
BROADENING "STANDING TO SUE" FOR CITIZEN ENFORCEMENT

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The law, in its majestic equality,
forbids the rich, as well as the poor,
to sleep under the bridges,
to beg in the streets,
and to steal bread.
— *Anatole France* ¹

1 INTRODUCTION: EQUAL ACCESS TO JUSTICE

The worldwide move toward citizen enforcement of environmental laws and obligations is one of the most striking contributions that environmental law has made to civilization worldwide at the end of the 20th century. In the field of environmental enforcement, societies all over the world are broadening the possibilities for citizen enforcement of the rule of law. That movement has grown so that it is impossible to think of modern environmental law without it.

Widespread *access* to justice is more likely to result in *equal* justice. Of course, inequalities will always exist. Those with power and resources will always have a bigger effect on governmental and private decisions than those lacking power and resources. But this inequality is magnified where access to courts is restricted, because restrictions are less likely to affect powerful economic interests. They easily have access to the courts. As a result, they are treated with respect by government officials. Citizens and their organizations often do not have such equal access to justice and the effect is felt not only in the courts but in other governmental bodies as well.

The question of whether a citizen may enforce a statutory (or constitutional) obligation when a fellow citizen or government official is disregarding that obligation is labeled in many countries "standing to sue" or *locus standi*². The traditional law of standing in many countries, "in its majestic equality," forbade corporations as well as citizens, to sue the government unless they had direct economic "injury," or "invasion of a legal right" (or were "aggrieved" or had "interests affected" by a governmental action, or perhaps more moderately a "sufficient interest," — whatever term happens to be in vogue for "standing"). This purportedly neutral rule had the effect of usually letting business interests into court while often keeping other members of civil society out of court.

The battle over expanded standing to sue is not, in short, about whether everyone should have access to justice. Those with money and power already have access. The battle over standing to sue is about whether *other* citizens will have access as well. If democracy is for all, if the rule of law is for all, and if justice is for all, then standing should be for all. To put it in the proper order, where standing *is* available to all, democracy, the rule of law, and justice are more likely to be for all.

In my view, increased “access to justice,” as the movement for broader standing is sometimes loosely labled, is an important component in building an application of rule of law that is applicable to the powerful as well as to the weak. Such an equal rule of law helps build civil society. It provides an essential element of participatory democracy.³ By stressing communitarian values, the movement to broaden legal standing will provide important societal restraints on the rampant individualism that accompanies enhanced economic development. By stressing the importance of compliance with duties and not only rights, this expansion of the ability to sue will paradoxically build a stronger framework for the protection of individual rights.

Three approaches to granting standing are judge-made standing law, constitution-based standing, and legislation-based (statutory) standing categories which I find transcend different cultures and legal systems⁴.

2 JUDGE-MADE STANDING LAW

2.1 England

As the home of Common Law, it is perhaps appropriate that much of the early judiciary-led movement to grant access to the courts occurred in England. The changes that took place starting in the early 1970s appeared so dramatic that one American scholar even stated:

“The House of Lords has all but eliminated the standing requirement, virtually converting the [judicial] review action into an actio popularis, which is available to any citizen who seeks to annul improper administrative action.... [T]here has been nothing comparable in the case law on this side of the Atlantic.”⁵

The above quote may seem an excessively ambitious interpretation by someone from the outside, but it may not be far off the mark, at least at the level of theory, if not necessarily in actual practice.

The revolution in the law of standing can be traced both to the work of Lord Denning in the 1970s and to a revision in the procedure for judicial review of administrative actions in England. Order 53 came into force in January 1978, based largely on the recommendation of the Law Commission. The Commission took the position that a single, unified procedure for judicial review would be preferable to the time-encrusted and sometimes confusing system of “prerogative writs.” It indicated that the law of *locus standi* should be liberalized as well. In Order 53 the issue for judicial review became no longer whether a person was “aggrieved.” Instead review would be premised on a party having a “sufficient interest” in the matter sought to be litigated. The Order was given statutory grounding in Section 31 of the Supreme Court Act 1981.⁶

The new formulation, “sufficient interest,” might still have been interpreted as restrictively as “person aggrieved” had been in the past. That is, the change might have been viewed as not intended to create a more liberalized, uniform rule of standing.⁷ But any time that the applicable words change there is also the opportunity for a change in doctrine as well. The House of Lords subsequently decided what to do with *locus standi* in light of Order 53 and section 31 of the Supreme Court Act in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses*⁸ (known as the *Fleet Street Casuals* case). Reversing its position of four years earlier in a case known as *Gouriet*,⁹ the Law Lords ruled that a group of taxpaying small businesses could sue the tax authorities in a complaint

against what the authorities were doing with regard to a *different* group of taxpayers. Since the argument that these small businesses were specially damaged or “aggrieved” in a way different from other taxpayers could hardly be made while keeping a straight face, the ruling in the *Fleet Street Casuals* case became the basis for, in essence, accepting Lord Denning’s view of dramatically lowered *locus standi* bars in English jurisprudence.

