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The Law of Standing and Its Relation to the Environment: As Compared to Standing to Assert the Constitutional Rights of Third Parties and Standing under the Fourth Amendment

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Comments

The Law of Standing and its Relation to the Environment: As Compared to Standing to Assert the Constitutional Rights of Third Parties and Standing under the Fourth Amendment

In 1965, the Forest Service of the Department of Agriculture published a prospectus inviting interested parties to submit bids for the construction of a year-around recreational resort in Mineral King Valley in the Sequoia National Forest. Walt Disney Productions, according to the Secretary of Agriculture, submitted the best proposal. Disney Productions' plan for the project was approved by the Forest Service in 1969. A new access highway and electrical transmission lines were also given approval to be built.

The final plan would result in a $35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate some 14,000 visitors a day. In the past, Mineral King Valley had been relatively inaccessible and the number of visitors was limited; this new complex would alter the quasi-wilderness nature of the Valley.

The commercialization of Mineral King Valley will certainly have ramifications on the environment of that area. If the Valley is haphazardly developed, a loss of the quasi-wilderness nature will result. This loss will have been occasioned by action taken by the Department of Agriculture.

If an injury will result from governmental action, it is open to question how to prevent that loss. In the Mineral King Valley situation, an injunction to restrain the granting of permits for construction is one remedy available. The problem is who can seek the injunction. Before a court reviews governmental agency decisions, it must insure the person seeking relief is the proper party to do so. Phrased in different

terms, the plaintiff must be able to show he has "standing" to sue for the relief requested.

STANDING

The elementary reasoning to permit one to judicially challenge governmental action is basically two-fold. A principle of justice must prevail, so that one who is hurt by illegal action will have a remedy.[1] Secondly, the granting of standing provides a healthy check on governmental action.

Judicial challenge in federal courts is defined and limited by article III of the Constitution.[2] In terms relevant to the question of standing in environmental suits, judicial power of the federal courts is constitutionally limited to "cases or controversies." To fulfill the constitutional requirement, the courts presently hold that the plaintiff must have a "personal stake in the outcome."[3] Thus federal courts will not give an advisory opinion,[4] nor decide political questions.[5] Neither will they decide a question that has been mooted by subsequent development.[6] One must have standing to be within the jurisdiction of the federal courts.

EVOLUTION OF THE DOCTRINE OF STANDING: THE EARLY CASES

To understand the concept of standing, a knowledge of the historical progression of important cases is necessary. In the landmark case of *Massachusetts v. Mellon*,[7] a taxpayer sued the Secretary of the Treasury on the theory that federal expenditures under the Maternity Act were illegal because Congress exceeded its constitutional authority. The individual taxpayer was denied standing on the ground that she had not "sustained or is immediately in danger of sustaining some direct in-

1. *See, e.g.*, Administrative Procedure Act § 701, 5 U.S.C. § 701 (1970). The action of "each Authority of the Government of the United States" is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law."
2. U.S. CONST. art. III, § 2 provides: "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . [and] to controversies . . . ."
3. Flast v. Cohen, 392 U.S. 83, 98 (1968).
4. *See, e.g.*, Muskrat v. United States, 219 U.S. 346 (1911).
5. Commercial Trust Co. v. Miller, 262 U.S. 51 (1923).
6. *See, e.g.*, California v. San Pablo & Tulare R.R., 149 U.S. 308 (1893).
7. 262 U.S. 447 (1923) (also commonly cited as *Frothingham v. Mellon*).

jury . . . ."[8] The Supreme Court stated that the taxpayer's interest in the federal treasury was too minute to allow standing.[9]

In *Tennessee Electric Power Co. v. TVA*,[10] the Supreme Court refined its position in *Mellon* by clarifying what the plaintiff must prove in order to have standing.[11] One threatened with direct injury by governmental action may not challenge that action "unless the right invaded is a *legal* right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[12]

A partial clarification of standing criteria came in the Supreme Court's decision in *FCC v. Sanders Brothers Radio Station*.[13] The issue was whether the existing broadcasting station, which would be economically injured by competition, had standing to challenge the FCC's grant of a permit to a new station. Standing was granted under a statutory provision allowing judicial review by "any party aggrieved" by the actions of the FCC.[14] The Court recognized that Sanders Brothers had no traditional contract or tort right at stake but did fall within the statutory privilege provision espoused in *Tennessee Power*. Relying on the *Tennessee Power* rationale, the Court noted that Congress was of the opinion that a competitor would be the only one with a sufficient interest to bring to the courts any possible errors committed by administrative agencies.[15] Also, it was within legislative power to confer stand-

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8. *Id.* at 448.

