete injury requirement" employed here by the Supreme Court remained somewhat vague, however. The Court's opinion concluded with the statement:

Nothing in this contradicts the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth*, 422 U.S., at 500. [Statutory] broadening [of] 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.⁵⁰

If Congress can "broaden the categories of injury," why not broaden them to the extent that "injury" is defined as a "procedural" injury? Other plaintiffs, particularly in civil rights cases,⁵¹ have been granted standing when the alleged injury is less than "concrete."⁵²

National Wildlife Federation and *Defenders of Wildlife* acted together to require more tangible types of harm for standing in environmental cases. By raising the barriers to standing, these two cases added to the costs environmental advocacy groups must incur to file citizen suits. Crystallizing the losses to environmental groups were subsequent

⁴⁹ *Ibid.*, at 2145.

⁵⁰ *Ibid.*, at 2145.

⁵¹ See *University of California Board of Regents v. Bakke*, 438 U.S. 265 (1978), in which the court granted standing to Bakke in spite of the fact that he had "failed to carry his burden of proving that he would have been admitted but for the existence of the special [admissions] program." The Supreme Court, rather than requiring Bakke to prove injury in fact, affirmed that the burden fell on the university to demonstrate the lack of injury. See also *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 113 S. Ct. 2297 (1993).

⁵² Greve (1996) contends that, first, civil rights cases concern a particular plaintiff with a particular "diminished opportunity," while environmental cases filed by advocacy groups are likely to concern a broad class of plaintiffs for whom immediate injury is insupportable in a court. Second, he writes, "The distinction between concrete, de facto injuries (which, with a little help from Congress, confer standing) and less tangible or more general types of harm (which is not) is often a matter of degree, and may look arbitrary in particular cases. But to leap from this observation to the conclusion that the concrete injury requirement is itself arbitrary is a symptom of acute lawyers' disease. Almost any distinction will look implausible in the marginal cases that become the stuff of litigation, but may still work

circuit court cases that look to *National Wildlife Federation* or *Defenders of Wildlife* for support. *Conservation Law Foundation of New England v. Reilly*⁵³ denied New England environmental advocacy groups the standing to challenge EPA policy with regard to federal waste sites nationwide. The only sites for which the advocacy groups were able to obtain standing under the CERCLA citizen suit provision were the ten particular sites in New England where individuals had alleged direct harm.⁵⁴

Bennett v. Spear (1997)

In 1997, *Bennett v. Spear* provided standing to environmental resource owners (in this case, ranchers) who had been denied use of their property due to a federal agency's restrictive actions.⁵⁵ The circuit court's overturned ruling in *Bennett* was consistent with many circuit court opinions to that point. The case was an Endangered Species Act case; using the ESA's broad citizen suit provision, Scalia found support for the ranchers' arguments that they had standing to sue:

It is true that the plaintiffs here are seeking to prevent application of environmental restrictions rather than to implement them. But the "any person" formulation applies to all the causes of action authorized...—not only to actions against private violators of environmental restrictions, and not only to actions against the Secretary asserting underenforcement..., but also to actions against the Secretary asserting overenforcement.... [T]he citizen suit provision does favor environmentalists in that it covers all private violations of the Act but not all failures of the Secretary to meet his administrative responsibilities; but there is no textual basis for saying that its expansion of standing requirements applies to environmentalists alone. The Court of Appeals therefore erred in concluding that petitioners lacked standing under the zone of interests test to bring their claims under the ESA's citizen suit provision.

Bennett presented environmentalists with continuing difficulties in achieving their goals through the courts, and reduced a major source of pressure on agencies like the EPA to expend funds on enforcement activities. More recently, the 1999 *Steel Co. v.*

well over the vast range of ordinary cases—most of which never surface in court *because* the distinction works tolerably well." [Greve (1996), p. 58.]

⁵³ 950 F.2d 38 (1st Cir. 1991).