While *Fleet Street Casuals* could, indeed, be viewed as signaling a new day of “open standing” in important public-interest cases, such hopes were soon dashed in the *Rose Theatre* case.¹⁰ The Rose Theatre will be familiar to those who have seen the motion picture *Shakespeare in Love* during the current 1998-99 season, for the action largely takes place in the Rose. During construction in the center of London in the late-1980s, a contractor digging a foundation struck the remains of the Rose Theatre. A group of citizens, scholars, and actors concerned with historic preservation, the Rose Theatre Trust, sprang up to defend this important archaeological find from destruction. The court ruled, however, that this group lacked the requisite *locus standi* because of what the court viewed as a lack of “sufficient interest.” In order to have standing, individuals must show a greater “interest” than that of the rest of the public, according to the decision. The fact that the members of the Rose Theatre Trust were distinguished scholars and actors who had devoted their lives and careers to Shakespearean work was not enough to show that greater “interest.”

Rose Theatre has been aptly termed the “low point of the standing issue” in recent English jurisprudence.¹¹ Very recently, a series of decisions has started to expand the right of legal standing again, at least in environmental cases. The environmental group Greenpeace was granted standing in the *Thorp* case to challenge a proposed license for a nuclear power plant. The High Court said that Greenpeace was a “responsible and respected body with a genuine concern for the environment” (recognizing, in a sense, standing as being conferred on the basis of ideological commitment, plus some efforts to follow up on such commitment) and that granting them standing to pursue the litigation would save the court’s time. They would efficiently and effectively represent the interests of 2,500 of its supporters living in the area of the proposed nuclear plant. This may be seen as a kind of “representational standing,” or perhaps “third party standing,” in lieu of others who truly would have had traditional standing.¹² Judge Otton said:

*“I reject the argument that Greenpeace is a ‘mere’ or ‘meddlesome busybody.’ ...I regard the applicants as eminently respectable and responsible and their genuine interest in the issues raised is sufficient for them to be granted locus standi.”*¹³

A recent English decision in 1997, *Ex parte Richard Dixon*,¹⁴ continued the liberalization, and continued the exposition of the viewpoint that public law is about duties, not rights. Justice Sedley wrote:

“Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs — that is to say, misuses of public power; and the courts have always been alive to the fact that a person or organization with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well-placed to call the attention of the court to an apparent misuse of public power...”

The contest in England between those seeking to eliminate most barriers to standing and those seeking to re-erect them is not yet decided. It is apparent, however, that judges do feel free under Order 53 and the Supreme Court Act to liberalize standing. This

is based on a recognition that the term “sufficient interest” is consciously designed to permit them to do so in appropriate cases. Standing is seen as a matter of mixed legislative and judicial policy, with the judges having the discretion under the new language to permit far broader standing than had been possible in England in the years immediately prior to 1980.

2.2 Argentina

In Latin America, the issue of broadened legal standing-to-sue, on behalf of those whose personal interests are not injured in a traditional way, but instead who assert “public interest” (for example, the interest of protection of the environment), has largely been put under the title of “intereses difusas,” or “diffuse interests.” Usually the basis of diffuse interests is statutory or even constitutional. But judges have on occasion stretched the notion of judicial interpretation to find justification for “intereses difusas.”

In Argentina, the late Dr. Alberto Kattan won some pioneering cases broadening standing for environmental cases for all of Latin America. The basis of his arguments relied upon Article 33 of the Argentine Constitution which protected his own human rights, and principles of ancient Roman Law that as a citizen he had a duty to protect the “dominio publico.” Although such principles may still be applicable in Argentina, the success of Dr. Kattan’s arguments depended significantly on a receptive judiciary.

In 1981 Dr. Kattan’s seminal case utilizing these arguments was an “accion difusa” to protect penguins, but it failed. Two years later in *Kattan v. Federal State (Secretary of Agriculture)* (1983), Alberto was granted the right to sue the Government of Argentina to challenge a permit that authorized a Japanese company to hunt and capture six dolphins (members of an endangered species). Again, he argued the case on the basis of Roman law. Similar arguments were developed by Dr. Kattan in cases successfully banning pesticides (specifically Agent Orange), prohibiting tobacco advertising on the grounds that tobacco is a toxic substance, and prohibiting pharmaceutical sales in Argentina that are prohibited in the country of origin.¹⁵

In a case similar to the *Rose Theatre* case in England, Kattan persuaded a court to block destruction of an architectural masterpiece, a mansion whose picture graced the cover of the standard architectural history of Argentina. The Hyatt Hotels Corporation sought to send in the wrecking balls in order to build a high-rise hotel on the site in Buenos Aires. When Kattan took the case to court, he made an argument that placed the hotel in realm of a sacred national treasure, part of the patrimony of the nation. He told the court, “Everyone has a right to buy a painting by Van Gogh. But nobody has the right to wrap fish in it.”¹⁶ The propriety of such environmental actions is not yet settled in Argentina, but the path has been blazed in some cases. The future depends upon the courage and creativity of Argentine judges as well as a new generation of lawyers, for Alberto Kattan is no longer on the scene to press the issue. He died in 1993 as a result of the delayed effects of the electro-shock torture that the military dictatorship had visited upon him in the late 1970s, when he became for a while one of the “disappeared.”