9. *Id.* at 487. But, the Court at the same time distinguished municipal taxpayer suits and granted standing. Bradfield v. Roberts, 175 U.S. 291 (1889). This has been criticized by Professor Davis. He feels that today certain large corporations who pay enormous taxes cannot be said to have only a "minute" interest at stake in the federal treasury. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.09 (1958) [hereinafter cited as DAVIS]. Also this economic test fails to measure the plaintiff's interest in assuring a true adversary will represent his viewpoint. *See* Hennigan, *The Essence of Standing: The Basis of a Constitutional Right to be Heard*, 10 ARIZ. L. REV. 438 (1968).

10. 306 U.S. 118 (1939).

11. In *Tennessee Power* numerous competing electric companies sought to enjoin the Tennessee Valley Authority from distributing and selling electric power alleging unconstitutionality of this procedure. *Id.* at 135.

12. *Id.* at 137-38. For another example of the legal right theory, *see* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). If this legal test were the law, then no one could object to a statute outlawing a church or authorizing unlawful searches and seizures because these two examples are constitutional rights not expressed by the Court. These two examples could be property rights but the Supreme Court probably meant to say that the plaintiffs were asserting a legal right arising out of the Constitution. *See* 3 DAVIS, *supra* note 9, § 22.04.

13. 309 U.S. 470 (1940).

14. 47 U.S.C. § 402(b) (1970) provides for a right of appeal "by any . . . person who is aggrieved or whose interests are adversely affected . . . ."

15. 309 U.S. at 477.

ing to prosecute an appeal.[16] This was clearly within the holding of *Tennessee Power.*

The *Sanders Brothers* doctrine was further developed in *Scripps-Howard Radio, Inc. v. FCC.*[17] The FCC had granted a license to a radio station to change its broadcasting frequency and to increase its power. Scripps-Howard Radio Station broadcasting in the same state, operated on the same frequency. Scripps-Howard requested the FCC to vacate its order; but this was denied. Judicial review of that order was initiated under section 402(b) of the Communications Act of 1934.[18] Relying on the *Sanders Brothers* rationale as precedent, the Court held that private litigants have standing as representatives of the public interest.[19] But this is questionable for use as precedent because there is a basic difference between economic injury and the claim of injury as representatives of the public. Economic injury is direct and immediate harm while harm to the representative is minute and indirect.[20]

At this same time, several circuit courts developed the *Scripps-Howard* rationale.[21] The courts molded a private attorney general concept in which the private attorney general is allowed to vindicate the public interest.[22] In *Associated Industries, Inc. v. Ickes,*[23] an association of coal consumers challenged administrative orders directing an increase in the minimum price of coal. The court required the plaintiff-citizen show an invaded interest, one recognized at common law or by statute, to insure the proper criteria for standing. The court stated

16. *Id.*
17. 316 U.S. 4 (1942).
18. 47 U.S.C. § 402(b)(2) (1970).
19. 316 U.S. at 4.
20. More than likely, harm to the representative will be minute but there is a possibility it can be great. Nevertheless, *Scripps-Howard* juxtaposes Massachusetts v. Mellon, 262 U.S. 447 (1923), where the taxpayer was denied standing because her interests in the federal treasury were considered minute. This case shows that if Congress may grant standing in *Scripps-Howard,* it may provide similar statutory standing for the private attorney general concept in environmental lawsuits. Possibly § 304 of the Clean Air Act, 42 U.S.C. § 1857(h)(2) (1971), may implicitly grant a private attorney general suit when dealing with air pollution.
21. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot,* 320 U.S. 707 (1943). *See also* Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953) (upheld the standing of a consumer to challenge an order permitting the use of a synthetic source of vitamin A without disclosure on the label on the theory the consumer was to vindicate the rights of public); American President Lines Ltd. v. Federal Maritime Bd., 112 F. Supp. 346 (D.D.C. 1953) (upheld the standing of competitors to challenge an award of subsidies).
22. The private attorney general concept raises several interesting problems that have not been answered by the courts, such as the issue of whether the private attorney general can fully represent the rights of the public as a whole. Also, whether a decision that the private attorney general litigated would collaterally estop an individual who later felt that his interests were different and not fully represented.
23. 134 F.2d 694 (2d Cir.), *vacated as moot,* 320 U.S. 707 (1943).

that Congress can constitutionally confer on a private individual authority to bring suit to prevent a statutory violation.[24] The significance is that the *sole* purpose was to vindicate public interest. Where consumers are harmed and there is no official attacking the administrative decision, the private attorney general would have standing on behalf of the customers to seek judicial review of that decision.