⁵⁴ See also *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993); *Western Radio Services v. Espy*, 79 F.3d 896 (9th Cir. No. 94-35605, filed March 18, 1996); *Inland Empire v. Glickman* (9th Cir. No. 95-36272, filed May 8, 1996); *Wilderness Society v. Alcock* (11th Cir. No. 94-9369, May 22, 1996); *Louisiana Environmental Action Network v. Browner* (D.C. Cir. No. 94-1042, decided July 9, 1996); *Animal Legal Defense Fund v. Glickman* (D.C. Cir. No. 97-5009, decided December 9, 1997); *National Solid Waste v. Charles Williams* (8th Cir. No. 97-2987, filed June 12, 1998);

⁵⁵ 117 S. Ct. 1154 (1997).

*Citizens for a Better Environment*⁵⁶ decision seemed to confirm a shift back to a more conservative, Hohfeldian view of standing. As the next section shows, however, this did not last.

III. Opening a can of harms: Recent developments in standing case law

On January 12, 2000, the U.S. Supreme Court handed down its decision in *Friends of the Earth v. Laidlaw*.⁵⁷ The 7-2 opinion, delivered by Justice Ginsburg, marked an important reversal of the decade-long trend toward a strict reading of standing requirements in environmental citizen suits. *Laidlaw* could prove to be the end of what some legal scholars have disparagingly called “Scalia’s *Lujan* project.”

Friends of the Earth and other plaintiff-petitioners filed a citizen suit against Laidlaw Environmental Services in 1992, alleging noncompliance with a National Pollutant Discharge Elimination System permit at Laidlaw’s wastewater treatment plant in Roebuck, South Carolina. In 1997, the District Court assessed a civil penalty of over \$400,000. On appeal to the Fourth Circuit, the court reasoned that since Laidlaw had come into compliance with its permit before the judgment by the District Court, the case had become moot.⁵⁸ The case was appealed to the Supreme Court.

The Court reversed the Fourth Circuit, rejecting Laidlaw’s mootness claim. This landmark decision may be expected to encourage future citizen suits.⁵⁹ In the majority opinion of the Court, plaintiffs’ *concern* that water was polluted, and a *belief* that the pollution had reduced the value of their homes was deemed sufficient for injury in fact. No actual damage to the environment was found by the district court. Clearly, with the threshold for a “concrete and particularized injury”⁶⁰ so lowered, environmental interest groups could begin to see the standing rights they lost in the 1990s reinstated.

⁵⁶ 523 U.S. 83 (1998).

⁵⁷ *Friends of the Earth v. Laidlaw*, 120 S.Ct. 693 (2000) *rev’d and remanded*, 149 F. 3d 303 (4th Cir. 1998).

⁵⁸ 149 F. 3d. 303 (4th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3397 (March 1, 1999).

⁵⁹ The mootness doctrine and injury-in-fact standing, though different, are both undergirded by Article III. In *Laidlaw*, the Fourth Circuit had assumed injury-in-fact standing because they were convinced that the case had become moot. The Supreme Court, in rejecting the circuit court’s assessment of mootness, reexamined the standing issue in light of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

⁶⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, at 560 (1992).

The majority opinion of the Court in *Laidlaw* was that “concern” about possible damages from emissions by Laidlaw Environmental Services was adequate to show harm, even though there appeared no evidence that Laidlaw’s emissions actually caused any environmental damage. Certainly, concern can impose psychic costs on individuals, and such psychic costs can be legitimately included in a reasonable assessment of benefits and costs. However, this ruling has the bizarre consequence of assigning significant weight to concerns that appear to have been unfounded.

As in all other cases, resources available to courts are scarce. One economic function of standing rules is to ration those scarce resources in such a way that relatively more meritorious and substantive cases are adjudicated, while less substantive cases are resolved in other ways. For the Court to rule in favor of standing for an individual who “was concerned that the river was polluted by Laidlaw’s discharges,” despite the (implicit) finding that Laidlaw’s discharges did not in fact pollute the river, appears to be pure folly. It would appear to open the court system to a potential barrage of trivial suits. Significantly, there is apparently nothing limiting the application of this principle outside environmental cases. In antitrust cases, for example, the *concern* of monopolization might be enough to warrant standing.

