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Many disputes which have come to be considered great affairs of state could have been decided without much consequence but for the fact that each proponent or faction associated the narrowest of conceptual refinement with its basic philosophy and commitment. The resolution of the dispute may be only the choice between two ways of looking at the problem, but because of this association the outcome may come to be viewed as favorable to the whole philosophy of the sucessful faction. The issue of standing to sue in environmental cases is viewed by some in our age in the same way that transubstantiation was viewed in sixteenth century England, as almost a religious issue. The dispute concerning standing, indeed, involves two ways of looking at a problem, and it shall be the thesis of this article that a clear view from a proper vantage point will remove much of the semantic haze that has surrounded it.

The first inquiry is to the nature of standing: When is it controlling? It is controlling when, despite the fact that a case raises a justiciable issue and *another* plaintiff might arguably win on the merits, the court decides that *this* plaintiff is, for reasons related to his interest in the issue, not a suitable litigant.[1]

The haze that surrounds the question of standing cannot be better illustrated than in the argument of Solicitor Griswold in *Sierra Club v. Morton*.[2] He found it very disturbing, in a case related solely to standing, that we "could have a system of government in which every legal question arising in the core of government would be decided by the courts."[3]

Though, on the merits, I do not find this such a frightening prospect, that question of policy was not before the Court in *Sierra Club*. The prospect was that of permitting an organization with a long and intimate association with environmental matters, particularly relating to the Sierra Nevada Mountains, to bring a suit as plaintiff upon the basis that it is a party with standing because it

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1. *See* Flast v. Cohen, 392 U.S. 83, 99-101 (1968).
2. 405 U.S. 727 (1972).
3. *Id.* at 754 (Extract from Oral Argument of the Solicitor General in Appendix to the opinion of Douglas, J., dissenting).

can speak knowingly for the environmental values it asserts. The court then may assume that it will adequately represent the interests it asserts.[4] This does not run counter to the grain of "the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years."[5] Indeed, the Supreme Court said in 1803 :

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.[6]

I have discussed at some length Dean Griswold's argument because it illustrates the fallacy of confusing the question of standing with those of justiciability, reviewability, and the merits of the case. These distinctions are eloquently made by Justice Brennan in *Barlow v. Collins*.[7] The crux of Justice Brennan's position is that:

> [b]efore the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory materials must be made in cases challenging agency action. But the canvass is made, not to determine *standing*, but to determine an aspect of *reviewability*, that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff.[8]

The clearest enunciation of the two-step approach for determining standing is found in *Association of Data Processing Service Organization, Inc. v. Camp*.[9] Under this approach the Court must find (1) that "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise,"[10] and (2) that "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."[11]

The first step is constitutionally commanded because Article III restricts judicial power to "cases" and "controversies," but the second step may be legislatively determined in such a way as to favor standing in all cases or in a broad spectrum of cases. I think that we should foreclose the question legislatively in a broad spectrum of environmental cases.

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4. For a further discussion of the prospect see, 51 N.D.L. REV. 549 (1974).
5. Sierra Club v. Morton, 405 U.S. 727, 754 (1972) (Extract From Oral Argument of the Solicitor General in Appendix to the Opinion of Douglas, J., dissenting).
6. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
7. 397 U.S. 159, 167 (1970) (Brennen, J., concurring in the result and dissenting).
8. *Id.* at 169.
9. 397 U.S. 150 (1970).
10. *Id.* at 152.
11. *Id.* at 153.

Dean Griswold's argument in the *Sierra Club* case reflects a kind of judicial irascibility that some courts and nearly all bureaucrats have toward "private attorneys general." When one appears before a court with an interest not sufficiently selfish to identify himself with the great mass of litigants, the Court is inclined to say, or think: What are you doing here? You ought to be at home watching the ball game like everyone else in your position. You should not be here arguing with the umpire. That is for the players and the coach. The plaintiff is then impelled to imagine a plausible interest sufficiently selfish or personal to justify his presence: that he once hunted in that wooded area or that he earned a fee as a guide for tourists. He seems out of place, like a man before the court in pajamas with a broken drawstring. On the one hand, he must show why he is in court at all, and on the other, he must establish the merits of his case. It would be better to lessen this disadvantage in an environmental case by assuring, statutorily, that a plaintiff is within the zone of interest to be protected if he shows that he is adversely affected or aggrieved or that he "speak[s] knowingly for the environmental values asserted in such suit."[12]

