

## DIRECT ENVIRONMENTAL STANDING FOR CHARTERED CONSERVATION CORPORATIONS

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In 1972, in *Sierra Club v. Morton*,<sup>1</sup> the United States Supreme Court rejected the Sierra Club's attempt to assert Article III standing under the Administrative Procedure Act based on its own corporate interest in environmental issues. The Court suggested instead that an environmental organization must rely on its ability to represent the environmental interests of its individual members. Since *Morton*, no environmental organization has been successful in asserting its own corporate interest in environmental resources as the basis for Article III standing in environmental litigation. For the most part, public interest environmental organizations have given up trying to assert direct environmental interests, relying instead on organizational standing as representatives of their affected members. Courts have routinely inquired into the individual standing interests asserted by organizational plaintiffs.<sup>2</sup> But, in recent years, this representational standing hurdle has become harder and harder to clear, as courts have demanded ever more detailed showings of individual injury and causation.

Entities asserting direct business interests have fared far better in the courts. Most recently, in *Bennett v. Spear*,<sup>3</sup> the Supreme Court upheld the statutory and constitutional standing of ranchers to challenge a habitat conservation plan adopted under the Endangered Species Act.<sup>4</sup> Courts have likewise recognized standing under the environmental laws for business corporations asserting economic inter-

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1. 405 U.S. 727 (1972).

2. See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000).

3. 520 U.S. 154 (1997).

4. See *id.* at 172-74.

ests.<sup>5</sup> These courts have not conducted any inquiry into the individual interest of corporate shareholders; the corporate entities' business interests were found to be sufficient.<sup>6</sup>

This article suggests that, as an antidote to the ever-tightening restrictions on individual environmental standing, a state may charter a not-for-profit corporation organized to protect a particular environmental resource, giving the corporation a non-exclusive portion of the State's interest in enforcing applicable environmental protections. The dichotomy between not-for-profit organizations that may litigate only as the representative of individual members' interests, and business corporations that assert their own direct economic interests, may seem natural to our late-twentieth-century sensibility, but is not founded in original intent. The framers of Article III, which grants jurisdiction over "cases and controversies" to the federal courts, would have seen the latter day business corporation as something of an oddity. Most incorporated entities during the eighteenth century were religious institutions, municipalities, and government franchisees. In fact, the now ubiquitous business corporation did not become commonplace until the early nineteenth century, as government franchise corporations expanded to include incorporation of private businesses.<sup>7</sup> To the framers, then, the concept of a corporate entity asserting community interests in natural resources on its own behalf would have been no more alien than the concept of a corporate entity asserting private business interests.

A line of cases suggests that states and municipalities have standing to assert environmental interests within their jurisdiction without reference to individual standing or injury on the part of any particular resident.<sup>8</sup> And, state-chartered corporations have long been delegated functions and powers originally residing in state government.<sup>9</sup> It follows that a state-chartered organization should have Article III standing to assert its own interest in protecting environmental resources directly, without reference to the individual interests of its members.

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5. See *Pacific Northwest Generating Coop. v. Brown*, 38 F.3d 1058, 1063 (9th Cir. 1994) (finding standing for aluminum and hydropower industries under the Endangered Species Act).

6. See *id.* at 1066.

7. See RONALD SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION* (1982).

8. See *infra* Part IV.A.

9. See *infra* Part IV.B.

I. THE ROAD NOT TAKEN: A DETOUR FROM  
DIRECT ENVIRONMENTAL STANDING AFTER  
*SIERRA CLUB V. MORTON*

The litigation choices made by the Sierra Club in *Sierra Club v. Morton*, the first environmental standing case to reach the Supreme Court, established the path for all environmental citizen plaintiffs. By choosing to rely on its general interest in environmental issues nationally, rather than its particular corporate interest in the Sierra Nevada mountains, Sierra Club provoked a Supreme Court precedent that all but rejected the assertion of a non-profit corporation's direct environmental interests.<sup>10</sup> With the Court's *Morton* decision blocking the direct road to environmental standing for organizations, these plaintiffs took the convenient detour through representational standing. In 1977, the Supreme Court established an easily met test for representational standing that, in part, relied on the individual standing of the organization's members.<sup>11</sup> Indirect standing based on the interests of members rather than corporate interest proved expedient for the following two decades of environmental litigation.

More recently, however, representational standing has proven more and more difficult to establish. The federal courts, following the United States Supreme Court's lead in its 1992 decision in *Lujan v. Defenders of Wildlife*,<sup>12</sup> have made it more difficult to show individual members' standing by imposing ever stricter requirements for establishing the Article III requirement of "injury in fact." Some courts have been receptive to attacks on environmental organization's representative capacity as well, inquiring closely into the relationship between the organizational plaintiff and its members with standing. These restrictions on standing threaten to defeat Congress' plan of citizen environmental enforcement as a backstop to government enforcement of federal environmental laws.<sup>13</sup>

A. *Morton and the Rejection of Standing Based on Abstract Environmental Issues*

In 1965, the United States Forest Service invited bids from private developers for the development of a ski resort in the Mineral King area of the Sequoia National Forest, an undeveloped wilderness.

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10. See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

11. See *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

12. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

13. See S. Rep. No. 91-1196, at 35-37 (1970), reprinted in 1970 U.S.C.C.A.N. 5356.

Walt Disney Enterprises, Inc. responded with a proposal to build a complex of ski trails and lifts, motels, restaurants, pools, and a cog railway, all designed to accommodate 14,000 visitors a day. The Forest Service gave Disney preliminary approval and permits to survey the area in preparation for a master development plan.<sup>14</sup>

The Sierra Club was, as it is today, a national environmental organization. Founded in 1892, its mission is to “to explore, enjoy, and protect the wild places of the Earth.”<sup>15</sup> Sierra Club was an active opponent of the Mineral King development. When the Forest Service gave its approval to the Disney development bid, Sierra Club challenged the approval in federal district court. In these pre-NEPA<sup>16</sup> days, Sierra Club challenged the authority of the Forest Service to grant leases and approvals under various provisions of the statutes governing use of the national forests. Sierra Club supported its standing to sue with allegations based primarily on its status as a national environmental organization. Its complaint asserted:

For many years 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, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains.<sup>17</sup>

The District Court found these standing allegations sufficient, and found sufficient doubt in the legality of the Forest Service’s approvals to grant a preliminary injunction against further permits and approvals pending the litigation. However, the Ninth Circuit Court of Appeals reversed, noting that there was “no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the Forest Service] other than the fact that the actions are personally displeasing or distasteful to them.”<sup>18</sup>

The United States Supreme Court affirmed the Ninth Circuit’s dismissal in its seminal decision on environmental standing. Justice Stewart’s opinion for the majority cleared the path for environmental standing generally, by recognizing non-economic interests as a sufficient basis for Article III “injury in fact:”

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14. See *Morton*, 405 U.S. at 729.

15. Sierra Club, *Sierra Club Policies* (visited Oct. 18, 2000), <<http://www.sierraclub.org/policy/>>.

16. National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (1994).

17. *Morton*, 405 U.S. at 735 n.8.

18. See *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970).

Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.<sup>19</sup>

The majority nonetheless blocked Sierra Club's claim of standing based solely on the organization's general interest in environmental issues. While recognizing that the Mineral King development would wreak environmental injury on someone, according to the Court, Sierra Club had not shown that it was itself "among the injured."<sup>20</sup> The Court noted Sierra Club's specific refusal to rely on the possible individual interests of its members for the purposes of the appeal.<sup>21</sup> The Court rejected decisions in some circuit courts recognizing standing of non-profit organizations to assert the public interest.<sup>22</sup> Instead, the Court established as the constitutional minimum under Article III a requirement of "individual" injury. The majority assumed that, at least for the Sierra Club, the font of that individual injury must be the interests of its members, and not its own corporate interests.

Justice Douglas's dissent in *Morton* is at least as memorable as the majority opinion, for its suggestion that environmental resources themselves—the very rocks, trees, rivers, and forests—should have standing to sue in their own name in federal court, much as ships have standing to sue as libellants in admiralty.<sup>23</sup> Justice Douglas even drew the analogy to historical corporate entities, such as the ecclesiastical "corporation sole," that were given a fictional legal personality to permit suit in the courts.<sup>24</sup> Nevertheless, Justice Douglas was not that far removed from the majority about the question of who should have standing to speak for the forests and rivers in court; he also would rely on the use of the environmental resources by individual members of an organizational plaintiff. Using the river as the paradigmatic environmental resource, he wrote: "Those people who have a meaningful relationship to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the val-

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19. *Morton*, 405 U.S. at 734.