Additionally, because of the complexity of the economic and environmental systems being regulated, environmental laws are inherently imprecise and vague on many points. Hence, reasonable enforcement of such laws must depend on reasonable decisions by administrators and courts in determining when violations are sufficiently serious to warrant action. If “concern,” no matter how unfounded that concern, is now adequate to not only gain access to the court but to also warrant punitive action, then the Court has made a major step toward removing all reason from this particular facet of the judicial process.

IV. Standing, regulation, and profit from politics

It is tempting, and conventional, to assume that environmental advocacy groups are interested in enforcing environmental regulations for ideological or public-interest reasons. However, when we are concerned with the standing issue and citizen suit

provisions, this may oversimplify the motives of these groups. Even if environmentalists are ideologically motivated, i.e., they wish to maximize environmental purity, they are still subject to budget constraints. Obtaining pecuniary rewards from helping to transfer property rights allows for expanded activities in other areas. Economic incentives do matter even if environmentalists are motivated primarily by altruism (i.e. environmental purity).⁶¹

As Greve shows clearly, there can be financial returns to filing citizen suits, and environmental advocacy groups have not neglected the political profits that broadened standing makes possible.⁶² In fact, the revenues that citizen suit provisions made possible for environmental advocacy groups can be so substantial that the provisions may be considered “an off-budget entitlement program for the environmental movement.”⁶³

Though settlements obtained by citizen suits filed against private firms are ostensibly structured to avoid providing a profit motive to citizen enforcers, there are two elements common in these settlements that can produce a pecuniary reward to citizen suits. The first element is the set of “credit” programs, which amount to payments to environmental organizations; the second is the above-cost reimbursement of attorneys’ fees.

Environmental groups are not the only ones to use environmental law to serve their interests. Rival business groups can use it as well. Other work has demonstrated that a polluting industry can (and does) use environmental regulation to raise rivals’ costs, perhaps form a legal cartel to restrict entry, and enjoy monopoly rents. While economists can make assertions about what approach to regulation would be most efficient, or welfare-maximizing for society as a whole, political outcomes more often reflect the values of special interests and political wealth-brokers.⁶⁴ Here the rent-seeking approach

⁶¹ See Michael S. Greve, *The Private Enforcement of Environmental Law*. 65 TUL. L. R. 339-394, 363 (1990).

⁶² *Id.* at 394.

⁶³ *Id.* at 341.

⁶⁴ On regulatory outcomes, Maloney and McCormick write:

The maze of environmental quality regulation is overwhelming and bears little resemblance to the efficiency criteria proposed in the economics literature. Many regulatory techniques—such as technology-specific regulations, differential standards for old versus new firms, uniform percentage reductions across pollution sources, and the inalienability of pollution permits—are hard to understand on the surface. Some of the confusion is the result of only focusing on the

is helpful. Special interest groups seeking rents may be able to influence the rule-making and rule-interpreting process in order to gain supra-normal profits for themselves. Public-interest goals, such as a cleaner environment, may be sacrificed for the sake of special-interest goals.⁶⁵

The rent-seeking or special interest approach is often applied to regulation, but applications to standing have been rare. Our approach searches for the winners and losers created by various standing rules, and attempts to determine if the winners are using standing rules to gain profits by politically restricting competitors.

If standing is denied to one group and given to another, it may be that command and control regulation is more likely to result because market-based systems of regulation (e.g. marketable permits) do not work as well for wealth transfers. Competitive markets do not generate artificial output or price restrictions in the way that command-and-control regulation does. Any environmental regulation that relies upon competitive markets for the allocation of property rights in an environmental resource will enjoy efficiencies not found in command and control regulation.

Buchanan and Tullock lend support to the view that command and control regulation is more suitable to wealth transfers than some other pollution reduction schemes (specifically, emissions taxes).⁶⁶ Command and control regulation produces an output restriction, which leads to price increases enjoyed by firms in the regulated industry.⁶⁷ Existing firms may be exempt from certain requirements due to grandfather

externality effects of air and water pollution and ignoring the effects of price changes on the regulated industry.

Michael T. Maloney and Robert E. McCormick, *A Positive Theory of Environmental Quality Regulation*, 25 J. L. & ECON. 99-123, 100 (1982).