This concept of standing was expressed in the second alternative in Justice Blackmun's dissent in *Sierra Club*.[13] Justices Douglas, Brennan and Blackmun would expand traditional concepts of standing to enable an organization like the Sierra Club, possessing pertinent, bona fide and well recognized attributes and purposes in the area of environment, to litigate environmental issues. Such a change, as Justice Blackmun said, "need only recognize the interest of one who has a provable, sincere, dedicated, and established status."[14] This approach makes only one addition to the customary listing of potential plaintiffs meeting the criteria for standing beyond these recognized in *Sierra Club*: Standing would be afforded to an organization (like the Sierra Club) if there were (1) the existence of a genuine dispute; (2) the assurance of adversariness; and (3) a showing that the party whose standing is challenged is one who speaks knowingly for the environmental values he asserts so that the court may assume that he will adequately represent the interests he asserts.[15]

The judicial irasciblity that I have mentioned here is neither justified nor is its basis properly removed by a rule concerning standing that eliminates persons or organizations which do not assert direct involvement with the park, forest or seashore affected. To eliminate them in that way is to say "No matter how illegal the

12. Refer to note 43 and accompanying text, *infra*.
13. Sierra Club v. Morton, 405 U.S. 727, 757-58 (1972) (Blackman, J., dissenting).
14. *Id.* at 757-58.
15. *Id.* at 758

action of the agency, and no matter how clear is the right in *somebody* to review that action, *you* are not the one to do it."

It is sure that "[o]urs is not a government by the Judiciary," that Congress and the Executive "should have wide powers," and that review of these powers should in many instances be narrowly confined.[16] But, it is also true that limitation of review through restrictions related to standing, as such, does not necessarily confine or restrict the scope of review available to *some* party — it merely confines the class of persons who can initiate the review in court.

Restriction on reviewability rests on different policy considerations than does confinement of standing to a narrow group of directly affected persons. The basis for standing should be that, when the case is brought by a particular litigant in a certain way, "the questions will be framed with the necessary specificity, . . . the issues . . . contested with the necessary adverseness and . . . the litigation . . . pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution."[17]

The policy considerations relating to reviewability are quite different. As Justice Brennan pointed out in *Barlow v. Collins*:[18]

> Under the Administrative Procedure Act (APA), "statutes [may] preclude judicial review" or "agency action [may be] committed to agency discretion by law." § U.S.C. § 701(a) (1964 ed., Supp. IV). In either case, the plaintiff is out of court, not because he had no standing to enter, but because Congress has stripped the judiciary of authority to review agency action.[19]

Though standing in environmental suits may be quite appropriately dealt with by a statute enunciating a uniform test,[20] reviewability should rest upon considerations unique to the subject matter of the review.

The most recently enacted statute creating an independent administrative agency[21] illustrates to what extent the matter of reviewability may be tailor-made for the particular circumstance involved. The Consumer Product Safety Commission is empowered to make rules relating to the safety of design of consumer pro-

16. *Id.* at 753-55. (Extract from Oral Argument of Solicitor General in Appendix to the Opinion of Douglas, J., dissenting).
17. Flast v. Cohen, 392 U.S. 83, 106 (1968).
18. 397 U.S. 159 (1970).
19. *Id.* at 173-74.
20. Such would be the effect of Section 304(a) of H.R. 7592, 93d Cong., 1st Sess. (1973) and companion bills in the 93rd Cong.
21. Consumer Product Safety Act, 15 U.S.C. § 2051-2081 (1972).

ducts.[22] Traditionally, rule-making by such agencies is subject to Subchapter 2 of the Administrative Procedure Act,[23] and court review is based on the "arbitrary or capricious" standard. But judicial review of consumer product safety rules is based upon the standard of whether or not the findings upon which the rule is based are supported by substantial evidence on the record taken as a whole.[24] The rule may be contested by any person adversely affected or any consumer or consumer organization.[25]

Also, any interested person, including a consumer or consumer organization may contest the agency's failure to enter a field of consumer product safety rule-making.[26] The standard, in a *de novo* proceeding in the court, is whether or not it is shown by a preponderance of the evidence that the consumer product presents an unreasonable risk of injury and that the failure of the Commission to initiate rule-making proceedings will unreasonably expose consumers to risk of injury presented by the product in question.[27]

In its original Senate form the provision gave the court responsibility to determine ultimately whether satisfactory consumer protection was afforded by the agency,[28] but the conferees left only court power to require initiation of a rule-making proceeding in proper circumstances, not the power to require the promulgation of a rule.[29]

This is an illustration of how Congress may precisely limit reviewability and how this is done without respect to the matter of standing. Standing is generously granted in both instances, but reviewability in the case of the agency's failure to act is limited to requiring the agency to proceed in a proper case. It does not extend to a review of the reasonableness of the agency's declining or failing to act.