One who purchases a campsite for a fee is a consumer just as one who purchases a ton of coal. Although the word consumer has a traditional economic connotation, it is asserted that users of national parks and forests are within the definition of consumer. If Congress can provide a private attorney general to protect the interest of coal users, it surely can protect the purchasers of campsites. The representative of coal users had a minute interest; yet the court allowed standing solely because he vindicated the public's interest. The representative of park users also has a minute interest; but he too can vindicate the public's interest. There is no logical difference between the two. The campsite and park users' representative should be given standing by a statutory grant.

One other circuit court decision, *Office of Communication of United Church of Christ v. FCC*,[25] applies to the environmental standing problem. In *Church of Christ,* an application was made for the renewal of a broadcast license. The court held that responsible representatives of the listening public had standing to contest a license renewal. The court conceded that not only do competitors have an interest at stake,[26] but the general public is "most directly concerned with and intimately affected by the performance of a licensee."[27] This is a practical test. It insures that only those with a genuine and legitimate interest participate in the litigation process. Several well-known groups have adequately demonstrated their concern for the environment. They are a legitimate interest group. This interest would provide a foundation for judicial review.

Change in the Doctrine

The Supreme Court announced in *Flast v. Cohen*[28] that the fundamental aspect of standing focuses on the party seeking relief and not on

24. *Id.* at 704. Review was based on § 6(b) of the Bituminous Coal Act, Act of Sept. 6, 1966, § 8(a), 80 Stat. 649, 651.
25. 359 F.2d 994 (D.C. Cir. 1966).
26. FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).
27. 359 F.2d at 1002.
28. 392 U.S. 83 (1968).

the questions of law he seeks to have adjudicated. The Court stressed that the gist of the problem of standing is whether the plaintiff has

> . . . alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the courts so largely depend for illumination of difficult constitutional questions.[29]

Although *Flast*, involving first amendment rights, is distinguishable on its facts from *Mellon*, *Flast* again placed the issue of whether a taxpayer has standing to challenge the legality of legislative action. In finding that standing existed, the Court determined that the difference between *Flast* and *Mellon* was the infringement of a constitutional right of the taxpayer as compared to a mere generalized grievance about governmental conduct.[30] The importance of *Flast* is that the inquiry shifted from the nature of the right asserted by the plaintiff (for example, contract, tort, or property right) to the nature of the plaintiff's injury as the determinative factor establishing standing.

The Supreme Court developed a broader concept of standing in *Association of Data Processing Service Organizations, Inc. v. Camp*.[31] The issue in *Data Processing* was whether sellers of data processing services had standing to challenge a ruling of the Comptroller of Currency allowing national banks to provide such services. The Court, in reversing the *Tennessee Electric* precedent that one is without standing unless the right invaded is a legal right, stated that the existence or nonexistence of a legal interest goes to the merits of the case, rather than being a criterion for the test of standing.[32] The new test requires the plaintiff either to show "injury in fact," either economic harm or otherwise, or, that the interest be arguably within the zone of interest to be protected by statute or constitutional guarantee.[33]

29. *Id.* at 99. Similar language can be found in Sierra Club v. Morton, 92 S. Ct. 1361, 1364 (1972).

30. In *Flast* the taxpayer alleged that the payment of federal funds in support of religious schools violated the first amendment. 392 U.S. at 86. In relation to the environmental problem, since there is no constitutional guarantee of clear air or water, the specific *Flast* holding is of no value but several commentators have made the argument that the ninth amendment provides the avenue for the constitutional theory. *See* Roberts, *The Right to a Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970); Comment, *Environment Law: New Legal Concepts in the Antipollution Fight*, 36 MO. L. REV. 78, 96 (1971).

31. 397 U.S. 150 (1970).

32. *Id.* at 153.

33. *Data Processing* involved a competitor's suit with current and future loss of profits at issue. Economic injury satisfied the "injury in fact" test. Secondly, under § 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864 (1970) ("No bank service corporation may engage in any activity other than the performance of bank services for banks."), a

By holding the legal interest test invalid, the plaintiff's interest is no longer limited to the narrow concept of "legal rights," but "may reflect 'aesthetic, conservational, and recreational' as well as economic values."[34] The result expanded the concept of standing.