⁶⁵ For applications of this theory to environmental regulation, see James M. Buchanan and Gordon Tullock, *Polluters' "Profit" and Political Response*, 65 AM. ECON. REV. 139-147 (1975); Maloney & McCormick, see *id.*; David W. Riggs, *Acid Rain and the Clean Air Act: Lessons in Damage Control*, in TAKING THE ENVIRONMENT SERIOUSLY, (Roger Meiners and Bruce Yandle eds.) (Rowman and Littlefield 1993); Richard L. Stroup and Jane S. Shaw, *Environmental Harms from Federal Government Policy*, in TAKING THE ENVIRONMENT SERIOUSLY, (Roger Meiners and Bruce Yandle eds.) (Rowman and Littlefield 1993); and BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT: CREATING WEALTH IN HUMMINGBIRD ECONOMIES (Rowman and Littlefield 1997).

⁶⁶ See *id.*, Buchanan and Tullock, at 142.

⁶⁷ Maloney and McCormick found that the final announcement of emission rules that affected the U.S. copper industry boosted the stock prices of major firms in the industry. It is of interest that the EPA had indicated before the announcement that, if the rules were made final, there would never be another copper smelter built in the United States. Maloney and McCormick found similar increases in stock prices of textile firms after the promulgation of an Occupational Safety and Health Administration cotton dust

clauses, or they at least may be able to better absorb the cost of regulation than marginal competitors.⁶⁸ Command and control, technology-based regulation is thus a cartelizing influence on industry, resulting in political profits for the regulated.

[U]nder regulation firms may well secure pecuniary gains from the imposition of direct controls that reduce total industry output. To the extent that the restriction is achieved by the assignment of production quotas to existing firms, net profits may be present even for the short term and are more likely to arise after adjustments in plant. In effect, regulation in this sense is the directional equivalent of cartel formation provided that the individual firm's assigned quota falls within the limited range over which average cost falls below price.⁶⁹

Regulation not only corrects a resource misallocation, but it creates a scarcity rent as well. In the recent history of environmental quality, the common access problem has been addressed by federal and state agencies through a standards-based approach, rather than through the enforcement of tradable property rights. As a consequence, rents from the right to use these assets have accrued to producers.⁷⁰

The Achilles heel of all cartels is usually the lack of enforcement—the ability to punish cartel members that produce more than their assigned quota and to keep would-be competitors out of the industry. Under liberalized standing rules, the cartel of environmental advocacy groups helps enforce the industrial cartels. As we discussed above, payoffs to the enforcers come in multiple forms, notably above-cost reimbursements of attorneys' fees and so-called “credit projects,” or payments to environmental advocacy groups as part of settlements.

Examples of industry-environmentalist cooperation are numerous. Blakeman Early of the Sierra Club stated forthrightly that “The commercial waste industry has an interest in improving regulations sufficiently to drive mom-and-pop operations out of business.”⁷¹ Adler notes that WMX, the largest waste management company in the United States, “has funded the National Audubon Society, National Wildlife Federation, Natural Resources Defense Council, Wilderness Society, and World Resources Institute, typically giving over \$700,000 annually to environmental causes.”⁷² A former director of environmental affairs for WMX, William Y. Brown, who also served as acting director of

standard. See Maloney and McCormick, *supra*, note 68.

⁶⁸ See *id.* at 101; see also Michael T. Maloney and Gordon L. Brady, *Capital Turnover and Marketable Pollution Rights*, 31 J. L. & ECON. 204-207, 225 (1988).

⁶⁹ Buchanan and Tullock, *supra* note 69, at 142.

⁷⁰ Maloney and McCormick, *supra* note 68, at 99.

⁷¹ ADLER, *supra* note 34, at 97.