3 CONSTITUTIONAL LAW TO LIBERALIZE STANDING

The constitutions of many countries form the basis of increased access to justice. Sometimes these constitutions are explicit in their *locus standi* provisions. For example, in Colombia, the 1991 Constitution explicitly states in Article 88 that anyone who has a “collective right” can sue to protect it. Other constitutions state forms of actions (such as *amparo* in Costa Rica and Peru, or *recursode proteccion* in Chile) that have been interpreted

to allow *acciones populares* (popular actions by any citizen). In other instances, courts have found that the constitution embodies implied rights of access to justice. Examples of both explicit and implicit provisions will be presented here.¹⁷

3.1 Explicit Provisions in Constitutions

Some of the more interesting recent decisions have tossed aside old restrictions on standing because the courts became persuaded that amendments to their nation's constitution required broadening of standing to sue. Some of the amendments appear to address standing in so many words, while some do so only indirectly.

3.1.1 Nepal

Like its nearby neighbors in South Asia, Nepal has embarked on a jurisprudence of widespread citizen enforcement of laws, particularly on issues involving constitutionality. Nepal has done this through explicit provisions in its constitution. Article 88(2) of the Nepalese Constitution provides that the Supreme Court of Nepal shall have the extra ordinary power to issue necessary and appropriate orders to protect rights in suits of "public interest or concern."¹⁸

As one U.S. scholar has noted, under the Nepal Constitution, any citizen may petition the courts, "not only someone harmed under the law in question or some designated office holder or holders . Few issues are likely to escape the scrutiny of a Court with such wide open standing requirements."¹⁹

In *LEADERS v. Godavari Marble Industries Private Ltd., Ministry of Industry, Dept. of Mines and Geology, Cabinet Secretariat*,²⁰ the Supreme Court of Nepal said that "as environmental conservation is indirectly related with life of the human being, this matter is included in Art 12(1) of the Constitution of the Kingdom of Nepal 1990." Specifically regarding standing, it said, "As the present constitution has established public interest as a fundamental right, whether the petition has *locus standi* is no more an issue." Actually, the *LEADERS* case could be categorized as one of "implicit" constitutional provisions, for it grounded standing for the protection of the environment on a "right to life" that was not written explicitly into the Constitution, but that was inferred from various other rights found there.

3.1.2 Botswana

Constitutional provisions such as the one mentioned above are not limited to South Asian countries. Section 18(1) of the Botswana Constitution, allows any person who alleges a violation of the Constitution to apply to a court for redress. In *Attorney General v. Unity Dow*, the Botswana Court of Appeal held the Citizenship Act of 1984 unconstitutional. The Attorney General had challenged the standing of the woman who brought the lawsuit, who was seeking to assert the rights of her children. He argued that the Roman doctrine of *actio popularis*, which gives individuals the right to sue in the public interest, was not part of Roman-Dutch common law, which Botswana had inherited as part of its legal system. Judge President Amisshah relied on section 18(1) of the Constitution for part of his holding. According to a report of the case,

He stated that this provision gives broad standing rights and should not be whittled down by principles derived from the common law, whether Roman-Dutch, English, or Botswanan.²¹

The court also found that the mother suffered injury if her children's rights were limited,²² and stated that a person who is injured can also "protect the rights of the public," citing precedent from South Africa to that effect.²³

3.2 Implicit Provisions in Constitutions

An even more interesting basis for the broadening of standing on a constitutional basis has been those countries whose constitutions do not appear to address standing as such, but in which seemingly substantive constitutional norms have been used to grant the procedural right of access to the courts.

3.2.1 India

India has long been a leader in finding standing rights implicit in a constitution. The Supreme Court of India has largely abolished restrictions on legal standing in cases that it is willing to recognize as "public interest cases." Other countries in South Asia have followed this approach although to a lesser degree.

The Constitution of India does not explicitly refer to standing, but both judicial policy and certain provisions of the Constitution have been used as the basis for a dramatic change in the law of standing in India. The Supreme Court of India decided in 1982, after some preliminary movement toward liberalized standing, that the legal system should no longer be a system for "men with long purses."²⁴ The dramatic breaking down of barriers to legal standing has been premised in part upon the reasoning of the judges and in part on the mere existence of fundamental rights provisions in the Indian Constitution (not special provisions directly relating to legal standing).

The watershed case for standing is known as the *Judges' Transfer Case*.²⁵ The Supreme Court ruled that bar associations of lawyers had the right to sue against transfers of judges during the "Emergency" that had been declared by Prime Minister Indira Gandhi — even though none of the lawyers would actually suffer economic harm from loss of clients by having different judges hear their cases than those originally assigned to a given court. There were a number of opinions, totaling 600 pages, quoting from law journal scholarship and cases from several nations. Amongst the opinions, Justice Bhagwati, who had previously served on a Law Reform Commission that called for looser standing rules, declared that "any citizen who is acting bona fide and who has sufficient interest has to be accorded standing." Lawyers, who as a profession seek to preserve people's faith in the legal system, were such a group, he decided. He stated that a "public-minded person" or organization can act directly in the Supreme Court "even though they may not be directly injured in their own rights."