Standing in the Lower Courts Before *Sierra Club*

Several lower federal courts have been confronted with the issue of whether a party who seeks to be the "champion" of the public's interest has standing to challenge agency action. There is a trend towards liberalization of the traditional law of standing.

Scenic Hudson Preservation Conference v. FPC[35] exemplifies this development. There the Federal Power Commission granted an electric power company a license to build a hydroelectric plant along the Hudson River in an "area of unique beauty and major historical significance."[36] This decision was challenged by adjoining landowners to the area and conservation groups. The Court agreed with the conservationists that the FPC must include environmental factors in granting licenses. More significantly, the Court specifically held that because the plaintiffs' (two local town associations and a conservation group) activities exhibited a special interest in "the aesthetic, conservational, and recreational aspects . . . ,"[37] the traditional personal economic injury need not be shown.[38]

Another exemplary case is *Citizens Committee for Hudson Valley v. Volpe*.[39] The plaintiffs, including the Sierra Club and a local conservation group, sought to declare that a permit granted by the Army Corp of Engineers was beyond the scope of authority granted under the Rivers and Harbors Act of 1899.[40] The Court held that the plaintiffs had standing to challenge governmental action concerning environmental resources as responsible representatives of the public interest.

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competing bank is within the zone of interests to be protected by the statute. *See also* Arnold Tours, Inc. v. Camp, 408 F.2d 1147 (1st Cir. 1969) (essentially holding that § 4's purpose would be to prohibit banks to engage in nonbanking activities).

34. 397 U.S. at 154.

35. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

36. *Id.* at 613.

37. *Id.* at 616.

38. Standing was initiated under § 313(b) of the Federal Power Act of 1935, 16 U.S.C. § 8251(b) (1970), which gives review to any party "aggrieved by an order issued by the Commission."

39. 425 F.2d 97 (2d Cir. 1970); *accord*, Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967).

40. 33 U.S.C. § 401 (1970).

This recognition is attributed to the private attorney general concept.[41] Similar conclusions have been reached by other federal courts.[42] These cases, specifically *Scenic Hudson* and *Citizens Committee*, led many to believe that the private attorney general concept would provide the new test to determine the issue of standing.[43]

Sierra Club

The idea of the private attorney general concept was tested in *Sierra Club v. Morton.*[44] In *Sierra Club*, the Supreme Court resolved the split of opinion among the circuit courts on the issue of whether conservationist organizations have standing. The Court held that "a mere 'interest in a problem' . . . is not sufficient . . ."[45] to establish judicial review.

The question of standing, as seen in *Baker v. Carr*,[46] centers on whether the plaintiff has a "personal stake in the outcome" to ensure that the litigation will be presented in an adversarial format.[47] Although the focus is on the plaintiff, the standing test remains the same. One must either show the traditional "legal interest" or fall within the broader requirements that alleged action caused an "injury in fact" or

41. *See* Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

42. West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) (non-profit membership corporation, dedicated to preserve natural areas, could maintain an action against the supervisor of a national forest because of "particularized" interests in that geographic area); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (organization devoted to environmental protection, which alleged biological injury to man because of the Secretary of Agriculture's failure to restrict the use of DDT, had standing); Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970) (residents of a metropolitan area had standing to enjoin the construction of crèche as violative of the first amendment and the court also stated that citizens may sue to enjoin governmental use of parklands that are dedicated to public use and enjoyment); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967) (non-profit association of concerned citizens had standing to challenge the Federal Highway Administrator). Only the Ninth Circuit balked. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom.* Sierra Club v. Morton, 92 S. Ct. 1361 (1972).

43. Commentators predicted such an outcome. *See* Comment, *Environment Law: New Legal Concepts in the Antipollution Fight*, 36 Mo. L. Rev. 78, 91 (1971); 46 N.Y.U.L. Rev. 177, 181 (1971).

44. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom.* Sierra Club v. Morton, 92 S. Ct. 1361 (1972).

45. *Id.* at 1368.

46. 369 U.S. 186 (1962).