⁷² *Id.*

the Environmental Defense Fund, acknowledged, “We’re in a position to benefit from the same objectives that [environmental groups] are pursuing.... Stricter legislation is environmentally good and it also helps our business.”⁷³

Yandle explains the advantage presented to the environmental advocacy groups from a movement toward statutory law and unlimited standing to sue:

The environmental statutes offered another attractive feature for environmentalists who could not make a valid claim of damages in a common-law court, but who nonetheless felt driven to correct perceived environmental harms. Under the statutes, any citizen could file an administrative complaint, which merely had to show an infraction of rules created by statute, and seek access to a federal court. Under federal statutes, infractions of federal rules automatically contain a federal question. The old common-law requirements of standing and demonstration of damages were not required. In effect, the statute law of the 1970s made every U.S. citizen an environmental deputy.⁷⁴

The environmentalist interest groups will tend to support this deputization because it adds to the power of their cobelligerents. Any environmental legislation that contributes to output limitation and the cartelization of industry will be more strictly enforced under citizen suit provisions.

One citizen suit brought against a Pennsylvania cement kiln industry illustrates clearly how liberalized standing can be used to raise rivals’ costs.⁷⁵ Cement manufacturing entails the use of a large amount of energy, and about 25 cement kilns in the United States use hazardous waste-derived fuels (HWDFs) as a remunerative partial substitute for coal. Because hazardous wastes can be disposed of in cement kilns while meeting federal emissions regulations, cement manufacturers can receive substantial revenue from burning this waste. Keystone Cement Co., of Bath, Pennsylvania, received about 15% of its 1995 revenues from HWDF use.⁷⁶

In September 1995, Pennsylvania Environmental Enforcement Project (PEEP), a local citizens’ group based in the Bath area, filed suit against Keystone under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA).⁷⁷ PEEP alleged

⁷³ *Id.*

⁷⁴ Yandle, *supra* note 69, at 108.

⁷⁵ *Pennsylvania Environmental Enforcement Project, Inc. v. Keystone Cement Company*, C.A. No. 95-5869 (E. D. Pa.).

⁷⁶ SCOTT H SEGAL, *THE WOLF IN SHEEP’S CLOTHING: THE MISUSE OF CITIZENS SUITS BY ECONOMIC COMPETITORS 2* (1997).

⁷⁷ *Pennsylvania Environmental Enforcement Project, Inc. v. Keystone Cement Company*, C.A. No. 95-5869 (E. D. Pa.).

that Keystone had violated RCRA as well as the Clean Air Act and the Emergency Planning and Community Right-to-Know Act. Calling the cement kiln an “imminent” threat to area residents, PEEP sought to enjoin Keystone from burning hazardous waste in its kilns.

The RCRA of 1976 gave birth to a strictly regulated hazardous waste incineration industry. U.S. industry produces about 250 million tons of hazardous waste annually, and with incinerators charging hundreds of dollars per ton destroyed, the incineration industry expanded rapidly. In the 1980s, the cement industry started burning liquid hazardous waste in its kilns, taking market share away from the incinerators. While incinerators charged \$284 per ton to burn waste, cement kilns charged only \$100 per ton (in 1990). The cement kiln’s cost advantage over incinerators grew more pronounced once new technology allowed kilns to burn solid waste as well. Over 60 percent of the incinerator industry’s market had been captured by cement kilns by 1991.⁷⁸

Understandably, this competition provoked a hostile reaction from the incinerator industry, which formed the Association for Responsible Thermal Treatment (ARTT) in December of 1993. The stated purpose of the association was “to advocate that combustion of hazardous waste be done using the most advanced technology possible and under the most stringent standards.”⁷⁹ Both industries have been engaged in a lobbying and public relations battle to tilt environmental regulation in their favor.

The Keystone case demonstrates how citizen suit provisions provided another avenue for firms to raise rivals’ costs and gain rents. PEEP, which was incorporated only weeks before the suit was filed, was found to have been heavily supported by one of Keystone’s competitors—a hazardous waste incinerator. Within eight months’ time, PEEP received at least \$250,000 from Rollins Environmental Services, an incinerator and one of three members of ARTT. A PEEP representative testified that, unlike its parent environmental organization, PEEP did not oppose all hazardous waste incineration, but only that which occurred in cement kilns. After the suit was settled, PEEP dissolved.