In a later case the Supreme Court of India wrote explicitly about how it understood the role of the courts in the social and economic reality of India and in the face of "public interest litigation" to be different from courts in ordinary litigation:

"In a public interest litigation, unlike traditional dispute resolution mechanisms, there is no determination or adjudication of individual rights. While in the ordinary conventional adjudications the party structure is merely bi-polar and the controversy pertains to the determination of the legal consequences of past events and the remedy is essentially linked to and limited by the logic of the array of the parties, in a public interest action the proceedings cut across and transcend these traditional forms and inhibitions."²⁶

Lawyers have even been regularly recognized as entitled to act themselves, as both petitioner and attorney, on behalf of a public interest. For example, M.C. Mehta has sued in his own name to have hundreds of children released from jails; to prevent employment of children in dangerous match factories,²⁷ to protect the Taj Mahal from air pollution; and to clean up the length of the Ganges River from industrial and municipal pollution,²⁸ among many other cases. In another of his many cases the Supreme Court of India has ruled that any citizen could sue to remedy harm from a leak of chlorine gas.²⁹

Similarly, law professors and lawyers have filed cases on behalf of mistreated mentally ill women,³⁰ journalists have sued on behalf of women in the Bombay Central Jail,³¹ and suits by motivated citizens have sued to protect orphans being sent abroad for adoption and possible enslavement.³²

The Supreme Court of India has set an example to courts and lawyers around the world of how a legal system can take an entirely new look at enforcement of the rule of law. It has simply set aside restrictions on access to the courts that had theretofore been accepted almost without thinking among the lawyers of that society. I recall discussing the dramatic developments of the law of standing in India with a private lawyer acting mostly for industry, during a sabbatical visit in 1987. He confidently predicted that, with a change in the membership of the Supreme Court of India, standing would soon return to the more comfortable and traditional categories with which he was familiar. In fact, however, each succeeding generation of judges have gained self-confidence in the work of their Court as blazing new trails for public-interest litigation. The Court has established a special office just to process public-interest petitions and has, to a remarkable degree, used its powers in the environmental area to stimulate action by the world's most bloated and reluctant bureaucracy.

3.2.2 Tanzania

The influence of India's progressive stance towards interpreting its constitution has extended beyond the Asian continent into Africa. An amazingly comprehensive and progressive court opinion was issued in Tanzania by the High Court at Dodoma in 1993. In *Mtikila v. Attorney General*,³³ the court made a survey of standing law in England, Nigeria, India, and elsewhere and then stated rules for standing in Tanzania. It concluded:

"In matters of public interest litigation this Court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter [S]tanding will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy."

After discussing the social conditions of Tanzania, the history of one-party politics and repression such as detention without trial, the court said further:

"Given all these circumstances, if there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing."

This case may well be little more than a straw in the wind of standing jurisprudence in Tanzania. Future cases will determine whether other judges are willing to follow its lead and the example of the Indian judges. But it is at least remarkable that some judges are willing to take a risk in nudging their legal system toward the kind of open standing suggested by this case.

4 STATUTORY LAW

It is perhaps in the realm of statutory expansion of access to justice that the greatest diversity in approaches exists.

4.1 Europe

In Europe, Parliaments have increasingly granted groups with registered interests the right to participate in legal actions related to their interests. For example, in Italy, Articles 13(1) and 18(5) of Law No. 349 of 1986 give environmental associations the right to sue in administrative courts if they have been recognized for this purpose in a ministerial decree.³⁴ This model is also mirrored in Germany. Although the German federal government has occupied a special, extraordinary conservative, position in legal doctrine concerning *locus standi* for some time, the *Länder*, or States, have been notably more progressive and open toward granting standing to sue, particularly for established environmental nongovernmental organizations (NGOs).

In the Netherlands legislation has taken a slightly different statutory track, following the model of allowing “anyone” to participate in the consultation process with a public authority, and then affording anyone who has lodged objections at the consultation stage the right to ask a court for judicial review of the decision. See the 1994 General Administrative Law Act’s (GALA’s) Title 3.5, “Extended Public Preparation Procedures.”³⁵ Additionally, the Netherlands also extends standing to NGOs in civil law suits much like Italy or the German *Länder*.³⁷

4.2 The United States

In the United States, statutory provisions in federal and state laws regarding standing to sue in specific legal contexts has generally been quite progressive. Many environmental laws contain provisions granting access to the judicial system. However this is being affected by some regressive constitutional standing requirements recently created by the United States Supreme Court.³⁶

4.2.1 Statutory Expansion of Standing in the U.S.

Lawsuits against U.S. federal government agencies can be brought under the Administrative Procedure Act, the Freedom of Information Act, under “judicial review” sections of every environmental statute, and under the “citizen suit” provisions that exist in most environmental statutes. Lawsuits against State and Federal government agencies proceed under many similar statutes. The statutory provisions for standing range from broad authorization for “any person” or “any citizen” to file certain suits to narrower requirements that a potential litigant be “adversely affected” in some way. The broader provisions for statutory citizen enforcement suits under most environmental laws generally also apply in

cases against government agencies. These “citizen suit” provisions first appeared in modern U.S. environmental laws with the Clean Air Act of 1970, but forerunners appeared in early U.S. history and even in England as long as 700 years ago.