47. Flast v. Cohen, 392 U.S. 83, 101 (1968). This adversarial format will prevent advisory opinions and collusive suits. Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?* 78 Yale L.J. 816, 827 (1969); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideogical Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968).

the alleged injury was to an interest "arguably within the zone of interest to be protected or regulated."[48]

The Sierra Club claimed that a change in Mineral King Valley from a wilderness area of the Sequoia National Forest to a ski and resort complex would result in aesthetic and ecological changes sufficient to call the Club a "person . . . adversely . . . aggrieved" to seek judicial review.[49]

The Supreme Court recognized that aesthetic and environmental well-being, as well as economic interest, are worthy of judicial protection. But there is the absolute necessity that the party seeking relief be injured himself along with the cognizable "injury in fact." The change in Mineral King Valley will not fall indiscriminately upon every citizen, but only those who use the National Park will *directly* feel the impact of the proposed changes. The Court noted the Sierra Club's failure to allege that it or its members would be directly affected. Although the Club stated that one of its principle purposes was to protect and preserve natural resources, it declined to rely on asserting individualized harm. An *amici curiae* brief[50] filed by the Wilderness Society and others pointed out that there was personal contact with the Mineral King Valley through camping trips and tours by club members. Relying on the lower federal court decisions,[51] especially *Citizens Committee*, it is submitted the Sierra Club thought that its "expertise" in environmental matters qualified it to act as the representative of the public.

But no matter how qualified the organization is to meet the problem or how longstanding their interest is, to meet the Supreme Court's

48. Barlow v. Collins, 397 U.S. 159 (1970); Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). The Supreme Court in *Sierra Club* stated that the latter test of standing, the alleged injury must arguably be within the zone of interests to be protected by statute, was not relevant in deciding the case. 92 S. Ct. at 1365 n.5. Although the Court did not explain this, there was no similar statute as in Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), or FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (granted the complaining party standing).

49. Judicial review was sought under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), which provides review at the instance of "a person . . . adversely affected or aggrieved . . . within the meaning of a relevant statute . . . ."

50. 92 S. Ct. at 1366 n.8.

51. *See* Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir. 1970); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967). *See also* Sierra Club v. Hickel, 433 F.2d 24, 38 (9th Cir. 1970) (Hamely, J., concurring). Judge Hamely stated that the Sierra Club did have standing. He reasoned that under *Data Processing* any organization with an established interest in aesthetic, conservational, or recreational values of a nature to be protected by statute had standing to seek judicial review of agency action. *See generally* 46 N.Y.U.L. Rev. 177, 181 (1971).

test one must himself be directly affected. This would prevent the unnecessary and unconstitutional litigation where an organization had only a small or relatively short-lived interest in the matter at hand.[52]

Conclusions from the Cases

In *United States ex rel. Chapman v. FPC*,[53] the Supreme Court admitted that standing was a "complicated specialty of federal jurisdiction."[54] Complexities of law are barriers to justice. If one's *legitimate* interest is in fact injured by illegal action, a basic premise of justice, that a party should have a chance to prove his harm, must prevail. The Supreme Court in *Sierra Club* focused directly on the problem of whether the *legitimate* interest of the environmental group was in fact injured. In holding that without a direct personal harm one lacks standing under the Administrative Procedure Act, the Court limited the area of harm to personal rights.[55] Such a limitation follows *Barlow*, *Baker v. Carr*, *Flast*, and *Data Processing*, that a personal element was necessary to obtain judicial review.

The problem of what were the limits of *Data Processing*'s two-pronged test, (1) "injury-in-fact," and (2) arguably within the zone of interests to be protected, were not clarified.

The Supreme Court in *Sierra Club* failed to consider the secondary purpose of standing, a healthy check on governmental action. The court in *Scanwell v. Shaffer*[56] considered this purpose. *Scanwell* involved the bidding for instrument landing systems at airports. The court held that the second lowest bidder had standing to challenge the Federal Aviation Administrative's choice. The court stated:

> . . . if there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits . . . .[57]

The court suggested that the policy of standing not only includes the ingredient of personal harm, but also provides a tool to check arbitrary

52. 92 S. Ct. at 1368.
53. 345 U.S. 153 (1953).
54. *Id.* at 156.
55. 92 S. Ct. at 1368.
56. 424 F.2d 859 (D.C. Cir. 1970).
57. *Id.* at 866-67.

governmental action. This healthy check on governmental affairs has significance when applied to the environmental field.

In the case of a government contract, the second or even third lowest bidder will have standing if there is any capricious action in the selection of the lowest bid. Even more importantly, the probability of suit by a losing party is not sufficient to insure this healthy check on governmental affairs. For example, if the governmental action involved a remote and non-populated region of northern Idaho, or the Mineral King Valley area of the Sequoia National Forest, the chances that someone would bring suit to challenge the governmental action are significantly reduced. This secondary purpose of standing would bolster the private attorney general concept to provide the needed impetus to check government action in these circumstances.[58] The constitutional requirement of "case or controversy" then must be a *court* determination that the necessary adverseness is present.