Initially, Rollins denied association with PEEP, but a later admission by a Rollins spokesperson and court-released documents prove the connection. Furthermore, the

⁷⁸ Bruce Rubenstein, *Outraged Citizens or Public Relations Ploy? Shills Front for Corporation in Pennsylvania*, 6 CORP. LEGAL TIMES 61 (1996).

documents clearly show an effort by Rollins to raise the costs of cement kiln rivals. One Rollins memo lists the cement kilns “most vulnerable” to additional regulation, noting: “Kilns or companies with the smallest waste rates should be the most vulnerable.... For these kilns the cost of regulatory and compliance efforts would be a higher percentage of waste revenues. Any additional costs would ‘have a smaller denominator’ in affecting the cost per pound burned.”⁸⁰ In other words, enforced regulation would raise average costs at marginal kilns by a higher percentage than at kilns that used a larger proportion of hazardous waste.

Christopher Marraro, Keystone’s attorney, commented that the PEEP citizen suit was part of “a strategy put forth by commercial hazardous waste incinerators, or at least by a sub-group, to use citizen groups to bring lawsuits for the purpose of trying to achieve in administrative or legislative forums—to shut cement kilns out of the hazardous waste market.”⁸¹

Certainly the Keystone case is not isolated. A Midlothian, Texas cement kiln has been engaged in a similar battle with citizen groups who have received substantial support from incinerators.⁸² In Michigan, the Huron Environmental Activist League (HEAL) filed a citizen suit against Lafarge, another hazardous waste-burning cement company.⁸³ The Lafarge Vice President of Environmental Affairs suspects that their competitors are funding the opposition in an effort to raise Lafarge’s costs. “We

⁷⁹ Lori Tripoli, *Think Globally, Sue Locally: Uncovering the Citizen Front*, 10 *INSIDE LITIG.* 1-5, 4 (1996).

⁸⁰ Memo, *Cement Kiln Strategy*, from Charles Lamb to Phil Retallick (Nov. 17, 1995).

⁸¹ Tripoli, *supra* note 93, at 3.

⁸² Though the defendants cannot prove that the incinerator group initiated the lawsuit, “Downwinders at Risk,” a citizen group, has received airline fares, copiers, reimbursement of phone expenditures, and other donations from ARTT. The American Lung Association (ALA) has used a \$46,000 grant from the ARTT for funding the prosecution, a grant which ARTT specified had to be used against cement kilns in Texas. [personal correspondence with Harold Green, TXI Director of Corporate Communications] Shortly after the founding of ARTT in 1993, it made an initial \$150,000 donation to the ALA, which has been followed by other donations such as the one mentioned above. The Cement Kiln Recycling Coalition has argued that the donations have been used in a multi-state campaign “focused exclusively on attacking cement kilns that burn waste. No such ALA programs have been aimed at commercial incinerators.” Cement Kiln Recycling Coalition, *Cement Group Calls for Investigation of American Lung Association* (press release, January 26, 1995). For more on the ARTT—ALA connection, see James T. Bennett, *Selling its reputation: The American Lung Association* *ALTERNATIVES IN PHILANTHROPY* 1-6 (1995); and Yandle, *supra* note 69, at 71, 72, also briefly mentions various cooperative efforts between hazardous waste incinerators and environmental groups.

⁸³ *Huron Environmental Activist League v. Harding*, No. 95-81890-CE (Mich. Cir. Ct. Ingham County, filed Dec. 1, 1995).

suspected they may be getting some funding provided by ARTT to the American Lung Association and then to HEAL.”⁸⁴

The use of citizen suits to gain political profits is not confined to the cement kiln industry. Northrup and White find that construction unions have used a wide variety of strategies, including citizen suits, to impose costs on non-union contractors.⁸⁵ Unions have typically begun their intervention in the construction permitting process

by claiming that the user’s application does not protect sufficiently the air or water quality, that drainage or waste disposal plans are insufficient, or that the construction plan violates other environmental regulations. The union posture may be supported by environmental groups and by “consumer groups” that spring up and likely are controlled or funded by unions. ...Often...the union action seems more designed to inflict costs on the users than to protect the environment.⁸⁶

Northrup and White provide multiple examples of union uses of suits against electric utilities and oil and gas companies. One such case, filed under the Clean Water Act, is *Labor for the Public Interest v. Union Oil*.⁸⁷ Labor for the Public Interest sought an injunction against Union Oil’s alleged pollution of San Pablo Bay, in addition to up to \$25,000 in civil penalties per violation.⁸⁸

Insofar as industries benefit from cartelizing environmental rules, then, industries will be assisted by citizen suit provisions. As federal courts moved toward more conservative standing rules in the 1990s, the enforcement mechanism for the industrial cartels was seriously damaged.