Famed American administrative law scholar Louis Jaffe showed through historical research published in 1961 that “the public action — an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations — has long been a feature of our English and American law.”⁵⁴ In 13th Century English law, anyone could sue on behalf of the king.⁵⁵ In the 14th Century, “popular actions” (or *qui tam*⁵⁶ actions) could be prosecuted by any citizen. If a fine were levied, it would be divided between the king and the private prosecutor.⁵⁷

This practice was still in effect at the time the United States of America was founded in 1787 and for the first 50 years nearly all criminal prosecutions were brought by private individuals. *Qui tam* actions, also known as “informers’ suits,” were authorized in early legislation of the new U.S. Congress. For example, the Trade and Intercourse Act of 1793 prohibited encroachment on Indian lands and provided that private prosecutions could be initiated. Half of the recovered penalty would go to the citizen who filed the prosecution.

Moreover, informants’ suits, “called, as Blackstone says, “popular actions, because they are given to the people in general,”⁵⁸ were the pre-twentieth century counterpart of citizen suit provisions in environmental statutes.⁵⁹

In the field of environmental law, *qui tam* statutes were enacted in the U.S.A. as long ago as in the Refuse Act of 1899, under which citizens could sue private parties who violated the Act. They were to be awarded 50% of any fine levied by a court.⁶⁰ Private citizens choosing to act as “bounty hunters” were authorized by law throughout the 19th Century to arrest and bring in criminals, leading to several Hollywood movies dealing with the practice.⁶¹ Private bail bondsmen have this right today in most States of the U.S.A.

4.2.2 Recent Judicial Limitations on Standing in Statutory Law in the U.S.

While the U.S. Congress has made strong efforts to expand standing for all persons under many environmental laws,³⁸ the U.S. Supreme Court, has made equally strong efforts in recent years to cut back that expansion, making claims of “unconstitutionality.” The ultimate outcome of this tug-of-war is uncertain. Several State legislatures have also expanded standing widely, sometimes with a better fate for their legislation in the State courts than what is now happening with U.S. statutes in the U.S. Supreme Court.

Remarkable developments in recent years position the United States as one of a handful, at most, of countries where the Supreme Court is starting to assert the power to reject efforts by the democratically elected legislative branch of government to specify who may bring lawsuits to court — that is, who may have access to justice.

In 1970, at the same time that Congress was broadening standing, the Supreme Court did the same. The Supreme Court interpreted the federal Administrative Procedure Act (APA) of 1946 in a new manner, essentially attempting to allow persons to sue federal agencies without first finding a specific “legal right” to sue in some specialized statute. It did so by reading the Administrative Procedure Act to allow persons who have actual “factual injuries” to sue, without having to have a “legal injury.”⁴¹ This was subsequently extended to include various intangible injuries, including aesthetic injuries to environmental groups.⁴²

But what had been designed by a liberal Supreme Court initially to liberalize standing was soon used by ascendant conservatives to cut it back. To put it another way, the use of a judicial sword by one group of Justices to attach apparent legislative restriction on standing soon gave way to the use of the same “injury of fact” sword to attack legislative efforts

that expanded standing. For this to happen, the doctrine was changed from being an interpretation of the APA to one of the Constitution. The doctrine of factual injuries — or “injury in fact” — then was used not merely as a sufficient basis for a court to recognize standing, but as a necessary basis, without which the legislature would have no authority to allow standing. Since the identification of an “injury” was now in the hands of the judges and labeled “constitutional”, they were then free to define injury in narrower and narrower terms, harking back largely to Nineteenth Century notions of rights and law. Unless an injury satisfied the judges, the legislature was powerless to grant standing.

Among the strongest influences leading to the constitutional shrinkage of the right of standing (and rights of the Congress) in environmental law has been Justice Antonin Scalia. He is a former law professor, who disclosed in a 1983 law journal article his intense dislike for law suits brought by public-interest environmental lawyers. He wrote at that time, before his appointment to the federal courts, that it was desirable to put an end to the federal judiciary’s “love affair with environmental litigation.”⁴³ At the time of Justice Scalia’s appointment, one commentator predicted what would happen to the law of standing under him: “Scalia has advocated a position on standing that could severely limit the ability of litigants to obtain judicial review where they allege an environmental injury.”⁴⁴

When Justice Scalia joined the Supreme Court, the tools for ending public interest law suits were already at his disposal. First, Supreme Court jurisprudence since about 1968⁴⁵ had been viewing standing-to-sue as (to quote the title of then-Professor Scalia’s law review essay), “an Essential Element of the Separation of Powers.”⁴⁶ Second, the Court had asserted since 1970 that standing turned to a large degree on “injury”⁴⁷(although largely as a statutory matter). Third, the jurisprudence transformed “injury-in-fact” (as compared to injury “in law”) into a constitutional requirement since about 1973.

