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SIERRA CLUB V. MORTON: STANDING TREES IN A THICKET OF JUSTICIABILITY

PATRICK L. BAUDET†

Much has been written about standing; much is even beginning to be written about how much has been written. The extensive commentary was stimulated by explicit recognition in several circuits of the citizen's suit, fortified by four important but not definitive Supreme Court cases which, although dealing with other problems of standing, seemed to sanction the lower courts' new receptivity to plaintiffs whose injuries were not special or direct. Those who follow Supreme Court decisions, especially environmental and consumer-interest lawyers, therefore eagerly awaited clarification by the Supreme Court following its grant of certiorari in an important Ninth Circuit case, *Sierra Club v. Hickel*. A minor feature of the Supreme Court's opinion was its exchange of quotations. Mr. Justice Stewart, writing for the court, drew on Tocqueville's usually overlooked qualification of his familiar observation on the dominant role of the Judiciary in the United States; Mr. Justice Blackmun, dissenting, preferred to read Donne's metaphorical "No man is an island . . ." with pointed ecological literalism. The lawyer trying to find exactly what the opinion holds and portends may prefer Horace's "Mountains will be in labor to give birth to a ridiculous mouse."

Mineral King is a scenic valley located within the Sequoia National Forest, bounded on three sides by the Sequoia National Park. National forests are under the administration of the Department of Agriculture, national parks under the Department of the Interior. * Mineral King

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2. The cases are collected in Annot., 11 A.L.R. Fen. 556 (1972).


4. 433 F.2d 24 (9th Cir. 1970).


6. *Id.* at 740–41 n.16.

7. *Id.* at 760 n.2.


Valley is also a game refuge, which excepts it from the general hunting permission for national forests and gives the Secretary of the Interior responsibility for wildlife. Since 1949 Mineral King has been designated a Recreation Area, and the Department of Agriculture has attempted to interest commercial developers, who have been deterred largely by the highly limited access—a narrow, winding and only partly graded mountain road crossing the National Park.

In 1965 the Department of Agriculture’s Forest Service again solicited bids for the commercial development of public recreation at Mineral King. To encourage these plans, the State of California approved funds for the construction of a new, straighter and better-surfaced road through Sequoia National Park, for which the Secretary of the Interior’s consent would be necessary. Later in 1965, the Forest Service chose Walt Disney Enterprises’ bid from the six submitted, granting Disney authority to prepare a master plan for the recreational facilities. The plan, approved in 1969, calls not only for hotels and parking lots to accommodate 14,000 daily visitors to the wilderness, but also for facilities to comfort those for whom the wild is too much: a chapel, a heated swimming pool, and even a theater (one wonders whether nature films will be shown).

The Sierra Club was not monolithically opposed to all “improvements” in the valley. In 1965, when the project was less grandiose in conception, an officer of the club had testified before Congress against the development of commercial skiing at San Gorgonio on the ground that Mineral King was better suited. Faced with the Disney plan, however, the Sierra Club strongly objected, suing for injunctive and declaratory relief on several grounds. That portion of the planned development within the Mineral King Valley was attacked as a misuse of the Secretary of Agriculture’s permit powers. The Secretary may issue two sorts of permits for the use of forest land: a term permit for eighty acres and a...
revocable permit unrestricted in area.\textsuperscript{17} To accommodate all Disney's plans the Secretary had to issue both sorts, thereby arguably thwarting either the acreage limitation or the authority to revoke (in practice if not theory, since revocation would destroy a good-faith investment of 36 million dollars). Features of the plan outside Mineral King itself were also attacked. The highway proposal was alleged to violate road standards of the National Park Service, prepared under statutory authority, which disapproved the construction of roads through national parks leading elsewhere (in this case, of course, to a national forest).\textsuperscript{18} The highway plan was also assailed for lack of public hearings, which would have been required under Interior Department regulations of doubtful status.\textsuperscript{19} The proposed development also required the construction of a power line through the National Park, for which, depending on one's interpretation of the appropriate statute, congressional approval may be required.\textsuperscript{20} The Sierra Club also joined claims that various administrative actions conflicted with the guiding principles of the statutes conferring administrative jurisdiction.\textsuperscript{21}