Laidlaw and industrial rent-seekers

The *National Wildlife Federation*⁸⁹ and *Defenders of Wildlife*⁹⁰ cases, followed by *Steel Co.*⁹¹ and *Bennett v. Spear*⁹², indicated a shift in the Supreme Court away from the liberalized standing requirements of the 1970s and 1980s. As standing was made more

⁸⁴ Tripoli, *supra* note 93, at 4.

⁸⁵ Herbert R. Northrup and Augustus T. White, *Environmental Regulation to Win Jobs: Cases, Impact, and Legal Challenges*, 19 HARV. J. L. & PUB. POL’Y 55-119 (1995).

⁸⁶ *Id.* at 61, 62.

⁸⁷ *Labor for the Public Interest v. Union Oil* No. C92-2531 (N.D. Cal. Nov. 19, 1993).

⁸⁸ Northrup and White, *supra* note 99, at 81.

⁸⁹ 497 U.S. 871, 889 (1990).

⁹⁰ 504 U.S. 555 (1992).

⁹¹ 523 U.S. 83 (1998).

⁹² 520 U.S. 154 (1997).

difficult for environmental interest groups, many industries were threatened with loss of rents as the enforcement program for cartelizing regulation was deprived of a key component. Anything that works to decrease enforcement endangers industrial cartels. Though not a subscriber to the rent-seeking idea, Mintz comments that a particular period of lower enforcement at EPA was not viewed favorably by some firms: “EPA’s weakened enforcement effort also met with increasing disenchantment from some elements of industry. During this period, a number of regulated firms became concerned that the decline in EPA enforcement was contrary to their interests.”⁹³ The Court’s decision in *Friends of the Earth v. Laidlaw* marks a return to less stringent standing requirements and could reintroduce more effective regulation, with a corresponding reinforcement of industrial cartels.⁹⁴

V. The chairman’s problem and calculation by judges

Bertrand de Jouvenel (1961) argued that the “chairman’s problem” justified limitations on free speech and assembly rights. The chairman must allocate “time or space in an assembly hall or newspaper, or in front of a microphone, where the writers or speakers believe that they have a ‘right’ of free speech to the use of the resource.”⁹⁵

Judges in any appellate court face a “chairman’s problem,” or rationing problem when deciding which cases to hear. The scarce resource of judicial decisions is not allocated by price; therefore it must be allocated in some other way.

Calculation by judges of the total costs and total benefits of deciding specific cases is impossible. An altruistic judge might attempt such a calculation, but the hope of consistently producing efficient outcomes is quite dim.⁹⁶ A self interested judge would naturally choose to hear cases he expects to enhance his personal reputation and wealth—there is no necessary correlation between such cases and those cases which would provide the greatest benefit to the litigants (much less society) if heard.

⁹³ JOEL A. MINTZ, ENFORCEMENT AT THE EPA, 50, 51 (1995).

⁹⁴ *Friends of the Earth v. Laidlaw*, 120 S.Ct. 693 (2000), *rev’d and remanded*, 149 F. 3d 303 (4th Cir. 1998).

⁹⁵ Rothbard (1998), p. 115.

⁹⁶ Mises (1990) [Economic Calculation in the Socialist Commonwealth]

The solution to de Jouvenel's "chairman's problem" is, as Rothbard (1998) puts it, "recasting the concept of rights in terms of private property rather than in terms of freedom of speech or assembly."⁹⁷

The chairman of an assembly *could* ask for price bids for scarce places at the podium and then award the places to the highest bidders. The radio producer could do the same with discussants on his program. (In effect, this is what producers do when they sell time to individual sponsors.) There would then be no shortages, and no feelings of resentment at a promise ("equal access" of the public to the column, podium, or microphone) reneged.