Other Comparable Areas of the Law

In our attempt to understand the concept of standing, a review of other comparable areas of law will be most helpful. The two areas that will be studied are: (1) standing to assert the constitutional rights of third parties not before the court—*jus tertii*,[59] and (2) standing under the fourth amendment's prohibition against unlawful search and seizures.

1. *Jus Tertii*

Standing to assert the *constitutional* rights of others was the underlying issue in the landmark case of *Barrows v. Jackson*.[60] Previously, the Court in *Shelley v. Kraemer*[61] held that racial restrictive covenants could not be enforced in equity against Negro purchasers. Such enforcement would deny equal protection of the laws under the fourteenth amendment. The Court was faced with the question of whether the defendant may rely on the invasion of the rights of others as a valid defense to an action at law for breaking the covenant. In *Barrows*, a

58. *Id.* at 864-65. *See* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 617 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).
59. *See* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962) [hereinafter cited as Sedler].
60. 346 U.S. 249 (1953).
61. 334 U.S. 1 (1948).

party attempted to enforce a restrictive covenant for damages against a co-covenantor who allegedly breached the covenant. But no non-Caucasian was before the Court claiming to have been denied his constitutional rights. The Supreme Court noted the general rule that one may not claim standing to vindicate the constitutional rights of a third party. Nevertheless, the Court held that the reasons underlying the rule are outweighed here by the peculiar need to protect the fundamental rights of the third party.[62]

The other *jus tertii* situations involve the rights of parents, teachers and pupils which are interfered with, state action, and the right of an organization to assert the constitutional rights of its members.

Dealing first with the rights of school children and their parents, in *Meyer v. Nebraska*[63] and *Bartels v. Iowa*,[64] the Court was confronted with state statutes prohibiting the teaching of a foreign language to school children. They were held to be unconstitutional as applied to the teachers because the rights of both the pupils and the parents were violated. These rights were the liberty of pupils to acquire knowledge and the right of parents to control the education of their children.[65]

Again, in *Pierce v. Society of Sisters*,[66] where suit was brought by private schools, the Court invalidated a statute requiring attendance at only public schools on the ground that it constituted an unreasonable interference with the right of parents to direct their children's education. The Court never questioned the standing of these private schools to assert the rights of the parents. Although this is one step removed from the *Meyer* and *Bartels* situation, it would seem the Court felt that the parent-teacher-pupil relationship was so integral that each could assert the rights of the other.[67]

Common to these three cases is the right to education in a free and uncoerced atmosphere. Thus the Supreme Court has relaxed the traditional rule of standing that one must be *directly* injured to foster important educational values. No one can argue that the "right" to breathe clean air and drink unpolluted water is not important not as

62. 346 U.S. at 257.
63. 262 U.S. 390 (1923).
64. 262 U.S. 404 (1923).
65. 262 U.S. at 400.
66. 268 U.S. 510 (1925).
67. *See* Adler v. Board of Educ., 342 U.S. 485 (1952). Suit was brought by parents and teachers challenging the validity of a state statute making membership in organizations advocating the unlawful overthrow of the government grounds for a teacher's dismissal. The standing of the parents to assert the rights of the teachers was not questioned.

a value or "right," but as a necessity. If the Supreme Court has relaxed its standing rule before, another relaxation is justified to cope with serious environmental problems.

One other area where the Supreme Court has allowed the litigant to assert the rights of third persons was in *NAACP v. Alabama*.[68] There, a state order requiring the NAACP to produce records of membership was held to be a denial of due process.[69] To force an association to divulge its members' names and addresses would be a substantial restraint upon the members' right to exercise their freedom of association. Although the general rule is that parties must rely on rights that are personal to them,[70] the Supreme Court held that the Association was the appropriate party to assert the right involved.[71] The Association and its members were "in every practical sense identical;"[72] and thus, a sufficient nexus was established to permit the Association to act as its members' representative before the Court.

A similar claim was presented in *Griswold v. Connecticut*.[73] A doctor and the director of a planned parenthood league were held to have standing to assert the constitutional right of privacy of their patients. Although the Court did not mention in either *NAACP v. Alabama* or *Griswold* what criteria would be used for future allowances of third party assertions, one common element is thought to be the key. The common element was that the doctor and organization acted as representatives for the injured parties not before the court. These two representatives facilitated litigation of the constitutional claims of the injured groups.[74] But this common factor is meaningless to the problem of standing in the environmental area because, as of now, there is no *constitutional* right of third parties that can be asserted.[75]