The United States District Court for the Northern District of California held that the Sierra Club had standing to bring the suit and granted

\begin{itemize}
\item \textsuperscript{17} This power is derived from the Secretary's general authority to manage the National Forests. 16 U.S.C. § 497 (1970). See Sierra Club v. Hickel, 433 F.2d 24, 34 (9th Cir. 1970); 35 Op. Att'y Gen. 485 (1928).
\item \textsuperscript{18} General road-building authority is given by 16 U.S.C. § 8 (1970): "The Secretary of the Interior . . . is authorized to construct, reconstruct, and improve roads and trails . . . in the national parks. . . ." \textit{Id}. This section even gave rise to an argument that the Secretary had to build the road himself (one hopes with help from his Department) rather than permit the state to do it.
\item \textsuperscript{19} The relevant standard is in U.S. DEPT. OF INTERIOR NATIONAL PARK SERVICE, PARK ROAD STANDARDS 11 (1968).
\item \textsuperscript{20} Provided, That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress. 16 U.S.C. § 45c (1970).
\end{itemize}
a preliminary injunction against issuance of the required permits.\textsuperscript{22} A panel of the Ninth Circuit Court of Appeals reversed, finding, two to one, that the Sierra Club lacked standing, and, unanimously, that the possibility of ultimate success on the merits was so remote as to render the preliminary injunction an abuse of discretion.\textsuperscript{23} The appellate court distinguished two earlier cases, which had recognized the Sierra Club's standing to preserve the wilderness from administrative encroachment. These cases were thought to be different because in those instances "the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action."\textsuperscript{24} This distinction seems fair for one of the prior decisions since that case's plaintiffs included several residents and property owners in the nearby town of Vail, Colorado; a guide who conducts wilderness trips into East Meadow Creek; the Eagles Nest Wilderness Committee, Colorado Open Space Coordinating Council, and the Sierra Club, conservation groups; the Town of Vail; and Colorado Magazine.\textsuperscript{25}

In the other Sierra Club standing case the club was joined by the Citizens Committee for Hudson Valley,\textsuperscript{26} and by a New York village.\textsuperscript{27} The Ninth Circuit's distinction between this case and the case before it amounts to saying that the Hudson Valley Committee is a "local conservation organization" for the Hudson Valley whereas the Sierra Club is not for the Sierra Nevada Mountains: the court does not explain why the Sierra Club is made an inappropriate plaintiff to protect the Sierras either by its parallel concern for other areas such as the Hudson Valley or by its willingness to accept as members citizens from throughout the United States who are interested in protecting the Sierras. In any event, the Second Circuit in finding standing in the Citizens Committee case drew no distinction between the Sierra Club and the Hudson Valley Committee.\textsuperscript{28} The Ninth Circuit's distinction of these Sierra Club cases—as


\textsuperscript{23} Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

\textsuperscript{24} Id. at 33.

\textsuperscript{25} Parker v. United States, 307 F. Supp. 685, 687 (1969), \textit{aff'd}, 448 F.2d 793 (10th Cir. 1971). The district court's finding of standing was not discussed by the Tenth Circuit.


\textsuperscript{27} The village had severe standing problems of its own. 425 F.2d at 105-06.

\textsuperscript{28} Two of the plaintiffs (the Citizens Committee and the Sierra Club) made no claim that the proposed Expressway or the issuance of the dredge
well as the distinction it might have drawn of a case it decided well before the recent bullish trend in standing— is particularly interesting for its casual acceptance of the unarticulated premise that one plaintiff's standing takes care of another's. 30

The Ninth Circuit found the Sierra Club itself without standing because it had not been injured in fact. The court, after restating the two-part test of \textit{Data Processing} and \textit{Barlow}, that the complainant must suffer injury in fact and that he must seek to protect an interest arguably within the zone of interests protected or regulated by the constitutional or statutory provision in question, concluded that the second part "does not establish a test separate and apart from or in addition to the test which the Court first looked to . . . ." The Ninth Circuit's excision is no doubt salutary but not the ordinary way in which courts of appeals treat recent Supreme Court holdings. In any case, the Sierra Club failed the first branch of the test; the court rejected the notion that general review statutes ought to be read broadly to make an unofficial group a private attorney general. 35

and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic alteration, claiming that they were "aggrieved" when the Corps acted adversely to the public interest. They are, as the federal defendants observe, serving as "private Attorney Generals" to protect the public interest.

425 F.2d at 102. \textit{But see West Virginia Highlands Conservancy v. Island Creek Coal Co.}, 441 F.2d 232 (4th Cir. 1971) (distinguishing the Ninth Circuit's opinion in \textit{Sierra Club to uphold the standing of a local group dedicated to preserving scenic and historic areas in the West Virginia highlands).