20. *See id.*

21. *See id.* at 735.

22. *See, e.g.,* Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965) (finding that environmental groups had standing to assert their special interests under the Federal Power Act).

23. *See Morton*, 405 U.S. at 741-42 (Douglas, J., dissenting).

24. *See id.* at 742 (Douglas, J., dissenting).

ues which the river represents and which are threatened with destruction.”<sup>25</sup> Noting the Sierra Club’s allegation that its principal purpose was to “protect and conserve the national resources of the Sierra Nevada Mountains,” Justice Douglas seems to have presumed that this meaningful relationship test was satisfied, and would have found standing.<sup>26</sup>

There is common ground between the majority and dissent in *Morton*. The majority recognized that environmental and aesthetic interests satisfied the “injury in fact” requirements of Article III standing, but would require specific allegations that members of a plaintiff organization personally and individually suffered such injuries. Justice Douglas likewise recognized that environmental interests constituted “injury in fact,” but was willing to go one step further to recognize the standing of the environmental resources themselves. However, Justice Douglas, like the majority, assumed the need for some natural person<sup>27</sup> with a meaningful relationship to the environmental resource, to serve as its spokesperson. There is unspoken agreement between the majority and the dissent that corporate persons do not suffer direct environmental injury, but serve only as litigating conduits for the environmental interests of their members.

The *Morton* Court thus assumed, without deciding, that incorporated environmental organizations would not have any corporate environmental interests to assert directly. It is easy to posit a situation where a not-for-profit might irrefutably have such interests, as when it owns real property that has been directly affected by environmental pollution. But such a case begs the question, as the environmental injury in such a case is also an economic injury.<sup>28</sup> A property damaged by environmental pollution is worth less money. The unspoken assumption of *Morton* and other cases is that, for Article III injury, corporate interests (even of the not-for-profit variety) amount to economic interests only. As we will see, this is not borne out by the history of corporations, either in this country or in England. Nevertheless, since *Morton*, the Supreme Court has not had to address the possibility of direct environmental injury claimed by an environmental non-profit organization. The question simply has not arisen

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25. *Id.* at 743 (Douglas, J., dissenting).

26. *See id.* at 744 (Douglas, J., dissenting).

27. I am using “natural person” here in the sense of a non-corporate person.

28. *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 365 (1982) (finding that a drain on organizational resources, but not an interference with organizational mission, supports standing).

because, for the most part, environmental organizations have found it more expedient to follow the Court's cue, and to rely on the environmental interests of their members.

B. *The Detour Through Representational Standing and the Representational Standing Test*

Since the *Morton* decision, most organizational environmental plaintiffs have relied on the individual standing of their members, and the representative capacity of the organization, to establish standing to sue. Thus, in the next environmental standing case to reach the Supreme Court, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,<sup>29</sup> the organizational plaintiff relied on the alleged injuries flowing from increased rail freight rates to its members who used forests in the metropolitan Washington, D.C. area for "camping, hiking, fishing, sightseeing, and other recreational purposes."<sup>30</sup> At the pleading stage, the Supreme Court affirmed a decision approving the standing of SCRAP.

Following the *Morton* and *SCRAP* decisions, there are precious few reported decisions in which environmental organizations sought to rely on their own interests to support standing, and none where they were successful. In one of these few cases, *Sierra Club v. SCM Corp.*,<sup>31</sup> the Sierra Club again sought to assert standing based on its own organizational interest in environmental issues. The Sierra Club argued that the citizen-suit provision of the Clean Water Act<sup>32</sup> expanded the standing available to organizational plaintiffs. The Second Circuit made short work of this argument, relying on *Morton* to reject the Sierra Club's persistent claim that its interest and expertise in environmental issues established its standing apart from the recreational or environmental interests of its members.<sup>33</sup>

More recently, the federal District Court for the Central District of Illinois rejected an attempt to prosecute a site clean-up action under the imminent and substantial endangerment provision of the Resource Conservation and Recovery Act (RCRA)<sup>34</sup> brought by Citi-

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29. 412 U.S. 669 (1973).

30. *See id.* at 678.

31. 747 F.2d 99 (2d Cir. 1984).

32. Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365 (1994).

33. *See SCM Corp.*, 747 F.2d at 102.

34. 42 U.S.C. § 6901 (1994).

zens for a Better Environment (CBE) “on its own behalf.”<sup>35</sup> Like Sierra Club, CBE relied on its organizational interest in preserving environmental values, and, also like Sierra Club, was unsuccessful. According to the court: “CBE has not offered any evidence, or even addressed in any of its various memoranda, how it, as an organization, has suffered anything more than a mere setback to its abstract social interests. Therefore, CBE cannot sue on its own behalf.”<sup>36</sup>

In cases where organizations have sought to rely on both their own organizational interests and the individual interests of their members, they have been successful only in the latter.<sup>37</sup> Most organizational plaintiffs rely simply and exclusively on the individual standing of their members.

For the most part, this detour into representational standing proved a smooth ride for the environmental organizations. The Supreme Court established a three-part test for representational standing in *Hunt v. Washington State Apple Advertising Commission*:<sup>38</sup>

Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.<sup>39</sup>

The second and third of these requirements never posed any problem for organizational environmental plaintiffs. The environmental interests they sought to litigate were uniformly “germane” to the purposes of the organization, and the kinds of suits they brought, typically seeking injunctive relief or penalties, but not individual damages, did not require individual participation by their members.

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35. See *Citizens for a Better Env’t v. Caterpillar, Inc.*, 30 F. Supp. 2d 1053, 1060 (C.D. Ill. 1998).

36. *Id.* at 1061. Several courts have also rejected claims of direct “informational injury” as a basis of standing by environmental organizations. See, e.g., *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996) (rejecting standing for FOE in Clean Water Act citizen suit); *Foundation on Econ. Trends v. Lyng*, 943 F.2d 79, 84 (D.C. Cir. 1991) (rejecting informational claim under the environmental impact statement requirement of the National Environmental Policy Act). These decisions are highly questionable in light of the Supreme Court’s decision last term in *Akins v. Federal Election Commission*, 524 U.S. 11 (1998), which held that where Congress created a right to information, any person claiming a desire to have such information has standing to litigate.

37. See, e.g., *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 446 (D. Md. 1985).

38. 432 U.S. 333 (1977).

39. *Id.* at 343.



Nor did the showing that individual members of the organization would have standing in their own right pose any significant obstacle to organizational standing in the first two decades of environmental litigation after *Morton*. Courts were routinely satisfied by allegations or affidavits establishing recreational use of the affected environmental resource by members of the organizational plaintiff. Thus, the Second Circuit found sufficient for standing allegations that one member regularly passed the Hudson River and “finds the pollution in the river offensive to [his] aesthetic values” and that another member’s “children swim in the river, . . . occasionally fish[] in the river and his family has and will continue to picnic along the river.”<sup>40</sup> Similarly, the Fourth Circuit found sufficient allegations that one of the plaintiff’s members regularly hiked along the river into which the defendant’s industrial discharges flowed.<sup>41</sup>

For example, in a Clean Water Act citizens’ enforcement suit brought by the Chesapeake Bay Foundation (CBF), the Maryland District Court found:

The three members of CBF who have submitted affidavits have indicated that they use and enjoy the Patapsco River and other areas of the Chesapeake Bay water system. CBF itself is a regional environmental organization with many members who are residents of Maryland. Undoubtedly, many more than the three named individuals use and enjoy the Chesapeake Bay, but CBF has chosen to name only three in support of its claim to representational standing. There is no question that those three members have shown sufficient injury in fact to show standing in this action. Therefore, CBF may proceed in this action as representative of those members.<sup>42</sup>

Given the hostility of courts after *Morton* to recognize environmental organizations’ standing to represent their own interests, and the relative receptivity of the court to claims of individual standing by these organizations’ members, it is hardly surprising that organizational environmental plaintiffs grew to rely exclusively on representational standing. Most of the larger national and regional organizations needed only to search their membership lists to find members who recreated along or near the environmental resource in question, and get that member to agree to submit an affidavit for standing purposes. The member’s participation posed little burden. With such a low threshold to establish individual environmental injury, the nature

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40. See *Friends of the Earth, Inc. v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985).