But beyond this, as Rothbard points out, the owner must be the ultimate allocator of permission to speak. Therefore, as long as the owner is concerned for his own well-being, he will attempt to make such allocations as maximize his satisfaction.

An arbitration firm would, if confronted with more cases than it could adjudicate with its limited resources, would have the incentive to choose those cases which would provide it with the highest profit. Presumably, the most profitable cases are those which either enhance the reputation of the firm or which offer high pecuniary compensation from the litigants.

Efficiency through conservative standing

Each arbitrator will then have to establish standing criteria. One can imagine many versions of standing doctrine which might evolve in different arbitration decisions, but we would expect private arbitrators to come up with something similar to the Hohfeldian standing doctrine discussed in section II. This is because restrictive barriers to standing has a unique element of efficiency. It provides a limited set of potential plaintiffs which may be approached by a potential offender for bargaining. Without some limitation of plaintiffs to those who are tangibly and individually harmed by an action, there would be no way for a potential defendant to approach each individual plaintiff to secure permission and/or offer compensation for the offensive act he is considering. Possibly profitable exchanges could not occur, and potential wealth is not created.

For instance, suppose a forester is considering harvesting activity that would add silt-bearing runoff to a stream and possibly harm those owning the stream or property along the stream. To avoid a potential nuisance suit, he approaches the stream owner or

⁹⁷ Rothbard (1998), p. 115.

property owners along the stream, and offers compensation in exchange for permission to pollute. If he succeeds in obtaining these rights, and has not omitted a property owner, then he is secure from legitimate lawsuits. If anyone can sue, including those claiming a “concern” about pollution, there is no way to contract out of the problem. An anti-logging group in another state could assert an “aesthetic or conservational” interest in the purity of the stream’s water, and succeed in enjoining the forester’s harvesting. Certainly members of such a group could actually suffer psychic harm from the forester’s activity. However, the need for predictability in all our activities seems to necessitate a conservative view of standing.

Sidestepping standing through deregulation

Today, of course, there is little expectation that state adjudication will give way to private arbitration on anything like a large scale. Regardless of expectations, however, a reduction in the need for adjudication would reduce the need to decide standing issues. Standing has come to the forefront of judicial controversy at the same time that government regulation has exploded into almost every area of human decisionmaking.

Citizen suit provisions are now a fixture in federal environmental regulation, and in many other regulatory statutes. If it is not politically feasible to strike citizen suit provisions, then reducing additions to regulation, or repealing current laws, would eliminate some of the fuel for standing controversies. “Concerned citizens” cannot sue for the enforcement of a statute that does not exist. However, the broad scope of many environmental statutes affords a wide variety of “harms” from which to choose, and consequently quite a lot of deregulation will be necessary before a significant impact can be felt.

VI. Summary and conclusion

Governments seem to be increasingly relying upon private parties to enforce regulations. This might be seen as an opportunity for individuals to reduce the negative effects of regulation by refusing to enforce the law. However, citizen suit provisions and the like operate in such a way as to offer substantial pecuniary rewards (much like

bounties) to private parties who act as little “attorney generals.” Often the government is a defendant in these cases, but the prevailing outcome of such cases is to provide a judicial mandate that the agency become more stringent, less flexible, in its enforcement of already oppressive regulation. Whether public parties or private parties are the defendants, it seems that the traditional requirement that a specific, individualized harm be suffered by the plaintiff has been virtually eliminated in many areas of law.

This paper has provided a history of standing case law. We have covered recent developments in standing case law and shown why there is justifiable concern over the recent direction taken by the Supreme Court in *Friends of the Earth v. Laidlaw*. It seems clear that standing, coupled with regulation, can be used for acquiring political profit by legally restricting competitors. We believe the standing issue is a manifestation of the “chairman’s problem,” and that the problem of judicial calculation may be at least partially relegated to the sidelines through deregulation.