29. In 1953, in a suit to review the Federal Power Commission's licensing of a municipal dam, the court held that two state government departments and the Washington State Sportsmen's Council, Inc., "All are 'parties aggrieved' since they claim that the Cowlitz Project will destroy fish in which they, among others, are interested in protecting." \textit{Washington Dep't of Game v. FPC}, 207 F.2d 391, 395 n.11 (9th Cir. 1953).

If the Sportsmen's Council was aggrieved in 1953 because of its interest in protecting fish, surely the Sierra Club was aggrieved in 1970 because of its interest in protecting a national park and forest.

71 \textit{Colum. L. Rev.} 176-77 (1971). But the Sportsmen's case could be distinguished not only because of the governmental co-plaintiffs, but also because the review arose under the Federal Power Act rather than under the Administrative Procedure Act alone or because the agency had already permitted intervention by the Sportsmen's Council.


33. 433 F.2d at 31.

34. Mr. Justice Brennan in his separate opinion for the \textit{Camp} and \textit{Barlow} cases views the second test as superfluous not because it duplicates the first but because it improperly anticipates questions of reviewability and the substantive law. 397 U.S. at 167, 169.

35. A less restrictive view of the opinion is suggested by the Court's statement
In this vein, the court found it easy to distinguish the four standing cases relied on by the district court. *Scenic Hudson*\(^3\) was a review of an administrative proceeding in which the various plaintiffs had participated as parties. *Church of Christ*\(^3\) was a "consumer case" holding that those who listen to a radio station are naturally those aggrieved by its licensing. *Road Review League*\(^3\) and *Powelton*\(^3\) both involved, among other plaintiffs, property owners whose land would be taken by proposed federal projects. The bases for distinguishing these cases are substantial, so that the Ninth Circuit's denial of standing to the Sierra Club, although probably challenging the Second Circuit's holding in *Citizens Committee*, is not irreconcilable with most of the other recent expansive standing decisions.\(^4\)

After disposing of standing, the court of appeals turned to the...
merits for the purpose of evaluating the district court's issuance of the preliminary injunction. The court does not explain the reason for going beyond standing; one explanation may have been a perceived need to forestall reissuance of the injunction in the event Sierra Club amended its complaint to allege an injury in fact or to join a more local conservation organization (which could no doubt have been easily formed for the occasion among some of the 27,000 club members who, according to the complaint, resided in the San Francisco Bay area). In any event, the court concluded that examination of the club's probability of ultimate success on the merits showed that a preliminary injunction was unjustified. The court sustained the combination of term and revocable permits because the practice is not specifically prohibited and has been sanctioned by established administrative practice in eighty-four instances. With respect to the highway location dispute, the court found that the route already existed and was simply being improved; therefore hearings were not clearly required and in any case were held, albeit by the state highway division. The statute requiring congressional approval of transmission lines was construed, for contextual and practical reasons, to apply only to lines in connection with hydroelectric development projects. The claim that the development would be inconsistent with the statutory policies establishing a game refuge was, without further discussion, declared of "no substance."

The Supreme Court affirmed the Ninth Circuit's decision on standing without ruling on the propriety of the injunction. The Supreme Court's opinion begins its discussion of standing by setting aside all previous Supreme Court standing cases.

42. 433 F.2d at 35.
43. Id. at 36-37.
44. Id. at 37.
45. Id.
46. Sierra Club v. Morton, 405 U.S. 727 (1972). The net effect, for this litigation, was to affirm both grounds, since a complaint amended to satisfy standing and refiled in the Northern District of California would still be subject to the court of appeals' views on the propriety of preliminary relief.

It could be argued that the court of appeal's opinion on the injunction is not binding, since it found the controversy one which federal courts could not adjudicate because of plaintiff's lack of standing. Cf. Freund, Discussion, in SUPREME COURT AND SUPREME LAW 35 (E. Cahn ed. 1954). If the plaintiff had failed to demonstrate itself a suitable litigant with respect to the merits of the controversy, which seems to be what it means to lack standing, there is no reason to suppose it a party appropriate to present the extraordinary showing requisite to preliminary relief.