41. See *Sierra Club v. Simkins Indus.*, 847 F.2d 1109, 1112 & n.3 (4th Cir. 1988).

42. *Bethlehem Steel Corp.*, 608 F. Supp. at 445.

of the member's interest was rarely an issue for intensive discovery or trial.

As the law of environmental standing matured, however, the threshold for individual standing and the burden on the organization and its members to establish representational standing began to increase.

### C. *Ruts and Potholes on the Representational Standing Detour*

During the 1980s, several major environmental organizations embarked on systematic programs to enforce Clean Water Act permits pursuant to the Clean Water Act citizen-suit provisions. The litigation that ensued produced many decisions that refined the requirements for the representational standing test. By the end of the decade, faced with increasingly sophisticated challenges to plaintiffs' standing in these enforcement initiatives, the courts began to tighten the standards for establishing both individual and representational standing. Courts began to inquire into the organizational relationship between the plaintiff organization and its members.<sup>43</sup> At the same time, instead of simply requiring a showing of recreational use of the environmental resource in question, courts began to require a showing of specific, observable impacts to the resource.<sup>44</sup>

#### 1. Judicial Inquiry into Organizational Structure

Environmental plaintiffs' reliance on representational standing invited judicial inquiry into their organizational structure and representative capacity. Organizational plaintiffs were faced with discovery demands for affected members.<sup>45</sup> While the Supreme Court had previously held membership lists to be protected by the First Amendment,<sup>46</sup> and organizations were interested in protecting the privacy of their members, defendants were nonetheless entitled to discover before trial which members an organizational plaintiff intended to rely on to establish standing.<sup>47</sup> At least one court resolved the issue by accepting affidavits from affected members under seal.<sup>48</sup>

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43. See *infra* Part I.C.1.

44. See *infra* Part I.C.2.

45. See, e.g., *Sierra Club v. SCM Corp.*, 580 F. Supp. 862, 865 (W.D.N.Y. 1984), *aff'd*, 747 F.2d 99 (2d Cir. 1984).

46. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

47. See FED. R. CIV. P. 26(a)(3).

48. See *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 446 (D. Md. 1985) (finding that NRDC did have representational standing even though it chose not to publicly release the names of all its affected members).

More fundamentally, courts began inquiring into the exact corporate structure of these organizational plaintiffs. Following decisions in other contexts, some commentators suggested that an organization may sue on behalf of its members only if it can establish that the putative members had some form of control over the activities of the organization.<sup>49</sup> The Ninth Circuit followed this reasoning and rejected a claim of organizational standing in an environmental case where the corporate plaintiff was organized as a non-membership corporation, with no voting members.<sup>50</sup> The Northern District of New York, on the other hand, rejected a challenge to Sierra Club's organizational capacity to represent impacted members even though those members constituted a very small minority of its national membership, reasoning that the requisite control of the organization need not be actual majority control so long as the represented members had some voice in the organization's governance.<sup>51</sup>

These authorities invited factual and legal inquiry into the exact structure of corporate governance of environmental plaintiff organizations. In one case, a district court conducted a three-day trial inquiring into the organizational structure of plaintiff Friends of the Earth (FOE), and concluded that FOE's failure to adopt formal criteria for membership qualification precluded its acting in a representative capacity on behalf of its putative members.<sup>52</sup> The Fifth Circuit reversed, finding sufficient indicia of membership to support representational standing under *Hunt v. Washington State Apple Advertising Commission*.<sup>53</sup> Other courts have similarly found sufficient representational capacity based on a finding of *de facto* membership control of the organization.<sup>54</sup> Recent commentary suggests that an

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49. See, e.g., JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 21 (1987); MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 6.07(C) at 6-32 (1995) (citing *Health Research Group v. Kennedy*, 82 F.R.D. 21 (D.D.C. 1979)).

50. See *Pacific Legal Found., Inc. v. Gorsuch*, 18 ERC (BNA) 1127 (9th Cir. 1982).

51. See *Sierra Club v. Aluminum Corp. of Am.*, 585 F. Supp. 842 (N.D.N.Y. 1984).

52. See *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 919 F. Supp. 1042 (E.D. Tex. 1996), *rev'd*, 129 F.3d 826 (5th Cir. 1997).

53. 432 U.S. 333 (1977).

54. See *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997); *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 986 F. Supp. 1406, 1409 (N.D. Ga. 1997) (finding "de facto membership organization").

inquiry into the corporate governance of plaintiff organizations should remain an essential element of representational standing.<sup>55</sup>

These inquiries into the membership lists and corporate governance are at a minimum burdensome, and at worst, fatal to the organization's standing. Yet, often these organizational standing burdens pale in comparison to the ever-elevating hurdle to establish standing for individual members in the first place.

## 2. The Rising Bar of Individual Injury in Fact

As noted, the early decisions in environmental enforcement suits established a relatively light burden for showing individual member standing. An affidavit stating that members of the organization used the affected resource usually sufficed.<sup>56</sup> However, courts have begun requiring increasingly specific showings of objective environmental harm. As a result, reliance on members' claims of individual injury has become increasingly tenuous.

The first hint of increasing judicial scrutiny into members' claims of individual injury came in a Third Circuit case, *Public Interest Research Group of New Jersey, Inc. v. Powell-Duffryn Terminals, Inc.*<sup>57</sup> In *Powell-Duffryn*, the Public Interest Research Group (PIRG) brought a citizen suit to enforce Clean Water Act permit requirements against an industrial discharger. PIRG's complaint alleged generally that it had members who resided and/or recreated on or near the Kill Van Kull, the affected water body. When the defendant moved to dismiss for lack of standing, PIRG amplified these allegations with more specific affidavits, including affidavits of members who hiked, jogged, or birdwatched along the Kill Van Kull and specifically complained about the brown color, foul odor, and oily sheens in the water.<sup>58</sup> The Third Circuit upheld the District Court's grant of summary judgment in PIRG's favor on standing and liability. In doing so, however, it specifically rejected the claim that *any* water pollution in violation of the Clean Water Act constituted an injury in fact to recreational users of the water body, and instead required the plaintiff to establish specific, objective injuries suffered by its members as a result of water pollution. The aesthetic injuries averred in

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55. See generally Charles H. Steen & Michael B. Hopkins, *Corporate Governance Meets the Constitution: A Case Study of Nonprofit Membership Corporations and Their Associational Standing Under Article III*, 17 REV. LITIG. 209 (1998).

56. See MILLER, *supra* note 49, at 21-22.

57. 913 F.2d 64 (3d Cir. 1990).

58. See *id.* at 71.

the plaintiffs' affidavits—foul odors, brown color, and oily sheens—were held to be sufficient.<sup>59</sup>

The Third Circuit went on to establish a practical approach to the “causation” prong of the Article III standing test. This approach is to consider whether the specific pollutants complained of are generally capable of causing the alleged harms, without requiring proof that the specific pollution coming out of the defendant's pipe was the sole cause of the harm.<sup>60</sup> Although this decision was a short-term victory for environmental plaintiffs, as it upheld PIRG's standing and established a workable test for causation, the *Powell-Duffryn* decision also had the effect of raising the bar for individual environmental standing. No longer would a simple allegation that a plaintiff's members recreated on or near the affected resource suffice to establish injury. Now plaintiffs would be required to establish specific observable impacts of pollution before they could sue. The *Powell-Duffryn* standard was swiftly adopted by other federal courts.<sup>61</sup>

In the early 1990s, two Supreme Court decisions led the way to further restrictions on environmental representational standing. In *Lujan v. National Wildlife Federation*,<sup>62</sup> the Court rejected statutory standing on the part of an organization whose members claimed to use Forest Service lands in the vicinity of a vast area of federal lands opened up for mineral development. Here standing was rejected because the plaintiff failed to establish that its members recreated on any of the lands actually opened for development.<sup>63</sup> In *Lujan v. Defenders of Wildlife (Lujan)*,<sup>64</sup> the Court rejected Article III standing in a case brought under the Endangered Species Act, even though the plaintiff's members had professional or avocational interests in particular endangered species that might be impacted by United States funding of certain development projects abroad. In *Lujan*, the basis for rejection was that individual members could not identify any specific plans to visit the affected venues in the future.<sup>65</sup>

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59. *See id.*

60. *See id.* at 73.