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68. 357 U.S. 449 (1958).
69. *Id.* at 466.
70. Tileston v. Ullman, 318 U.S. 44 (1943).
71. 357 U.S. at 459-60.
72. *Id.* at 459.
73. 381 U.S. 479 (1965).
74. *See* Sedler, *supra* note 59, at 627-28. Sedler contends that there are four relevant factors that the Supreme Court takes into consideration to determine who can assert the constitutional rights of third parties: (1) the interest of the litigant, (2) the nature of the right asserted, (3) the relationship between the litigant and the third party, and (4) the practicability of assertion by the third party in an independent action. He concludes that the last factor is probably the most important.
75. Justice Douglas and Professor Stone basically propose that legal rights be given to forests, oceans, rivers, and other so-called "natural objects" in the environment. Sierra Club v. Morton, 92 S. Ct. 1361, 1369. (Douglas, J., dissenting); Stone, *Should Trees Have Standing?—Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Since corporations, states, and incompetents cannot speak nor represent themselves, the courts should also make similar appointments and handle the legal problems of natural objects

A constitutional argument for the right to a pollution-free environment has been based on the ninth amendment of the United States Constitution.[76] Such a "right" would be protected under the due process clause of the fifth amendment and would also be made applicable to the states under the fourteenth amendment.[77]

The judicial precedent necessary for this argument may be found in the Supreme Court's decision of *Griswold v. Connecticut*.[78] In striking down a state statute that prohibited the dissemination of birth control material, the Court stated that each of the specific rights listed under the Bill of Rights has "penumbras . . . that help give them life and substance."[79] Thus, in *Griswold*, the Court found a right of privacy protecting citizens from governmental intrusion based on the first amendment (right of association), the fourth and fifth amendments (protection of a "man's home and the privacies of life"[80]), and the ninth amendment ("the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people").

Therefore, reasoning from *Griswold*, a "right" to a pollution-free environment would read something like this: if environmental problems continue, one will be deprived of life, liberty or property, without due process of the law; people are unwilling to surrender their expectation that they should live in a decent environment.

Consistent with these cases, *Griswold*, *NAACP*, and *Meyer*, was the touchstone "injury in fact." Each plaintiff was subject to criminal prosecution. In relation to the environmental area, where environmental groups spent many hours in preserving hiking trails, natural wildlife preserves, and parklands, governmental action affecting the work product of the groups is the "injury in fact."

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as one does those of legal incompetents. If a railroad corporation can constitute a "person" under the fourteenth amendment, Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886), it is conceivable that a river or mountain preserve is also a "person" entitled to rights.

76. U.S. CONST. amend. IX states: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

77. *See* Roberts, *The Right to A Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970); Comment, *Environment Law: New Legal Concepts in the Antipollution Fight*, 36 MO. L. REV. 78, 96 (1971); Comment, *The Environment Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1133 (1970).

78. 381 U.S. 479 (1965).

79. *Id.* at 484.

80. Boyd v. United States, 116 U.S. 616, 630 (1886).

2. *Fourth Amendment*

The second area of comparable law that will be analyzed is standing to assert the fourth amendment's prohibition against unlawful search and seizures. The common issue in every motion to suppress illegally obtained evidence is whether the defendant can raise the claim of illegality and seek the remedy of exclusion. This question is referred to by the courts as "standing." Even though the fourth amendment prohibits unreasonable searches and seizures, it is not a blanket provision that can be asserted by any defendant. The courts impliedly demand that the defendant must still meet the equivalent of article III of the United States Constitution that a "case or controversy" exists. This requirement is fulfilled when the defendant shows a "logical nexus between the status asserted and the claim to be adjudicated."[81] Application of this general rule in the area of the fourth amendment would require the defendant demonstrate that *his* constitutional rights were personally affected.[82]

To better understand the analogy between standing in an environmental lawsuit and standing in the constitutional criminal procedure area, the distinction between general and specific standing must be made. General standing requires that the plaintiff have an adversarial interest in the outcome of the lawsuit as required by the Constitution. To meet this requirement one must have a "personal stake in the outcome" as defined by the Supreme Court in *Flast* and *Sierra Club*. This is the "injury in fact" test. In the criminal law area, the general standing requirement is met whenever the defendant's personal liberty is at stake, which is the case in every criminal trial. Thus the issue of specific standing becomes relevant. The question is whether the defendant is in the necessary legal position to have standing to object to tainted evidence.