Still, the district judge knew what to do when the amended complaint was filed; he refused the preliminary injunction but denied the motion to dismiss the complaint. Sierra Club v. Morton, 4 ENV. REP. C. 1543 (N.D. Cal., Sept. 12, 1972).
Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.\textsuperscript{47}

The inquiry seems not only to begin there but also to end there, since the Court does not, after preliminary reference, return to discussion of \textit{Baker v. Carr}\textsuperscript{48} or \textit{Flast v. Cohen}.\textsuperscript{49} The statutory provision here in question is § 10 of the Administrative Procedure Act,\textsuperscript{50} recently given a seemingly definitive construction in \textit{Data Processing} and \textit{Barlow}.\textsuperscript{51} According to the Court, the two-part invention of those cases is inapplicable because the plaintiffs in those cases alleged potential pecuniary loss resulting from the official action complained of:

These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review. Thus, neither \textit{Data Processing} nor \textit{Barlow} addressed itself to the question, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared.\textsuperscript{52}

The Court goes on to recognize that "aesthetic and environmental"\textsuperscript{53} harms may also constitute injuries in fact, but in the circumstances of this case

\[ \text{[t]he impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be} \]

\textsuperscript{47} 405 US. at 732.
\textsuperscript{48} 369 U.S. 186 (1962).
\textsuperscript{49} 392 U.S. 83 (1968).
\textsuperscript{50} 5 U.S.C. § 702 (1970): 'A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.'
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} 405 U.S. at 733-34.
\textsuperscript{53} \textit{Id.} at 734.
lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.64

Nor can the Sierra Club succeed as a "private attorney general." The traditional cases,55 according to the Court, construe the "person aggrieved" provisions of the typical review statutes to give standing to those who sustain economic injury; the Court will recognize additional categories of injury — "aesthetic, conservational, and recreational,"56 but will not replace injury with a mere "interest."57 This extension is refused for two stated reasons: first, because of the impossibility of drawing objectively based lines between the Sierra Club and small or short-lived organizations, or even merely interested citizens,58 and second, because the injury requirement serves "as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."59 The first reason may be acceptable to those who have little faith in judicial discretion, although they would no doubt reject the remaining part of United States constitutional law. The second justification would be convincing only if the Court had bothered to explain why even a smooth attempt to limit review to those who have a direct stake is a good idea, or even, for that matter, why an "interest" is less a "direct stake" than is an aesthetic injury. Mrs. Frothingham60 no doubt found the Maternity Act an ugly distortion of the symmetry of federalism. And indeed, why should an eyesore be an injury if a moral outrage is not? The Sierra Club was certainly within the class of persons outraged by the Disney development.

There were three dissents.61 Mr. Justice Douglas borrows Christopher Stone's brilliantly serious whimsy62 to suggest that the suit could

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54. Id. at 735.
57. 405 U.S. at 739.
58. Id.
59. Id. at 740.
61. Justices Powell and Rehnquist did not participate, so that the opinion lacks support of a majority of the total membership. Mr. Justice Rehnquist's concurrence may, however, safely be inferred from his opinion in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). See text accompanying note 88 infra.
62. Stone, Should Trees Have Standing?—Toward Legal Rights for Natural
be treated as an *in rem* action, with the "river as plaintiff" and the Sierra Club next friend: "The voice of the inanimate object, therefore, should not be stilled." Mr. Justice Blackmun in his dissenting opinion suggests two alternative conclusions. Either the preliminary injunction should be continued on condition that the plaintiff amend its complaint to meet the Court's requirements, or the concept of standing should be imaginatively expanded to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide and well-recognized attributes and purposes in the area of environment, to litigate environmental issues.

He then suggests that the "eloquent" Douglas opinion provides a sticking-point adequate to resolve the majority's line-drawing problem. Mr. Justice Douglas concurred in the Blackmun opinion. Mr. Justice Brennan, in a one paragraph opinion, agreed with that part of the Blackmun opinion which supported the standing of the Sierra Club.

1. It is not easy to tell if *Sierra Club* is really just a pleading case. The opinion suggests that the result might be different if the plaintiff had stated that any of its members used Mineral King, especially if their use were alleged to be significantly affected by the development. The implication that such allegations would support standing has led one commentator to conclude that "the Sierra decision should not be a significant roadblock to public actions to protect the environment." There is internal evidence supporting this view. The opinion states, of course, that aesthetic or environmental injuries could suffice for standing. Furthermore, the Court in a footnote seems to approve a number of recent cases "broadening the categories of injury that may be alleged in support of standing." Thus the opinion approves the two cases distinguished by the Ninth Circuit, as well as an old consumer case, a recent case sus-

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*Ornithological Notes*, 45 S. Cal. L. Rev. 450 (1972). One of Stone's less solemn authorities is a New York Supreme Court case discussing the equal protection rights of a mouse named Morris (undoubtedly cousin to one of Disney's creatures). *Id.* at 455 n.23a.