61. *See, e.g.,* Save Our Community v. EPA, 971 F.2d 1155 (5th Cir. 1992); Natural Resources Defense Council v. Watkins, 954 F.2d 974 (4th Cir. 1992); Concerned Area Residents for the Env't v. Southview Farm, 834 F. Supp. 1410 (W.D.N.Y. 1993), *rev'd on other grounds*, 34 F.3d 114 (2d Cir. 1994).

62. 497 U.S. 871 (1990).

63. *See id.* at 889.

64. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

65. *See id.* at 564.

Neither of these cases represented a dramatic departure from previous environmental standing doctrine on their facts; after all, the *Sierra Club v. Morton* decision had long ago required that environmental plaintiffs demonstrate that they themselves be “among the injured.”<sup>66</sup> Individuals who cannot establish any physical proximity to threatened environmental resources, not surprisingly, are not “among the injured.” Nevertheless, the tone of Justice Scalia’s majority opinion in *Lujan* sent shock waves through the environmental plaintiffs’ community and led many commentators to question the continued viability of the federal environmental citizen suit.<sup>67</sup> In his rejection of standing based on the theory of the entire world as one interlinked ecosystem, Justice Scalia wrote that the Endangered Species Act could not create rights “in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.”<sup>68</sup>

It is this language requiring “perceptible” injury that has led many lower federal courts to dramatically tighten previously liberal standards for establishing environmental “injury in fact.” A case in the Third Circuit that bracketed the *Lujan* decision presents the most dramatic example of this change in judicial winds. PIRG brought a Clean Water Act permit enforcement suit against a chemical manu-

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66. See 405 U.S. 727, 735 (1972).

67. See generally Charles A. Abell, *Ignoring the Trees for the Forest: How the Citizens Suit Provision of the Clean Water Act Violates the Constitution’s Separation of Powers Principle*, 81 VA. L. REV. 1957 (1995); Harold Feld, *Saving the Citizen Suit: The Effect of Lujan v. Defenders of Wildlife and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141 (1994); Robert B. June, *Citizen Suits: The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761 (1994); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992); Robert Wiygul, *Gwaltney Eight Years Later: Proving Jurisdiction and Article III Standing in Clean Water Act Citizen Suits*, 8 TUL. ENVTL. L.J. 435 (1995); Matthew M. Werner, Note, *Mootness and the Citizen Suit Civil Penalty Claims Under the Clean Water Act: A Post-Lujan Reassessment*, 25 ENVTL. L. 801 (1995); Christopher T. Burt, Comment, *Procedural Injury Standing after Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275 (1995). For an analysis of the assertion that standing based solely on use of the affected resource remains viable after *Lujan v. Defenders of Wildlife*, see Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of Lujan v. Defenders of Wildlife*, 22 COLUM. J. ENVTL. L. 169 (1997).

68. See *Lujan*, 504 U.S. at 566. Justice Scalia’s emphasis on “perceptible” injury is tempered somewhat by Justice Kennedy’s concurring opinion (joined by Justice Souter), which specifically recognized the power of Congress “to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.* at 580 (Kennedy, J., concurring).

facturing facility, Magnesium Elektron, Inc. (MEI).<sup>69</sup> Early in the litigation, PIRG sought a declaratory judgment to establish that it had standing and that MEI had violated its water permit.<sup>70</sup> It supported this motion with affidavits from its members, which established that they made recreational use of waters downstream of MEI's discharge, including the Delaware River, and that their enjoyment of these waters was diminished by the knowledge that the River contained pollutants. The District Court granted PIRG's motion in an opinion issued before *Lujan*, declaring that it had standing on the basis of these affidavits.<sup>71</sup> The Third Circuit granted an interlocutory appeal and affirmed without opinion.<sup>72</sup> The case proceeded to trial on the issue of appropriate penalties, the issues of standing and liability having already been determined.

At trial, PIRG sought penalties under the Clean Water Act based on the money saved by non-compliance and the defendants' lack of efforts to comply.<sup>73</sup> MEI defended by presenting expert testimony that the quantities of the pollutants in question (primarily total organic carbon and chlorides) would not cause any perceptible impact either on the creek into which they were discharged or downstream in the Delaware River. Believing the issue of standing to have been settled in its favor, PIRG did not present new scientific testimony in rebuttal.<sup>74</sup> The District Court awarded penalties and attorneys fees. MEI appealed to the Third Circuit.

The Third Circuit vacated the judgment and directed a dismissal of the complaint for lack of a justiciable controversy.<sup>75</sup> Relying on *Lujan*, the Court ruled that the unopposed scientific testimony of lack of perceptible harm to the receiving waters precluded the existence of a "case or controversy."<sup>76</sup> Despite its earlier affirmation of the plaintiff's standing, the court reasoned that the "law of the case" doctrine could not preclude the reopening of jurisdictional issues such as

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69. See *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 34 ERC (BNA) 2077 (D.N.J. 1992), *aff'd*, 983 F.2d 1052 (3d Cir. 1992).

70. See *id.* at 2079-80.

71. See *id.* at 2080-81.

72. See 983 F.2d 1052.

73. See *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 40 ERC (BNA) 1917 (D.N.J. 1995) (relying on the Clean Water Act, 33 U.S.C. § 1319(d) (1994)).

74. See *id.*

75. See *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997).

76. See *id.* at 121.

standing.<sup>77</sup> The court refused even to remand the case to allow the plaintiff to present further evidence of actual harm to the receiving water body.<sup>78</sup>

Other post-*Lujan* cases have similarly raised the bar required to establish individual injury in fact. The Fourth Circuit recently rejected claims of standing in a Clean Water Act enforcement case against a copper smelter even though the plaintiffs included both a canoe guide who depended on clean water downstream of the plant to run his guiding business, and the owner of a lake located downstream of the plant who limited swimming and fish consumption because of his concerns about pollution.<sup>79</sup> The Fourth Circuit reasoned that, although the copper smelter admitted to discharges of copper and other heavy metals in excess of its permit limits, the plaintiffs had not established that metals concentrations in the river and lake were higher than levels found elsewhere.<sup>80</sup>

Compared to the affidavits found sufficient in early Clean Water Act citizens enforcement cases, the burdens imposed by the Third Circuit in *Magnesium Elektron* and the Fourth Circuit in *Gaston Copper* are nearly insurmountable. Under these cases, the threshold question of environmental standing would require detailed (and expensive) scientific analysis of ambient water quality, "natural" conditions, and the relationship between pollutant discharges and "perceptible" impacts on water quality. Commentators and the media have noted this most recent judicial trend making citizen enforcement more difficult.<sup>81</sup>

### 3. Laidlaw: The Detour Takes Another Turn

Most recently, the United States Supreme Court seems to have halted the trend away from representational standing with its decision in *Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.*<sup>82</sup> In *Laidlaw*, the Court emphasized that the touchstone of environmental standing is not injury to the environmental resource, but injury to the

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77. See *id.* at 117.

78. See *id.* at 126 (Lewis, J., dissenting because PIRG was not on notice that standing remained an issue).

79. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Co.*, 179 F.3d 107 (4th Cir. 1999), *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000).

80. See *id.* at 113-14.

81. See William Glaberson, *Novel Antipollution Tool is Being Upset by Courts*, N.Y. TIMES, June 5, 1999, at A1; John D. Echeverria & Jon T. Zeidler, *Barely Standing: The Erosion of Citizen "Standing" to Sue and Enforce Environmental Law* at 1 (Env'tl. Policy Project, Georgetown University Law Ctr., June 1999).

82. 528 U.S. 167 (2000).



individual plaintiff. This individual injury may be established by showing a reasonable concern for the effects of environmental pollution, without showing a demonstrable injury to the resource itself.<sup>83</sup> It remains to be seen how the lower federal courts will implement the Supreme Court's approach to injury in fact in *Laidlaw*.<sup>84</sup> At a minimum, the *Gaston Copper* and *Magnesium Elektron* decisions seem unsupportable in light of *Laidlaw*.

If *Laidlaw* does not effect a shift in the courts' recent interpretation of "injury in fact," increased judicial scrutiny into organizational structure, and the rising bar for individual standing may merit reconsideration of reliance on an organization's representational standing. Regardless, the untested question remains: how can a corporate entity establish an environmental interest in a resource that is somehow greater, and more cognizable for Article III purposes, than the sum of the individual interests of its members?

Unlike environmental not-for-profit groups, business corporations have not suffered from the handicap of having to establish the individual standing of their shareholders, or their capacity to represent these shareholders. While environmental not-for-profit corporations have struggled to identify individual members who can satisfy the ever-increasing threshold for individual standing, businesses seeking to litigate environmental issues have enjoyed ever-easier access to the courts.