If someone were so inclined, standing doctrine could be used in ways that one scholar has called “Machiavellian.”⁴⁸ After surveying most of the scholarly commentary on the Supreme Court’s standing jurisprudence as of 1993, one young scholar concluded, “There is virtual unanimity among constitutional law scholars that the Court’s public action analysis is seriously flawed.”⁴⁹

The current membership of the nation’s highest Court has achieved a modification of legal doctrine regarding access to justice and the Constitution⁵⁰ in the face of unrebutted research by a number of legal scholars demonstrating that the basis for their constitutional interpretations is ideology riding under the colors of history.⁵¹ No scholars seem to have argued to the contrary.⁵² The historical research has shown that the basis for this “Constitutional anti-standing” doctrine is thin at best and intellectually questionable at worst. The research has shown that the better view is that the Constitution was written in an atmosphere of liberal standing-to-sue, both in terms of legal philosophy and historical practice. Other research has suggested that, if anything, the U.S. Constitution is better read as requiring open standing for the vindication of the rule of law and the protection of collective rights and interests.⁵³

The sword continues to cut ever more deeply into “citizen suit” provisions enacted by the Congress in a decision in March 1998 denying the Congress the right to confer open standing on citizens to aid in the collection of civil penalties that might help deter lawbreaking.⁶⁴

Despite the best intentions of Parliaments and legislative bodies, and despite the most progressive legislation, the true state of access to justice must be assessed with an eye on the jurisprudence of the courts. Nowhere is this more true than in the United States,

where the “citizen suit” provisions adopted in a wide variety of U.S. environmental laws, starting in 1970 with the Clean Air Act amendments of that year, are being chopped back by the actions of the Supreme Court under the leadership of Justice Scalia. Nowhere is the broadening of environmental standing to sue in more peril than in the United States of America at present. If a conservative majority on the U.S. Supreme Court, sitting tall in the saddle for the past few years, has its way, the U.S. Constitution will be interpreted, almost uniquely in the world,³⁹ as prohibiting the U.S. Congress from broadening access to justice. On the other hand, attrition in the ranks of the current members of the Supreme Court⁴⁰ could put an end to this challenge to Congressional power, which has appeared relatively recently in U.S. law.

5 CONCLUSION

Barriers to law enforcement by citizens and NGOs are falling in countless countries of Africa, the Americas, Asia, Europe and the Pacific. Courts and legislatures are recognizing that citizens and citizen groups can and should play an enforcement role. The current author’s worldwide study of the law of standing-to-sue has not yet found any nation in which the country’s Constitution has been interpreted to limit the right of the national legislature to broaden access to justice. In sharp contrast to the conservative judicial interpretation of the U.S. Constitution, courts in a large number of countries have interpreted their constitutions as broadening access to justice in environmental and other matters, not restricting it. A partial list of countries where judicial decisions have been handed down by apex or near-apex courts that recognized broad standing, based on constitutional interpretation, would include Bangladesh, Botswana, Costa Rica, Chile, Colombia, India, Ireland, former Yugoslav Republic of Macedonia, Nepal, Pakistan, Peru, Philippines, Slovenia, and Zimbabwe. (A future phase of the current study will analyze these cases.)

Legislatures also have an important role to play. The trend nearly everywhere is to broaden locus standing for citizen enforcers, against both polluters and government departments that violate the law. It is reasonable to believe that the law will forbid the rich and powerful, as well as the poor from despoiling the environment. Citizen enforcement through broadened standing-to-sue will supplement often inadequate government enforcement resources. And this enhanced involvement of citizens in the implementation of environmental laws will move us toward societies of voluntary compliance.

ENDNOTES AND REFERENCES

- 1 http://www.aphorismgalore.com/author/Anatole_France.html. Anatole France (1844-1924) won the Nobel Prize in 1921.
- 2 Many other terms are in use as well — *actio popularis* (people’s legal action, *acciones populares*, *acciones difusas*, *intereses difusas*, *acao popolare.*, *jus tertii* (third party rights), “next friends,” “informers’ actions,” “citizens suit,” *la capacite’ d’ester en justice.*, “legal capacity to litigate,” *Verbandsklagerecht*, “right of access to justice,”