63. 405 U.S. at 749.
64. *Id.* at 757.
65. *Id.* at 755.
67. 405 U.S. at 738 n.13.
68. *Id.* at 738.
70. Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953).
taining the standing of the Sierra Club and other organizations because their members are unwilling consumers of DDT residues, and a case permitting suit by those allegedly about to be irradiated from a project of the Atomic Energy Commission. The cases which have gone beyond recognizing "organizational interest" as standing, seem to be less approved than tolerated for the reason that "[i]n most, if not all of these cases, at least one party to the proceeding did assert an individualized injury either to himself or, in the case of an organization, to its members.

The conclusion is inviting, then, that the Sierra Club had standing but failed to plead it properly. The difficulty with the conclusion is that it seems strange as a matter of procedure. Complaints under the Federal Rules are not to be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." That statement could hardly be taken literally but, even so, cannot easily be squared with the holding in Sierra Club. The complaint not only alleged that 27,000 members of the club lived near San Francisco but also that

the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country . . . . One of the principal purposes of the Sierra Club is to protect and conserve the natural resources of the Sierra Nevada Mountains.

Utterly consistent with that allegation are the assertions in an amicus brief, quoted by the court, that the club regularly guides camping trips into Mineral King and that its members often go to the valley for recreational purposes.

There are, however, two reasons that may justify special rules requiring greater specificity for standing allegations. First, it is important that the jurisdiction of a court of limited jurisdiction be made to appear in the complaint. To an uncertain extent standing is an element of the "cases or controversies" to which the Constitution limits federal judicial

73. 405 U.S. at 739 n.14.
75. 405 U.S. at 735-36 n.8.
76. Id. (brief of the Wilderness Society).

...
The facts upon which standing is based are not ordinarily included in the jurisdictional section of the complaint, but similar policies might call for similar treatment if there is good reason to anticipate a substantial resulting question of federal judicial power, especially when preliminary injunctive relief is sought.

Indeed the injunction may have forced the issue in *Sierra Club*. Had the district court not granted the injunction there would have been no interlocutory appeal and the appellate court would have had before it the record of testimony at trial, which might well have disclosed the frequency with which Sierra Club activities and members were associated with Mineral King. Of course the court to which an interlocutory appeal is taken must be able to dismiss the complaint for plaintiff’s lack of standing, but dismissal is not necessarily appropriate where the facts upon which standing turns, in the judgment of the appellate court, are neither in the record nor inconsistent with the complaint. Even in such an as yet unilluminated case, though, the older formulation of the conventional preliminary injunction rule, that an order should not issue if the case is a doubtful one, would justify reversal—certainly this principle makes its strongest claim where the doubt concerns the propriety or power of any action at all by a federal court. The trouble with so defending the Supreme Court’s disposition in *Sierra Club* is that good sense and the modern authorities both reformulate the rule so that doubtfulness is to be considered only together with the balance of irreparable harm to the parties. This line of analysis would then have led the Court to assess the merits of the Sierra Club’s case for the purpose of balancing them against the Court’s appraisal of the extent of irreparable harm to aesthetic and environmental interests the club might be entitled to represent, all in order to explain why the business was no business of a federal court. The result is logical enough but so easily susceptible to misconstruction as a validation of the Mineral King project that only an unusually forceful casuist could convince the public that the Court had not approved Disney’s plan. The same policies could be served, however, by a categori-

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ocal rule requiring detailed allegations of standing for preliminary injunction. In the ordinary case the showing of irreparable harm will leave no doubt of standing. In the extraordinary public-interest case there will seldom be occasion for concern with visiting the consequences of artless pleading on hapless plaintiffs; the plaintiff is probably not an appropriate representative of the public interest if its lawyers haven’t read Sierra Club and plead their case accordingly.