## II. BUSINESS INTERESTS ON THE STANDING SUPERHIGHWAY

At the same time as the bars to individual standing have been increasing, Courts have been increasingly receptive to standing for business corporations, usually brought to challenge environmentally protective measures rather than to enforce them. While one early commentator suggested that "[r]egardless of how the issue of injury is resolved, for profit corporations have difficulty with standing because of the zone of interest test,"<sup>85</sup> this did not prove to be the case. The

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83. *See id.* at 181.

84. This article was conceived and largely written prior to the announcement of the *Laidlaw* decision. Obviously, if the Court's new approach to injury in fact is applied by the lower federal courts, many of the recent impediments to environmental organizations' standing will be removed. Nevertheless, the question of organizational capacity, as well as the difficulties of locating individual members willing to expose themselves to the rigors of litigation will continue to hamper organizations seeking to assert environmental interests.

85. *See* MILLER, *supra* note 49, at 24. Under the "zone of interests" test, courts would not recognize a plaintiffs' standing unless the interests they sought to assert were within the "zone

Supreme Court recently decided, in *Bennett v. Spear*,<sup>86</sup> that the “zone of interests” test does not apply to most of the citizens enforcement provisions of the federal environmental laws.<sup>87</sup> The resulting doctrine puts businesses asserting rights to exploit natural resources at a distinct advantage in the courts over individuals who seek to protect such resources.

Although a few decisions have revealed doubt about the standing of business corporations to assert rights under the environmental statutes,<sup>88</sup> the distinct trend has been towards recognizing economic injury as a basis for standing to litigate environmental issues. Thus, courts have allowed potential contractors and housing developers to enforce Clean Water Act permit provisions requiring sewage treatment plant upgrades.<sup>89</sup> Another court recognized the right of an electric utility to bring a Clean Air Act citizen suit challenging a potential co-generation facility that would eat into its rate base.<sup>90</sup> In a more recent case, the Ninth Circuit recognized the right of electrical utilities to enforce the consultation requirement of the Endangered Species Act,<sup>91</sup> even though their only interest in the endangered salmon involved was to avoid further flow requirements that would affect their hydroelectric power costs.<sup>92</sup>

The culmination of this trend towards liberalized business standing to assert environmental claims was the Supreme Court’s decision in *Bennett v. Spear*. The prior cases had recognized standing on the part of businesses whose economic interests happened to coincide with enforcement of the environmental protections at issue. In *Bennett*, the Court recognized business interests’ standing to enforce the procedural provisions of environmental statutes even where those

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of interests” protected by the underlying statute. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 465, 474-475 (1982).

86. 520 U.S. 154 (1997).

87. See *id.* at 162.

88. See *Citizens Coordinating Comm. on Friendship Heights, Inc. v. Washington Metro. Area Transit Auth.*, 765 F.2d 1169 (D.C. Cir. 1985) (rejecting claim of environmental injury by a business corporation); *Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979).

89. See *Locust Lane v. Swatara Township Auth.*, 636 F. Supp. 534 (M.D. Pa. 1986) (holding that developers precluded from building on their property due to failure of a pollution control plant to comply with a permit had standing to sue under the Clean Water Act); *Michigan v. City of Allen Park*, 501 F. Supp. 1007 (E.D. Mich. 1980) (finding contractors had standing to bring suit against city under the Clean Water Act).

90. See *Consolidated Edison Co. v. Realty Invs. Assocs.*, 524 F. Supp. 150 (S.D.N.Y. 1981) (denying award of attorney’s fees and recognizing claim under the Clean Air Act was not frivolous).

91. 16 U.S.C. § 1536(a) (1994 & Supp. IV 1998).

92. See *Pacific Northwest Generating Coop. v. Brown*, 38 F.3d 1058 (9th Cir. 1994).

interests were directly contrary to the environmental values the statutes sought to protect. The *Bennett* plaintiffs consisted of ranchers and irrigation districts that protested a biological opinion given by the National Marine Fisheries Service under section 7 of the Endangered Species Act.<sup>93</sup> The opinion required minimum reservoir levels as a means of protecting endangered fish, the Lost River sucker and the shortnose sucker, in certain reservoirs.<sup>94</sup> The ranchers claimed that this biological opinion, the effect of which would be to deprive them of water they wished to use in their ranching businesses, violated section 7 of the Endangered Species Act in that it constituted a *de facto* critical habitat designation without the consideration of economic impacts required by section 4(b)(2) of the Act.<sup>95</sup>

Justice Scalia's opinion for the Court quickly disposed of any "zone of interests" objection to the ranchers' standing to assert their competing claim to the water needed by shortnose and Lost River suckers under the Endangered Species Act. The Court reasoned that the "zone of interest" test was a prudential limitation on standing, not grounded in the Constitutional "case or controversy" requirement, and that Congress intentionally abrogated the "zone of interests" test by authorizing a suit to enforce the Endangered Species Act by "any person."<sup>96</sup> The Court barely paused to find that the rancher plaintiffs satisfied the "injury in fact" requirement of Article III of the Constitution, holding an allegation that the effect of the biological opinion would be to reduce the water available for their ranching business to be sufficient.<sup>97</sup>

While perhaps not surprising as a matter of statutory interpretation and constitutional standing doctrine, the impact of the *Bennett* decision is jarring. *Bennett* flings open the courthouse doors to business interests seeking to exploit the environmental resources needed by endangered species to survive shortly after the same Court effectively slammed the doors on those seeking to assert the interests of the endangered species themselves, in *Lujan*.<sup>98</sup> It will always be easier for businesses to establish their economic interests in exploitation of

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93. See 520 U.S. at 159.

94. See *id.*

95. 16 U.S.C. § 1533(b)(2) (1994).

96. See *Bennett*, 520 U.S. at 165-66 (citing ESA, 16 U.S.C. § 1540(g)) (distinguishing citizen-suit provisions such as the provision in the Clean Water Act, which limits the citizens authorized to sue to those "having an interest which is or may be adversely affected." 33 U.S.C. § 1365 (g)).

97. See *id.* at 167-168.

98. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

environmental resources than for individuals to establish the “perceptible,” “individualized” injury in fact resulting from a reduction in species abundance or an incremental loss of environmental resources.

Perhaps the most dramatic example of the relative ease with which business interests may assert standing in environmental cases is a Clean Air Act case decided a few years ago in the Eastern District of Pennsylvania. In *Ogden Projects, Inc. v. New Morgan Landfill Co.*,<sup>99</sup> individuals as well as the corporate owner of a competing landfill challenged the development of a new landfill without obtaining an air quality new source permit that would require offsetting emissions reductions, including reductions of ozone precursors. The individual plaintiffs alleged that they lived and recreated in the region whose air quality was affected by emissions from the landfill. This air quality region was in non-attainment for the national ambient air quality standard for ozone—i.e., the air in this region violated the standards set by EPA based on health impacts from ozone. The individual plaintiffs alleged that they were concerned about the health impacts of recreating in areas with excess ozone, and submitted expert testimony establishing that their health concerns were reasonable.<sup>100</sup>

Nevertheless, the court rejected the individual claims of standing:

[W]e believe the Individual Plaintiffs fall short of establishing that their alleged injuries are sufficiently concrete to satisfy the first prong of the standing test. The Individual Plaintiffs offer no evidence regarding the magnitude of the diminished air quality nor the specific direct effect, if any, that this diminished air quality will have on their health, environmental and recreational interests. From the fact that the air quality in the geographical area surrounding the landfill would have been better had Defendant obtained a Part D permit, Individual Plaintiffs summarily conclude that their health, environmental and recreational interests suffer injury, without filling in the blanks.<sup>101</sup>

The Court went on, however, to find that the corporate landfill owner had standing to assert the Clean Air Claims, holding that the competitive economic injury that would result from the opening of a new landfill easily satisfied the injury in fact standard of Article III standing.<sup>102</sup>

As the law of environmental standing has thus developed, individuals and not-for-profits who band together to assert environmental

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99. 911 F. Supp. 863 (E.D. Pa. 1996).

100. *See id.* at 870.

101. *Id.* at 869-70.