- 3 For some thoughts on this broader agenda, see Bonine, "Synopsis," *DOORS TO DEMOCRACY (A Pan-European Assessment of Current Trends and Practices in Public Participation in Environmental Matters)* (Regional Environmental Center, Szentendre, Hungary, June 1998), <http://www.rec.org/REC/Publications/PPDoors/EUROPE/synopsis.html>.
- 4 Several of my colleagues from civil law countries firmly maintain that a distinction between civil law and common law countries must be made within my three categories because they insist that in civil law countries, judges do not "make law." Clearly I disagree with these colleagues, yet always enjoy our debates on this matter.
- 5 Bernard Schwartz, *LIONS OVER THE THRONE: THE JUDICIAL REVOLUTION IN ENGLISH ADMINISTRATIVE LAW* (New York Univ. Press 1987) at 6.
- 6 Supreme Court Act 1981, s 31, Application for judicial review:
 - (1) An application to the High Court for one or more of the following forms of relief, namely—
 - (a) an order of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction under subsection
 - (2) shall be made in accordance with rules of court by a procedure to be known as an application for judicial review
 - (3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a *sufficient interest* in the matter to which the application relates. [Emphasis added.]
- 7 Such a view was expressed in 1980, just before the most important, modern case of standing was rendered by the House of Lords, holding the opposite. P. Cane, *The Function of Standing Rules in Administrative Law*, 1981 Public Law 332 (1981), reprinted in D.J. Galligan (ed), *ADMINISTRATIVE LAW* 303, 326 (1992). The opposite view, which prevailed, was expressed by Lord Denning in *THE DISCIPLINE OF LAW* 133 (1979), cited *Id.* n. 99.
- 8 [1981] 2 All ER 93; [1982] AC 617.
- 9 *Gouriet v. Union of Post Office Workers and Others* [1977] 3 All ER 70; [1978] AC 435
- 10 *R. v. Sec. of State for the Environment, ex parte Rose Theatre Trust* [1990] 1 QB 504).
- 11 Stephen Grosz, *Access to Environmental Justice in Public Law*, in Robinson and Dunkley, eds., *PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW* (Wiley Chancery 1995) at 196.
- 12 *R. v. Inspectorate of Pollution, ex parte Greenpeace, Ltd. (No. 2)* [1994] 4 All E R 329 (High Court, by Justice Otton).

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- 13 Quoted in Fiona Darroch, *Recent Developments in UK Environmental Law*, in A WORLD SURVEY OF ENVIRONMENTAL LAW at 293, 300. Judge Otton said, however, that standing would be granted on a case by case basis, not that all interest groups would automatically be granted standing. This comes under the rubric of “leave to appeal,” something provided in the Supreme Court Act 1981 sec. 31(3). *Id.*
 - 14 CO/3410/96 (High Court of Justice, QB Div., Crown Office) (20 April 1997).
 - 15 <http://www.igc.apc.org/elaw/americas/arg/kattan.html>.
 - 16 Personal conversation with author, 1993.
 - 17 This paper presents a sample of cases from Commonwealth countries. Research on cases from Latin American civil law countries, also based on constitutional provisions, are not covered in this paper.
 - 18 Article 88(2)-The Constitution of The Kingdom of Nepal 1990. Cited in e-mail message from Prakash Mani Sharma, Forum For Protection Of Public Interest (Pro Public) Nepal, Nov. 20, 1996, on file with author.
 - 19 Richard Stith, *Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal’s Supreme Court*, 11 Am. U.J. Int’l L. & Pol’y 47, 52 (1996).
 - 20 S.Ct. of Nepal, 31 Oct. 1995.
 - 21 *Dow v. Attorney General* [1992] LRC (Cons) 623 (3 July 1992), cited in Michael P. Seng, *In a Conflict Between Equal Rights for Women and Customary Law, the Botswana Court of Appeal Chooses Equality*, 24 U. Tol. L. Rev. 578 (1993). Case also cited in M.D.A. Freeman, *Botswana: Bucking the Backlash*, 33 U. of Louisville J. of Fam. L. 293, 293 (1995).
 - 22 The Botswana decision can be seen, of course, as narrowly granting standing to the mother because of the special familial relationship, and parental obligations, but the language used was broader than that. As for the family relationship being a basis for standing, this decision may be compared to the view of a judge in England who, in an unreported opinion, refused to grant *locus standi* to the son of a woman detained under the Mental Health Act 1983, to contest a decision to apply electro-convulsive therapy to her. Cited in Stephen Grosz, *Access to Environmental Justice in Public Law*, in Robinson and Dunkley, eds., PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW (Wiley Chancery 1995) at 196 n.7.
 - 23 Seng. *supra* note 12, at 658 (quoting Rumpff C.J. in *Wood v. Ondangwa Tribal Authority*, 2 S.A. 294, 310 (S. Afr. App. Div. [1975])).
 - 24 *S. P. Gupta v. Union of India*, AIR 1982 SC 149 (known as the *Judges’ Transfer Case*).
 - 25 *S. P. Gupta v. Union of India*, AIR 1982 SC 149.
 - 26 *Sheela Barse v. Union of India*, 1988 4 SCC 226, 234, 1988 AIR (SC) 2211, 2214, quoted in Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 Wis. Int’l Law J. 57, 66 (1994).
 - 27 *M.C. Mehta v. State of Tamil Nadu and others*, 1 SCC 283 (1991).
 - 28 *M.C. Mehta v. Union of India*, 4 SCC 463 (1987).