There may be a more general reason for requiring detail in the complaint of a case like Sierra Club; a reason, that is, which would have justified dismissal of the complaint even if no preliminary injunction had been sought. Generally worded complaints are the modern practice not because courts now prefer ill-defined issues in litigation, but because there are other procedural devices to define the case before trial. In the typical case, say an automobile accident, exploration of the event itself almost inevitably shapes the subject of the dispute. Even in many suits against government officers, the emerging facts narrow the issues. One of the most celebrated, or at least controversial, early pleading decisions under the Federal Rules found a complaint to state a claim for relief from an unlawful misappropriation by a customs officer in the following two allegations: “he sold my merchandise to another bidder with my price of $110, and not of his price of $120” and “three weeks before the sale, two cases, of 19 bottles each case, disappeared.” Such a complaint can be tolerated because the case will not become a wide-ranging inquiry into the legitimacy of the customs process; the plaintiff’s disclosed interest will always limit the issue to the sale and disappearance of his bottles.

Sierra Club is a different matter. Various features of the development plan are attacked for separate reasons, with varying degrees of substantiality. The improved road through the park may well, as Mr. Justice Blackmun suggests with impressive detail, threaten the “beauty, solitude and quiet” of the wilderness. But the injury from the noise and fumes of the traffic is distinct from the question whether a power transmission line may be buried under the road or whether the tourist facilities inside the game refuge are consistent with the protection of wildlife. Requiring the Sierra Club to allege in precisely what way its members will suffer thus serves to give the defendants an opportunity to know exactly which challenges they must meet, and to give the court an opportunity to decide that some features of the development plan need not be defended. This screening becomes crucial if the only real interferences with club activities or interests are by clearly valid features of the plan. For example, the

83. Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).
84. 405 U.S. at 759.
Solicitor General asserted at oral argument that plaintiff's only substantial legal objection, on the merits, was to the power line. The line itself, however, was to be buried under the road at the time of road construction. Whether Sierra Club had a case worth hearing and worth forcing the government to defend would, on this analysis, depend specifically on whether any of its members were accustomed to digging in the immediate area with metal tools.

This possible reading makes the case more than a pleading decision, however, for it is based upon substantive notions of separability; upon the premise that the elements of "public interest" which a plaintiff may raise depend in part upon the nature of its injury. This premise is not inconsistent with the Court's statement that

once review is properly invoked, [an injured] person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate,

because the plaintiff may have separable claims, perhaps that different statutes have not been complied with, perhaps even by different agencies (as in *Sierra*). To deny a plaintiff permission to argue the public interest in support of one claim which it is entitled to have adjudicated would induce deliberate purblindness in the judicial process; but to permit generalized allegations of standing would have the different consequence of stopping substantive conduct the plaintiff could otherwise not prevent. The Supreme Court, in a case decided after *Sierra Club*, has taken a strict view of separability. In *Moose Lodge No. 107 v. Irvis* the Court held that a black plaintiff who had been refused as a guest at a private club was without standing to raise the issue that the club also discriminated by refusing membership to blacks. The Court's explanation was in terms of standing to raise the rights of third parties, rather than to raise additional issues, but the distinction seems purely verbal.

Another way of stating the problem is to ask what the Sierra Club must now allege. The holding would not be much of an obstacle if the following allegation sufficed: "The Sierra Club by its activities and con-

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85. 2 ENV. REP. CURRENT DEVELOPMENTS 848-49 (1971).
86. See H. HART & H. WEchsLER, FEDERAL COURTS AND THE FEDERAL SYSTEM 177-80 (1953).
87. 405 U.S. at 737.
89. Sometimes the issue of standing to raise the rights of third parties is distinct from the question of defining the litigants' own rights, sometimes not. See generally Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433, 440-41 (1962).
duct has exhibited a special interest in the conservation and sound main-
tenance of the Mineral King Game Refuge and the Sequoia National Park."  
Such a modest change would make the club very close to a "local  
conservation group" thereby perhaps satisfying the Ninth Circuit. The  
Supreme Court, however, suggests that the "alleged injury will be felt  
directly only by those who use Mineral King . . . and for whom the  
aesthetic and recreational values will be lessened. . . ."  
Scarcely less restrictive, though, would be the requirement that the complaint allege:

The Sierra Club has conducted regular camping trips into the  
Mineral King area, and various members of the Club have used  
and continue to use the area for recreational purposes. These  
activities will be adversely affected by the defendants' issuance  
of the permits and licenses hereafter described.