The act also illustrates a balance of review opportunity for both the manufacturer restricted by the rule and the consumer protected by it, or who asserts that he should be protected in a field in which there has been no rule promulgated. It shows, too, how that balance would be disturbed if the framers of the statute, feeling that certain matters should be left to agency discretion, had accomplished this by restricting standing to, say, "persons adversely affected" by the promulgation of a rule. This would have kept consumers out of the courthouse altogether but would have afforded manufacturers a most generous scope of review.

22. *Id.* § 2056(a)(1).
23. 5 U.S.C. § 553 (1964).
24. Consumer Product Safety Act, 15 U.S.C. § 2060(c) (1972).
25. *Id.* § 2060(a).
26. *Id.* § 2059.
27. *Id.* § 2059(e)(2).
28. S. 3419, 92d Cong., 2d Sess. (1972).
29. Consumer Product Safety Act, 15 U.S.C. § 2059(e)(3) (1972).

Since rudimentary concepts of fairness and constitutional requirements of due process both militate against excluding the regulated from all court review, limitations on standing are not likely to be drawn to exclude them. Not so with consumers or citizens concerned with the environment. But it is still a matter of basic fairness that they not be excluded. The Consumer Product Safety Act responded to both concerns.

United States v. SCRAP[30] gives an example of the limitation on court action in the environmental field by limiting reviewability rather than standing. In that case substantially all of the nation's railroads sought a 2.5 per cent surcharge on nearly all freight rates as an emergency measure to obtain increased revenues pending adoption of selective rate increases on a permanent basis.[31] Shippers and other interested persons petitioned the Interstate Commerce Commission to suspend the tariff for a seven-month period permitted by the Interstate Commerce Act.[32] Students Challenging Regulatory Agency Procedures (SCRAP) and other environmental groups protested that failure to suspend the surcharge would continue and exacerbate rates favoring haulage of iron ore as opposed to scrap metal, and that this would discourage the use of recyclable materials, thus adversely affecting the environment.[33] To establish standing they alleged that their members used the forests, streams, mountains and other resources in the Washington area and that this use was disturbed by the environmental impact caused by non-use of recyclable goods.[34] Among other things, defendants challenged plaintiffs' standing to sue and argued, as Justices White, Burger, and Rehnquist ultimately opined in their dissent, that the alleged injuries were "so remote, speculative, and insubstantial in fact that they failed to confer standing."[35]

The Court, however, held that, since persons in the organization, SCRAP, had asserted in their pleadings that they were among the injured, they had established standing.[36] In response to the argument that they were not injured in any way different from all others that use scenic resources of the country or breathe the air, the Court said:

> To deny standing to persons who are in fact injured simply because many others are also injured, would mean that

30. 412 U.S. 669 (1973).
31. *Id.* at 674.
32. 49 U.S.C. § 15(7) (1970).
33. United States v. SCRAP, 412 U.S. 669, 675-76 (1973).
34. *Id.* at 678.
35. *Id.* at 723 (White, J., with whom Burger, C.J. and Rehnquist, J., join, dissenting in part).
36. *Id.* at 686-90.

> the most injurious and widespread government actions could be questioned by nobody.[37]

Though the decision on SCRAP's standing is sound, it seems anomalous that an organization, whose *ad hoc* inception is clearly reflected by its acronym and whose interest in the outcome of the controversy is not distinguishable from that of any other citizen, should have standing when such is denied, as in the *Sierra Club* case, to an organization with a provable, long-term and established interest, indeed one which grew around the nucleus of concern for the Sierra Nevada mountain range where the objectionable facility was to be located. The distinction was, of course, based upon the fact that SCRAP, unlike the Sierra Club, had alleged that its members used the forests, streams, mountains and other resources in the Washington, D. C. area which, like all other areas of the country, were arguably affected by the outcome of the case. But if standing only exists upon the basis of this distinction, what about standing in cases like that envisaged by Professor Rodgers in his testimony before the Subcommittee on Fisheries and Wildlife Conservation and the Environment in October 1973?[38] He pointed out:

> The standing issue mentioned this morning lingers on after *Sierra Club v. Morton,* a problem this legislation should banish.
>
> Who has standing, for example, to challenge the Park Service's grizzly bear management program in Yellowstone National Park which has been responsibly criticized as hastening the extinction of the species?
>
> I cannot think of any one who is injured, in fact, by that particular course of conduct.[39]

The basis of standing also does not answer the problem posed in Justice Blackmun's dissent in *Sierra Club.* He pointed out that a resident of an area subject to environmental degradation by the governmental action complained of is frequently not likely to become a plaintiff in a suit contesting such governmental action.[40] Residents of the area are the real users that may be naturally inclined to regard the change as one which will benefit them economically. As Justice Blackmun says of such a person:

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37. *Id.* at 688.