102. *See id.* at 871.

causes tend to fall short of establishing sufficient “injury” even with expert testimony concerning health impacts of environmental pollution, while business corporations may establish injury with mere allegations of potentially lost profits. This stark dichotomy between the treatment of not-for-profit corporations asserting environmental interests and business corporations asserting financial interests may seem natural to late twentieth-century sensibility. The pursuit of financial profit seems to us the natural function of the corporate form; profit is about money; money is the ultimate property; and litigation about property rights seems to be now (and therefore must always have been) the quintessential “case or controversy” for judicial resolution.

In this view, pursuit of money is natural for a corporation while pursuit of community values, such as environmental integrity, is unnatural. As one court put it, in rejecting a business corporation’s claim of standing to object to pollution of the groundwater underlying its mall on aesthetic grounds:

Though a corporation is a person for some purposes, we would be most reluctant to hold that it has senses and so can be affronted by deteriorations in its environment. That is beyond the reach of legal fiction and belongs in the realm of poetic license.<sup>103</sup>

As it turns out, however, this late twentieth century sensibility is historically inaccurate, and might have been somewhat surprising to the drafters of the “case or controversy” clause of Article III of the Constitution.

### III. THE CORPORATE VEHICLE ON THE ROAD, HISTORICALLY

Can a corporation have a direct interest in the environmental integrity of a natural resource akin to a natural person’s aesthetic interests? The District of Columbia Circuit, in *Friendship Heights*, emphatically said no. However, the Supreme Court has repeatedly acknowledged that corporate “persons” have rights and interests that go beyond their financial and material interests. Thus, in *First National Bank of Boston v. Bellotti*,<sup>104</sup> the Supreme Court recognized the right of business corporations to freedom of speech, specifically including speech on political matters not affecting their financial inter-

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103. Citizens Coordinating Comm. on Friendship Heights, Inc. v. Washington Metro. Area Transit Auth., 765 F.2d 1169, 1173 (D.C. Cir. 1985) (citing MACLEISH, COLLECTED POEMS 1917-1952 22 (1952)).

104. 435 U.S. 765 (1978).

ests.<sup>105</sup> If a corporation has a right to have political opinions apart from its financial interests, and to enforce this right in federal court, why may it not also have an interest in environmental well-being cognizable by the same federal courts?

In fact, the business corporation, founded and organized around financial profit, is a relatively recent development in the history of the corporate “person.” Early corporations, up to and including the time of the framing of the Constitution, were much more likely to have been chartered for religious or quasi-governmental purposes, such as education or public works development, than for profit. Business corporations, chartered for profit-making purposes, did not become commonplace until the nineteenth century. While some early corporations organized for public works endeavors were incidentally quite profitable to their members, the concept of a corporation organized primarily to make money would have been just as alien to the framers as one organized primarily to assert environmental values.

#### A. *Of Corporations Ecclesiastical and Civil, Aggregate and Sole*

At the time of the framing of the Constitution and its “case or controversy” requirement, the corporate entity was a very different creature than currently perceived. A contemporaneous treatise of the British law of corporations authored by Stewart Kyd<sup>106</sup> describes and classifies the typical corporations of the times in terms that do not include either the modern day business corporation, nor for that matter, the modern day public interest organization.

Kyd describes the development of the corporate form as “collective bodies of men” that formed as an outgrowth of existing communities: “At the first introduction, they were little more than an improvement on the communities which had grown up imperceptibly, without any positive institution . . . .”<sup>107</sup> Kyd provides an essential definition of the corporate form:

A corporation then, or a body politic, or body incorporate, is a collection of many individuals, united into a body, under a *special denomination*, having a perpetual succession under an *artificial form*, and vested, by policy of the law, with the capacity of acting, in several respects, as an *individual*, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of

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105. *See id.* at 795 (invalidating a Massachusetts statute that prohibited corporations from spending money to influence ballot referendum issues other than those that affected the corporation’s business interests).

106. STEWART KYD, *THE LAW OF CORPORATIONS* (photo. reprint 1978) (1793).

107. *See id.* at 2.

enjoying privileges and immunities in *common*, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence.<sup>108</sup>

The corporate form was thus defined by the attributes of perpetual succession combined with the powers to take and grant property, contract, and to sue and be sued, as well as to exercise those political rights defined in its charter.

The 1793 treatise also describes various classes and distinctions of then contemporary corporations. It classifies corporations into “corporations sole” and “corporations aggregate.” Corporations sole were those that provided perpetual succession to an office held by one single individual; these corporations sole included “the King, archbishops, certain deans, and prebendaries, all archdeacons, parsons, and vicars . . . .”<sup>109</sup> Corporations aggregate were those more currently familiar entities that consisted of a group of individuals banded together for a common purpose. Kyd further classifies corporations as either ecclesiastical or lay; ecclesiastical corporations being “those of which not only are the members spiritual persons, but of which the object of the institution is also spiritual . . . .”<sup>110</sup>

All other corporations are lay corporations, which, according to Kyd, are “again subdivided into two class, *eleemosynary* and *civil*.”<sup>111</sup> Eleemosynary corporations were those “constituted for the perpetual distribution of the free alms, or the bounty of the founder of them, to such purposes as he has directed.”<sup>112</sup> The chief examples Kyd provides of such eleemosynary corporations are hospitals for the poor and educational institutions. The treatise then describes by example the various purposes of the civil (non-eleemosynary) lay corporation:

Civil corporations are established for a variety of temporal purposes. Thus a corporate capacity is given to the King, to prevent, in general, the possibility of an interregnum or vacancy of the throne, and to preserve entire the possessions of the crown; for immediately on the demise of one King, his successor is in full possession of the regal rights and dignity[]. Other civil corporations are established for the purpose of local government, such as the corporations of cities and towns, under the names of Mayor and Commonalty, Bailiffs and Burgesses, and other familiar denominations; and to

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108. *Id.* at 13 (italics in original).

109. *See id.* at 20.

110. *See id.* at 22.

111. *See id.* at 25 (italics in original).

112. *See id.*

this class seem properly to belong the general corporate bodies of the two universities . . . . Other corporations are established for the maintenance and regulation of some particular object of public policy; such as the Corporation of the Trinity House for regulating navigation[], the Bank, and the different Insurance Companies in London; others for the regulation of trade, manufactures, and commerce, such as the East India Company, and the companies of trades in London and other towns; others for the improvement of s[ci]ence in general, or some particular branches if it . . . ; the Society of Antiquarians for promoting the study of antiquities; and the Royal Academy of Arts for cultivating painting and s[cul]pture.<sup>113</sup>

Starkly absent from this bestiary of 18<sup>th</sup> century corporate creatures is any animal resembling either the modern day business corporation or the modern day environmental organization. Certainly, the business corporation had its ancestors in such entities as the “Bank, . . . Insurance Companies . . . [, and] the East India Company.”<sup>114</sup> But the primary purpose of these entities, at least according to the leading contemporary treatise writer, was the accomplishment of some particular public policy or regulation of commerce, not profit for its own sake. Presumably these entities had some corporate interest in the public policy or regulation in question, independent of its attachment to some property interest. Similarly, there is no close relative of the modern day environmental advocacy organization on this list. Such organizations do not distribute alms or bounty to the poor (and thus do not fall within the class of eleemosynary institutions); they would seem to be more closely descended from a variety of other “civil” corporations, including both the municipal, and “scientific” ones.<sup>115</sup> And, finally, contrary to the suggestion of the latter-day *Friendship Heights* court, assertion of aesthetic interests is not necessarily in the realm of “poetic license.”<sup>116</sup> Ecclesiastical corporations in existence at the time of the Constitution’s framing were routinely organized for equally abstract “spiritual” purposes.<sup>117</sup>

It appears, then, that both the modern day business corporation and the modern day environmental advocacy organizations de-

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113. *Id.* at 28-29.

114. *Id.*

115. See James J. Fishman, *The Development of Nonprofit Law and an Agenda for Reform*, 34 EMORY L.J. 617, 631 (1985) (describing the origins of the American charitable corporation, and noting that the colonial charitable corporation derived from the same corporate family as religious and business corporations).

116. See Citizens Coordinating Comm. on Friendship Heights, Inc. v. Washington Metro. Area Transit Auth., 765 F.2d 1169, 1173 (D.C. Cir. 1985).

117. See Fishman, *supra* note 116, at 631.



scended from the same branch of the corporate family. A scholarly study of the development of business corporations and not-for-profit corporations bear this family history out.