The Court expressly left open the possibility that facts like these might  
amount to standing. Mr. Chief Justice Burger, sitting as Circuit  
Justice, has recently found similar allegations to be adequate.  
However, if this latter allegation sufficed the case would be no more than a prodigious waste of judicial effort (or a veiled limitation on the preliminary in-
junction).

90. During oral argument Mr. Justice White asked the Solicitor General if  
all that was needed was for the Sierra Club to amend the complaint alleging  
a special interest in the Mineral King Valley. Mr. Griswold responded that  
this would help.


91. 405 U.S. at 735 (emphasis added).

92. The Court, after reciting the Wilderness Society's description of the club's  
activities said:

Moreover, the Sierra Club in its reply brief specifically declines to rely on  
its individualized interest, as a basis for standing. . . . Our decision does not,  
of course, bar the Sierra Club from seeking in the District Court to amend its  

405 U.S. at 735-36 n.8.

93. With obvious reluctance the Chief Justice refused to stay a District Court  
decision permitting a public-interest group (five law students) to challenge the ICC  
rate schedule for non-recyclable goods upon the allegation  
that its members use the forests, streams, mountains, and other resources in  
the Washington [D.C.] area for camping, hiking, fishing, and sightseeing, and  
that this use is disturbed by the adverse environmental impact cause [sic] by  
nonuse of recyclable goods.

brackets in the original).

94. In its brief the plaintiff claimed to have refused to allege "private, unique  
injury" to escape the resulting trap that the injunction would be denied. The Court  
said that the  
short answer to this contention is that the "trap" does not exist. . . . Once  
this standing is established, the party may assert the interests of the general  
public in support of his claims for equitable relief.

405 U.S. at 740 n.15.
basis of decision as a way of avoiding the greater issue. A case like one of those approved in the Sierra opinion would be an easier instance to defend the standing of citizens' action groups. The Sierra Club may partly have chosen its pleading theory to yield the most extravagant recognition possible for the citizen's action, a choice some would excuse the Court from seconding.\(^95\)

**The Garden in the Wilderness**

Whatever the uncertainties in the future sweep of the Sierra Club decision, it shares with most of the Court's standing decisions an almost total failure to relate its conclusions to the policies underlying the exercise of judicial review. At the immediate level, the reason for requiring a plaintiff to demonstrate actual hurt is to assure vigorous advocacy in the presentation of all the facts and arguments which the court may need to make sound decision possible. But as Professor Jaffe has argued with irresistible force, a litigant whose motives are ideological frequently is the most dedicated and well-equipped champion of the issues.\(^96\) Why then should the Sierra Club be forced to validate its right to sue by finding among its members a casual camper in the valley? The Supreme Court's answer, reminiscent of one of Marshall's major arguments in *Marbury v. Madison*,\(^97\) is that the suit is unnecessary if no affected person sues.\(^98\) Thus the Supreme Court ultimately justifies its holding, as did the Ninth Circuit, with respect to whether the suit should have been brought at all, rather than by whom.

Perhaps the greatest source of confusion in the law surrounding the standing problem is the distinction between the "who" and the "what," between standing and justiciability.\(^99\) Clarity can be gained by provisional acceptance of Mr. Chief Justice Warren's observation that

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97. 5 U.S. (1 Cranch) 137, 177-78 (1803).

98. 405 U.S. at 740.

99. One source of this confusion is Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 149 (1951), in which standing and justiciability are both reduced to a search for a feel of the past:

[b]oth characterizations mean that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.

*Id.* at 150. For a more convincing historical account, see Berger, *supra* note 78.
The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wished to have adjudicated.\textsuperscript{100}

However, this clarity can quickly be lost by failing to recognize that in some instances the policies of standing are identical with those of justiciability. If the real question is whether what the government has done to its citizen is an injury of the sort judicial process should redress or prevent, then an affirmative answer decides both who and what. \textit{Flast v. Cohen}\textsuperscript{101} makes a useful example. The question in \textit{Flast} was whether federal spending for the benefit of religious schools' programs in secular instruction violated the establishment clause. Pure establishment clause cases often present special difficulties of standing if they conjoin only the abstractions of church and state. Free exercise cases, on the other hand, usually pose concrete situations in which a limited and identifiable group of persons—Mormons with two wives, Amish who refuse to send their children to school—are subject to state sanctions. The greatest pressure for allowing taxpayers to sue in cases like \textit{Flast} results from the fear that otherwise the courts would be denied the opportunity to rule on the constitutionality of expenditures allegedly used to establish a religion. As expressed by Mr. Justice Fortas, concurring in \textit{Flast}, a failure to recognize taxpayers or citizens as appropriate plaintiffs would consign the "separation of state and church . . . to limbo, unacknowledged, unresolved, and undecided.\textsuperscript{102}