- 29 M.C. Mehta v. Union of India, 2 SCC 176 (1986); 2 SCC 325 (1986); 1 SCC 395 (1987).
- 30 Uppendra Baxi v. State of Uttar Pradesh, 2 SCC 308 (1983).
- 31 Sheela Barse v. State of Maharashtra, 1983 AIR (SC) 378.
- 32 Lakshmi Kant Pandey v. Union of India, 1984 AIR (SC) 469.
- 33 Civ. Case No. 5 of 1993.
- 34 Fuhr, Gebers, Ormond, and Roller, *Access to Justice: Legal Standing for Environmental Associations in the European Union*, in Robinson & Dunkley, PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW 89 (Wiley Chancery, London 1995). Granting standing to nongovernmental organizations, or NGOs, through legislation originated in Switzerland, in Article 12 of the Federal Nature and Heritage Conservation Act 1966. *Id.* At 79.
- 35 Gerrit Betlem, *Environmental Locus Standi in The Netherlands*, 3 Rev. of Eur. Comm. & Int'l Envir. L. 238 (1994). (Another article by him appears in A WORLD SURVEY OF ENVIRONMENTAL LAW, edited by Stefano Nespore, published in Milan.)
- 36 See below.
- 37 P. Klik, *Group Actions in Civil Law Suits: The New Law in the Netherlands*, 4 Eur. Env'tl. L. Rev. 14 (1995) (analyzing Articles 3:305a, 305b of the Dutch Civil Code).
- 38 Louis Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 302 (1961).
- 39 Mich. 11 Hen. 4, pl. 24, fol. 11 (1409) (stating that anyone could sue on behalf of the king); Mich. 5 Edw. 4, Long Quinto fol. 141, 142 (Exch. Ch. 1465) (equating indictment with a "popular action"), cited in David J. Seipp, *The Distinction Between Crime And Tort In The Early Common Law*, 76 B.U.L. Rev. 59, 74 n. 99 (1996).
- 40 "Qui tam" is short for "*qui tam pro domino rege, etc., quam pro se ipso in hac parte sequitur.*" This translates to "who prosecutes this suit as well for the King, etc., as for himself." United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v Prudential Ins. Co. (1990, DC NJ) 736 F Supp 614, affd 944 F2d 1149 (3d Cir. 1990).
- 41 Seipp, *supra* note 35, citing Mich. 13 Hen. 7, pl. 1, fol. 4, 8 (1497).
- 42 Huntington v. Attrill, 146 U.S. 657, 673 (1892).
- 43 Daniel M. Crane, *Congressional Intent or Good Intentions: The Inference of Private Rights of Action under the Indian Trade and Intercourse Act*, 63 B.U.L. Rev. 853, 877 (1983).
- 44 A more recent statute was passed by the Oregon Legislature granting 50% of any fine levied on persons throwing out litter.
- 45 See, e.g., THE BOUNTY HUNTER.
- 46 See above.

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- 47 Assoc. of Data Processing Org. v. Camp, 397 U.S. 150 (1970).
- 48 Sierra Club v. Morton, 405 U.S. 727 (1972); Students Contesting Regulatory Agency Procedures (SCRAP) v. Interstate Commerce Commission, 412 U.S. 669 (1973).
- 49 Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 884 (1983).
- 50 Michael A. Perino, *Comment: Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B. C. Env'tl. Aff. L. Rev. 135 (1987).
- 51 Flast v. Cohen, 392 U.S. 83 (1968).
- 52 Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 884 (1983).
- 53 Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152 (1970) (issue of standing turns on whether plaintiff has suffered injury in fact).
- 54 J. Vining, *LEGAL IDENTITY* 10 (1978).
- 55 Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. Pitt. L. Rev. 351, 402 (1993).
- 56 See, for example, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
- 57 See, for example, Gene R. Nichols, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 Duke L.J. 1141, 1151-52 (1993). See, e.g., Louis L. Jaffe, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION*, 462-67 (1965); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 Yale L.J. 816 (1969); William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363 (1973); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 Calif. L. Rev. 1915 (1986); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992). at 173-76; see also Evan Caminker, *Comment, The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 341-44 (1989); Gene R. Nichol, Jr., *Rethinking Standing*, 72 Calif. L. Rev. 68 (1994). Perhaps also: Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677, 694 (1990).
- 58 In response to Gene Nichols' historical exegesis on the subject, Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 Duke L.J. 1141, 1142 (1993), the lawyer who represented the government Lujan v. Defenders of Wildlife subsequently asserted that "practice prior to the framing of the Constitution — and perhaps constitutionally dubious remnants persisting thereafter — thus is not an infallible guide to the scope of judicial power under Article III." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993). Taking this position, the lawyer did not find it necessary to provide any countervailing historical research.
- 59 Daniel M. Crane, *Congressional Intent or Good Intentions: The Inference of Private Rights of Action under the Indian Trade and Intercourse Act*, 63 B.U.L. Rev. 853, 877 (1983).

- 60 Steel Company v. Citizens for a Better Environment, 118 U.S. 1103 (1998)
- 61 Justices of the U.S. Supreme Court are appointed for life. Presidents Ronald Reagan and George Bush strived to put relatively youthful conservatives on the Court. President Bill Clinton has appointed two Justices, Ruth Bader Ginsburg and Steven Breyer. Their views on access to justice are far more temperate than that of Justice Scalia, as are also the views of a couple of other sitting Justices.
- 62 Gene R. Nichols, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 Duke L.J. 1141, 1151-52 (1993) (footnotes omitted).