B. *The Recent Development of the Business Corporation as an Offshoot of Public Works Corporations*

A 1982 monograph by Professor Ronald Seavoy studies the development of the American business corporation, focusing on the experience in New York State from 1784 to 1855.<sup>118</sup> Business corporations and benevolent corporations developed concurrently, and neither had strong antecedents during colonial times. Seavoy describes American corporation law as being wholly “indigenous,” that is, drawing very little from British corporation law and developing wholly independently from British law.<sup>119</sup> Key to the rapid rise in the American business corporation was the enactment of general corporation statutes, which were first provided for benevolent corporations, and later expanded to include business corporations as well.

Seavoy describes five phases of the development of corporation law in New York.<sup>120</sup> In the first phase, individual charters were granted. The second phase was the enactment of general incorporation laws providing for the automatic incorporation of benevolent organizations (initially churches). The third phase consisted of general regulatory statutes setting forth the powers and restrictions on incorporation for specified classes of business corporations involved in implementing public improvements, such as turnpike corporations. These general statutes still required individual legislative action to incorporate each business. The fourth phase consisted of general incorporation statutes allowing for incorporation of specific businesses without individual legislative charter (but still restricted to the specified classes of businesses). The fifth and final phase consisted of the enactment of general incorporation statutes for any legitimate business without legislative intervention.

Throughout this development of corporation law no great distinction was drawn between benevolent corporations and the nascent public improvement businesses. According to Professor Seavoy,

A turnpike and church building were both visible and useful public improvements and all communities needed them. A turnpike was a business corporation that was undertaken for private profit, but be-

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118. See SEAVOY, *supra* note 7.

119. See *id.* at 46.

120. See *id.* at 5-7.

cause, in the eyes of the community, it performed a vital public service (as important as religious instruction), the state legislatures during the early national period gave equal encouragement to both forms of corporations as a matter of public policy; one by general incorporation statute and the other by a general regulatory statute coupled with the pro forma passage of all charters.<sup>121</sup>

Instead of distinguishing between benevolent corporations and business corporations, early American law drew a distinction between municipal corporations, which held public office consonant with their corporate title, and “private corporations,” which included those that were constructing public improvements for profit as well as those that were providing public benefits without profit.

This development of American corporation law, which took place during the early national period, after the framing of the Constitution, was of domestic origin. As Professor Seavoy notes, the American nation had little need for many of the corporate institutions described by British commentators, such as the royal “corporation sole.”<sup>122</sup> Meanwhile, the development of institutionalized business corporations led the development of similar institutions in Britain by decades.<sup>123</sup> In sum, the United States did not inherit a common law of corporate powers and identity, but rather invented it to deal with the exigencies of a rapidly developing nation.

### C. *The Grant of Sovereign Powers to Early Business Corporations*

Early American benevolent and business organizations had several reasons to seek the corporate form. Chief among these were the traditional desire to own land in a form that provided for institutional succession (rather than succession through the individual trustees of the institution), and the ability to receive bequests.<sup>124</sup>

Public improvement corporations, however, had an additional reason to seek the corporate charter: very often their business purpose required them to assume certain powers of the State.<sup>125</sup> Construction of improvements such as turnpikes, railroads, and canals were impossible without the power of eminent domain; accordingly, corporate charters for these kinds of early corporate businesses allowed these corporations to assume the State’s sovereign power of

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121. *Id.* at 6.

122. *See id.* at 46.

123. *See id.*

124. *See id.* at 10.

125. *See id.* at 5.

eminent domain. This is not to say that the grant of this sovereign power to incorporate franchisees was non-controversial; indeed, the gravity of the delegation of the State's eminent domain power was one of the chief arguments used against the creation of general incorporation statutes for turnpike companies and railroads during New York's constitutional convention of 1846.<sup>126</sup> Nevertheless, general corporation statutes providing the grant of eminent domain were permitted.

The Supreme Court has long recognized the legitimacy of delegations of the eminent domain power to private business corporations providing facilities, such as railroads, for the public benefit.<sup>127</sup> This delegation of eminent domain authority to private corporations has been described as "routine."<sup>128</sup> Indeed, there does not seem to have been any serious question about the power of the state and federal governments to delegate the eminent domain power to private business corporations. Yet, this power of eminent domain is usually described as being the very essence of sovereignty; a power so wound up with the very nature of government that it needs no constitutional grant to be exercised.<sup>129</sup>

#### D. *The American Corporation, Article III, and Sovereign Interests*

As the evolution of the American corporate animal shows, there is nothing inherently "natural" about corporations being organized for business pursuits, nor is there anything inherently "unnatural" about corporations organized for spiritual (religious) or public interest purposes. Nor did the early national period draw any great distinction between these sorts of corporate enterprises. The corporate form has proven flexible, and evolved greatly in the ensuing development of our nation, chiefly to accommodate and encourage the formation and operation of business corporations. The framers drafted the Article III "case or controversy" requirement long before the corporation's metamorphosis into primarily a business organization. Because the implicit requirement of standing was placed in the constitution long before corporate interests became identified with business interests, there should be no reason to assume that only business interests can be asserted as a corporate "injury in fact."

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126. *See id.* at 187.

127. *See, e.g.,* *Olcott v. Fond du Lac County*, 83 U.S. 678, 691 (1872).

128. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1326 (11th Cir. 1999).

129. *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Kohl v. United States*, 91 U.S. 367 (1875); *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985).

Even more tantalizing to the question of standing for environmental corporations is the routine grant of sovereign state powers—usually the power of eminent domain—to franchise corporations. If the State can make a non-exclusive grant of this essential attribute of sovereignty to a corporation, there is no principled reason that a State could not also grant other sovereign interests, such as the State's sovereign interest in the purity of its air and waters, to an entity it has incorporated. If a corporate entity has standing to assert eminent domain rights in court, why shouldn't a corporation with explicit authority have standing to assert the State's sovereign environmental interests in court? The usefulness of such a delegation may depend, of course, on the extent to which the State itself has judicially cognizable interests in environmental resources that go beyond those of its individual citizens.

#### IV. THE STANDING OF STATES AND MUNICIPALITIES TO ASSERT ENVIRONMENTAL PROTECTION INTERESTS

Individuals have been required to show personal use of a resource and injury to that use in order to establish standing. In contrast, the Supreme Court has long recognized the interest of States, as sovereigns, in protecting the purity of the air, water, and other environmental resources within its borders. This interest has been recognized wholly apart from a State's interest as property owner or as a representative for the interests of its citizens who use these resources. Indeed, in delimiting the scope of a State's capacity to sue as *parens patriae*,<sup>130</sup> the Court has explicitly rejected the organizational standing model of a state acting as representative of the individual interests of its citizens. Although less clear, there is also authority that municipalities enjoy a similar sovereign interest in the protection of the environment within their borders, independent of the interests of their residents.

##### A. *The State's Sovereign Interest in Clean Air and Clean Water Within its Borders*

Writing for the Supreme Court in 1907 in the case of *Georgia v. Tennessee Copper Co.*,<sup>131</sup> Justice Holmes declared in sweeping terms the sovereign interest of a State in protecting its environment:

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130. The *parens patriae* doctrine, which literally means "parent of the country," allows a State or other sovereign to assert the interests of its citizens. See Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel. Barez*, 458 U.S. 592, 600 (1982).

131. 206 U.S. 230 (1907)

[The] State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. . . .<sup>132</sup>

In *Tennessee Copper*, the Court recognized Georgia's right to sue a plant located in Tennessee to abate an air pollution nuisance, under the *parens patriae* doctrine. The Court explicitly recognized the quasi-sovereign right of a state to protect its natural resources on behalf of its citizens, even apart from any direct proprietary interest of the State in those resources. In other cases, the Supreme Court had similarly recognized the right of States, as sovereigns, to abate environmental hazards emanating from beyond their borders, under nuisance law.<sup>133</sup>

These cases cannot be explained simply as a form of representational standing at the state level.<sup>134</sup> Though the early cases pre-date modern standing doctrine, a contemporary Supreme Court decision makes clear that, far from being an analog to representational standing, a State's *parens patriae* standing is its inverse. Unlike representational standing, which depends on the identification of an individual with interests that would merit individual standing, the Court has held that *parens patriae* standing depends on the assertion of quasi-sovereign interests that are not individuated.<sup>135</sup>

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, the Supreme Court upheld the Article III standing of the Commonwealth of Puerto Rico, acting in its *parens patriae* capacity, to challenge the practices of apple growers giving preference to foreign pickers from Jamaica over workers from Puerto Rico, which it alleged to be in violation of the Wagner-Peyser Act<sup>136</sup> and the Immigration and Nationality Act of 1952.<sup>137</sup> Far from basing this standing on the State's representation of the individual interests of its citizens, the Supreme Court emphasized the need for a State asserting *parens patriae* standing to identify "quasi-sovereign" interests that exist apart from

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132. *Id.* at 237.