To remove a matter from limbo to the federal courts is to make it justiciable. This decision ought to be justified by the demonstration that courts in fact have the capacity to make useful contributions to the sound resolution of the problem. The establishment clause cases subsequent to \textit{Flast} do not make such a showing. \textit{Walz v. Tax Commission}\textsuperscript{103} for example, sustained property tax exemptions for religious institutions largely because the exemptions were rooted in long-established practice. It is incongruous to find standing in order to permit the bringing of new challenges, which are then dismissed on account of their novelty. But the Court's difficulty in \textit{Walz} was easy to see; exemption of religious property from taxation is an inherently abstract question of proprieties, unilluminated by the informing context of an individual put to more than psychic suffering and peculiarly complicated by the possibility that the free exercise clause may require exemption.

\begin{itemize}
  \item[101.] 392 U.S. 83 (1968).
  \item[102.] \textit{Id.} at 116.
  \item[103.] 397 U.S. 664 (1970).
\end{itemize}
The problems of litigation to promote the natural environment seem similar. Few could deny the general proposition that the bounty of nature can no longer be wasted; but "a judgment or intuition more subtle than any articulate major premise" is needed to reach a satisfactory allocation of natural resources to present popular consumption. The question of standing for the environmental public interest organization amounts, as a matter of policy, to asking whether there is something about the action complained of that outfits the court to develop a useful intermediate premise.

The role of the judiciary in environmental issues is a subject fully treated elsewhere: the present point is merely that the proper unfolding of that role, rather than anything about the Sierra Club itself, is the important and difficult issue in the Sierra Club case. The public interest plaintiff ought, of course, to be able to sue if it has a substantial injury which justifies relief without regard to the "public interest" other than the interest in redressing private injury. Where the plaintiff relies on the public interest alone, however, it ought to be required to show the potential for constructive judicial contribution. The potential could be shown in several ways. Where the legislation establishing the decision-making function can be read to create a role for interests ignored by the actual makers of the decision, the courts can compel attention to the slighted interests. Such legislative warrant might be found either in the specific administrative statutes or in the generalities of the National Environmental Policy Act of 1969. The Sierra Club opinion may indeed be limited to the assertion of standing by statute. The opinion analyzes the problem entirely in those terms, although the two cases it sets aside as inapposite may be read as requiring injury in fact for standing to raise constitutional rights.

An often-quoted passage from Baker v. Carr, quoted again in Sierra Club, defines standing as "personal stake in the outcome"; personal stake is usually considered a sort of code-word for injury in fact although the logical equivalence is not compelling, nor is it obvious that the injury in Baker v. Carr was personal. The opinion

106. Comment, supra note 9.
111. It should be perfectly clear, therefore, that the interest sought to be
in *Flast v. Cohen* also proceeds, formally at least, as an application of the personal stake requirement to taxpayers.\(^\text{112}\) Aside from these two cases mentioned without invocation of authority, however, the *Sierra Club* opinion relies on five cases construing statutes authorizing judicial review of agency action,\(^\text{213}\) and repeatedly describes the issue as "seeking judicial review." A finding of standing without statutory authority would be proper, however, either if traditional common-law remedies are available\(^\text{114}\) or if a constitutional doctrine of environmental protection can be adequately defended.\(^\text{115}\) However weak or counter-majoritarian the case for a constitutional right to a decent environment, creating such a right entails the conclusion that the judiciary ought to prevent elected officials from degrading anybody's environment. In addition to guaranteeing administrative attention to values the legislature elects to cherish, the courts have established adverse possession to the function of overseeing respect for the interests of those unable to present their own claims in the political process. The harshest burdens of destroying the wilderness will fall on the yet unborn—whom it may not be pure fancy to analogize to the disenfranchised or the out-of-state.\(^\text{116}\)

\(^{112}\) *vindicated* is either that of the public at large (Tennessee "as a polity," as Mr. Justice Frankfurter put it in *Colegrove v. Green*) or at least that of a loose, indeterminate, and very numerous group.


\(^{113}\) "There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest. . . ." 392 U.S. 83, 101 (1968).