The Supreme Court has frequently held that the fourth amendment's prohibition against unlawful search and seizures is a personal right.[83] Therefore, for one to be a party aggrieved in the constitutional sense, one's rights must be violated. While the courts have expanded the scope of standing in the judicial review context, an expansion has also taken

81. 392 U.S. at 102.
82. *See, e.g.*, Simmons v. United States, 390 U.S. 377 (1968).
83. *Id.*

place in the question of who has standing to object to tainted evidence under the fourth amendment.[84]

The expansion was initiated in the Supreme Court's decision in *Jones v. United States*.[85] *Jones* relaxed the traditional standing requirements. Under the old rule, a person who was charged with a crime of possession had to admit to ownership of the contraband to have standing. The problem here is that once he admitted to ownership he admitted guilt. Therefore, when a person is charged with a crime of possession standing is automatic.[86]

Secondly, the Court held that anyone legitimately on the premises where a search occurs may challenge its legality when the fruits of the search are going to be used against him.[87] This abolished the historical property distinctions of licensee, lessee, and owner that the courts formerly made to determine whether the defendant had proven the required nexus between his relationship to the premise searched (i.e., owner) and the unlawful search to have standing. The Court's holding would prevent a trespasser to have standing to object to an illegal search and seizure because one must be legitimately on the premise.

In *Alderman v. United States*,[88] where the owner of the searched premises was incriminated by persons conversing on his premise, the Court held that the defendant-owner had standing to suppress unlawful wiretaps whether or not he was present when the search occurred. This decision placed emphasis on the concept that fourth amendment rights are personal and that protection of the individual's liberty is utmost.[89]

Only the victims of the wrong are able to suppress tainted evidence. This is the essence of specific standing. This is consistent with the general doctrine that fourth amendment rights are personal and cannot be asserted vicariously as other constitutional rights may be.[90]

One must consider the rationale behind the exclusionary rule to

84. *See* Sierra Club v. Morton, 92 S. Ct. 1361 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970).
85. 362 U.S. 257 (1960).
86. *Id.* at 266-67.
87. *Id.* at 266.
88. 394 U.S. 165 (1965).
89. *See, e.g.*, Simmons v. United States, 390 U.S. 377 (1968).
90. *Id. But see* McDonald v. United States, 335 U.S. 451 (1948). Criticism of this doctrine is prevalant. *See* Comment, *Standing to Object to an Unlawful Search and Seizure*, 34 U. Chi. L. Rev. 342 (1942); 38 U. Cin. L. Rev. 691 (1969). These commentators argue that the underlying rationale for the exclusionary rule is a "police-deterrent" concept that logically dictates that any defendant should be able to object to *any* unconstitutionally seized evidence.

determine whether the doctrine that fourth amendment rights are personal makes sense. The Supreme Court in *Terry v. Ohio*[91] held that the major thrust of the exclusionary rule was a mode for discouraging police misconduct. Ostensibly, one would be led to believe the exclusionary rule would protect individual rights. But a minority reading of *Terry* holds that the rule is really for protection of the public and the rights of the individual are secondary. This protection of the public in general from lawless police conduct is not consistent with the doctrine that fourth amendment rights are personal (in that only the defendants whose rights have been violated have standing to object). Therefore, if the exclusionary rule is aimed at police conduct, then every person who has been charged with a crime should be allowed to challenge police misconduct. California, in *People v. Martin*,[92] has adopted such a theory that general standing itself is sufficient to allow a defendant to object to any illegal search and seizure.

The approach of allowing *any* defendant standing to object to tainted evidence is consistent with the second purpose of standing. This purpose is to have a healthy check on government action. If the object of the exclusionary rule is based on a police-deterrent rationale, then all police wrongdoings should be under scrutiny and subject to check by one who will be potentially harmed.

Although the law of standing to object to illegally seized evidence does not help to surmount an argument for the grant of standing to the environmentalists, it does demonstrate another basic injustice that the general law of standing encourages. The injustice is that illegal governmental action can be used to convict a defendant and to deny environmentalists standing to protect the environment on the ground that they do not have the necessary "personal stake" in the controversy.

Conclusion

The law of standing is not the correct method to decide what parties, if any, may challenge an action because too many injustices are allowed. The courts should look at each case and decide whether the complaining party has a legitimate claim to be aired.

To deny standing to legitimate environmentalist groups to challenge

91. 392 U.S. 1, 12 (1968).
92. 45 Cal. 2d 755, 290 P.2d 855 (1955).

governmental action makes sense if the only consideration to which the courts look is whether the party is directly harmed. But the courts fail to consider the important factor that suits provide a healthy check on government action. This check is the critical function of the private attorney general. *He should be able to sue when no one else is directly harmed or when individuals lack the necessary funds or interest.*

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