38. *Hearing on H.R.* 5931, *H.R.* 5932, *H.R.* 7592, *H.R.* 7947, *H.R.* 7948, *H.R.* 8587, *H.R.* 8720 *Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries,* 93d Cong., 1st Sess. (1973).

39. *Id.* at 105-06 (Statement of William Rodgers, Jr., at Georgetown University Law Center).

40. Sierra Club v. Morton, 405 U.S. 727, 759 (1972) (Blackmun, J., dissenting).

> His fishing or camping or guiding or handyman or general outdoor prowess perhaps will find an early and ready market among the visitors. But that glow of anticipation will be shortlived at best. If he is a true lover of the wilderness—as is likely—. . . it will not be long before he yearns for the good old days when masses of people . . . and their thus far uncontrollable waste were unknown to [the area].[41]

Therefore, the selection of use-plaintiffs may be artificial at best. If such "user" standard is to be retained, the plaintiff will continue to come into court in the weakest posture for asserting that his challenge is a bona fide one asserted by persons genuinely affected.

The best course appears to be providing by statute that, in suits to protect environmental quality, pursuant to the National Environmental Policy Act of 1969[42] or other federal statutes involving the environment, any person would have standing to sue if he were adversely affected or aggrieved by the activity which is the subject of the suit or speaks knowingly for the environmental values asserted in a suit which satisfies the constitutional "case" and "controversy" test of Article III.[43]

Such provision would have salubrious results in four areas:

(1) It would obviate the anomaly referred to above in the situations of *Sierra Club* and *SCRAP* cases.

(2) It would embrace a situation like that referred to by Professor Rodgers where only the most strained construction would find any person directly or personally *injured in fact* under the standard of the *Sierra Club* case.

(3) It would permit an honest alternative to the use of the real "user" as a plaintiff when every such person is likely to be an adversary.

(4) It would avoid confusion, resulting in delay, in trial courts' processes dealing with the question of standing.

This last point deserves amplification. As has been pointed out above, *Barlow v. Collins*[44] established a two-step method of determining whether the plaintiff has standing:

(1) Whether the plaintiff alleges that the challenged action has caused him injury in fact; and

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41. *Id.*
42. 42 U.S.C. § 4321 *et seq.* (1970).
43. This language is modeled after H.R. 7592, 93d Cong., 1st Sess. § 304(a) (1973).
44. 397 U.S. 159 (1970).

(2) Whether the interest sought to be protected by the plaintiff is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.[45]

The second point is enmeshed with the questions of justiciability and reviewability. Courts have all too frequently dealt with questions involving justiciability, reviewability, and the merits as if they had to do with standing. This has caused great confusion and much delay.

A general statutory determination that plaintiffs of the nature of those involved in the *Sierra Club* case are intended to be within the scope of protection of environmental laws to the extent at least that they have standing to urge what is deemed to be the law's proper application would remove such a second step. It would, by statute, bring the law into conformity with Justice Brennan's view in *Barlow v. Collins* and *Sierra Club v. Morton,* which he thought had been established in *Flast v. Cohen.*[46]

Thus, at the threshold, the court would only decide whether or not the plaintiff has alleged that the challenged action in the environmental field has caused him injury in fact in the sense that it is a case or controversy within the framework of Article III. Such would be determined on the basis of standards set forth in *Baker v. Carr,*[47] requiring only that the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness" exists.[48] There can, of course, be no question after *Scenic Hudson Preservation Conference v. Federal Power Commission,*[49] that a party may be aggrieved when his concern is esthetic or conservational as well as when his concern is of a more tangible nature.

Justice Brennan is correct in asserting that, by requiring the second, non-constitutional step, the Court in *Barlow v. Collins* came "very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests."[50] At any rate so long as the second step remains, a trial court is very likely to overstep the bounds of *what is arguably within the zone of interest to be protected* into the area of *whether or not the plaintiff has a legally protected interest.* Thus, under the guise of determining the question of standing, the court would consider matters which go to reviewability and to the merits.

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45. *Id.* at 164.
46. 392 U.S. 83 (1968).
47. 369 U.S. 186 (1962).
48. *Id.* at 204.
49. 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).
50. Barlow v. Collins, 397 U.S. 158, 168 (1970) (Brennan, J., concurring in the result and dissenting).