133. *See, e.g.*, *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *New York v. New Jersey*, 256 U.S. 296 (1921); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Missouri v. Illinois*, 180 U.S. 208 (1901).

134. *Cf. Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (holding that a state-commissioned agency may assert organizational standing on behalf of its constituents).

135. *See Barez*, 458 U.S. 592, 601 (1982).

136. 29 U.S.C. § 49 et seq. (1994).

137. 8 U.S.C. § 1101 et seq. (1994).

any individual interests of its citizens. Referring to *parens patriae* standing, the Court opined:

That concept does not involve the State's stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved—i.e., if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine . . . . Rather, to have such standing the State must assert an injury to what has been characterized as a “quasi-sovereign” interest, which is a judicial construct that does not lend itself to a simple or exact definition.<sup>138</sup>

In explaining these “quasi-sovereign” interests, distinct from the interest of particular citizens, that would suffice for *parens patriae* standing, the Court provided several examples. These examples included the sovereign interest of a state in adopting and enforcing codes and regulations to apply to persons within its jurisdiction, and the right to demand recognition by other sovereigns. The Court emphasized that these interests are not the interest of the State as an owner or proprietor, or of the State as representative of a particular individual interest:

Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party. Quasi-sovereign interests stand apart from all three of the above: They are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace.<sup>139</sup>

This description of the essence of Article III *parens patriae* standing is the exact inverse of the Article III requirements articulated by the Court for individual (and representational) standing. The individual must show “concrete and particularized” harm.<sup>140</sup> Such “particularized” harm is an anathema to *parens patriae* standing, which cannot be based on the interest of a “particular” citizen. Conversely, the individual seeking standing cannot rely on “generally available grievance[s],”<sup>141</sup> while *parens patriae* standing is specifically based on the generalized interest of the State “in the well being of its populace.”<sup>142</sup>

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138. *Barez*, 458 U.S. at 600-01 (citation omitted).

139. *Id.* at 602.

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

141. *See id.* at 573-74.

142. *See Barez*, 458 U.S. at 602.

Significantly, the *Barez* Court relied on the series of interstate nuisance cases discussed above to flesh out its concept of exactly what sorts of State interests qualified as “quasi-sovereign” interests amenable to judicial recognition under the *parens patriae* doctrine. Noting that these nuisance cases were “instances in which the injury to the public health and comfort was graphic and direct,”<sup>143</sup> the Court also noted that “*parens patriae* interests extend well beyond the prevention of such traditional public nuisances.”<sup>144</sup> These early nuisance decisions, combined with the Court’s explicit reference to a State’s interest in the purity of its environmental resources in *Barez* suggest that States have an Article III *parens patriae* interest in preserving environmental resources that goes well beyond the interests required to establish individual standing.

Indeed, the Court itself seems to assume the existence of automatic State standing, as a sovereign, to enforce environmental requirements with respect to resources located within its borders. In a case where the State of California challenged the failure of the Department of the Interior to issue a consistency determination under the Coastal Zone Management Act (CZMA),<sup>145</sup> the Court found California’s standing “clear” without any inquiry into “injury in fact” requirements:

Petitioner-defendants (hereafter petitioners) state their disagreement with the Court of Appeals for the Ninth Circuit’s holding that environmental groups and local governments have standing to sue under CZMA § 307(c)(1), but do not challenge that standing decision here. Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State’s.<sup>146</sup>

A State’s sovereign interest in the integrity of its environment is thus a constitutionally cognizable interest that exists independent of

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143. *See id.* at 604.

144. *See id.* at 605.

145. 16 U.S.C. § 1456(c)(1) (1994).

146. *Secretary of Interior v. California*, 464 U.S. 312, 319 (1984). States have similarly been held to be “persons” who are entitled to sue as plaintiffs under various federal citizen-suit provisions. *See Department of Energy v. Ohio*, 503 U.S. 607 (1992); *Hancock v. Train*, 426 U.S. 167 (1976); *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119 (1st Cir. 1976); *United States v. City of Toledo*, 867 F. Supp. 595 (N.D. Ohio 1994); *Illinois v. Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), *vacated and remanded on other grounds*, 453 U.S. 917 (1981), *on remand*, 680 F.2d 473 (7th Cir. 1982). *But see United States v. City of Hopewell*, 508 F. Supp. 526 (E.D. Va. 1980).

the sort of individualized “injury in fact” requirement applied in individual standing analysis.<sup>147</sup>

### B. *Municipal Standing to Assert Environmental Interests*

Several courts have similarly recognized municipal standing to assert environmental interests without inquiry into individualized “injury in fact.” One early Second Circuit case under NEPA found such standing without question. In a case in which a municipality challenged the United States Postal Service’s failure to complete an environmental impact statement for a new postal facility that would result in the closing of an existing postal facility in downtown Rochester, New York, the Court emphatically upheld the standing of the City of Rochester to press its NEPA claims:

The conclusion of the district court that neither the City of Rochester nor the regional planning board has standing to seek enforcement of NEPA and the ICA is out of harmony with settled law. Well-reasoned cases have uniformly held that a municipality has standing to challenge federal agency action resulting in environmental damage within the city.<sup>148</sup>

This holding suggests that a municipality has standing *per se* to challenge “environmental damage” within its borders. Recent cases, however, have applied more traditional “injury in fact” analysis to address the standing of municipalities. Thus, one series of cases has relied heavily on property ownership by municipalities in assessing their environmental standing.<sup>149</sup> Another case seemed to recognize sufficient potential injury in the expenses a village would incur to respond to flooding that might result from a proposed project.<sup>150</sup>

These municipal standing cases may be significant to the question of corporate environmental standing, as municipalities are often explicitly organized as state-chartered corporate entities, and even

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147. Despite the relative clarity of these Supreme Court precedents, some courts do continue to apply Article III “injury in fact” analysis to State assertions of environmental claims in the federal courts. *See, e.g., Idaho v. Interstate Commerce Comm’n*, 35 F.3d 585 (D.C. Cir. 1994) (finding standing based on State ownership of lands that might be impacted by pollution); *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990) (rejecting Nevada’s standing to assert claims under the National Environmental Policy Act with respect to studies for siting of nuclear waste repository within the State).

148. *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 972 (2d Cir. 1976) (citing *City of Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972); *Town of Groton v. Laird*, 353 F. Supp. 344, 348 (D. Conn. 1972)).

149. *See Churchill County v. Babbitt*, 150 F.3d 1072 (9th Cir. 1998); *Catron County Bd. of Comm’rs v. United States Fish and Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996); *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

150. *See Village of Elk Grove Village v. Evans*, 997 F.2d 328 (7th Cir. 1993).



when not so chartered, are usually recognized to enjoy the essential attributes of “corporateness.”<sup>151</sup> These more recent cases considering municipal standing have ignored whatever sovereign environmental interests municipalities may enjoy as subdivisions of the state, and have instead focussed on the municipalities’ direct, “corporate” property or monetary interests. These cases may simply reflect the trend toward closer judicial scrutiny of environmental standing where non-business interests are at stake.

Municipalities are not generally considered sovereigns, however.<sup>152</sup> Their interests and powers, like those of private corporations, are limited to those granted by the state.<sup>153</sup> Municipal charters do not typically include an explicit grant of the State’s sovereign interest in protecting the air, lands, and waters within its boundaries. In the absence of such a grant, there is no more reason to expect courts to recognize such interests on the part of a municipal corporation, than for a private environmental corporation. This does not mean, however, that an explicit grant of the State’s sovereign interest in protecting its environment to a state-chartered corporation would not be recognized for standing purposes.

#### V. BACK TO THE DIRECT ROUTE: EXPLICIT DELEGATION OF SOVEREIGN ENVIRONMENTAL INTERESTS TO CONSERVATION CORPORATIONS

States have long been laboratories for innovations in the law of environmental protection. The State of Michigan adopted citizen environmental enforcement legislation before the federal government did.<sup>154</sup> This state legislation in turn inspired the federal citizen-suit provisions.<sup>155</sup> The recent contraction of federal standing doctrine and the restrictions placed on federal representational standing may present a similar opportunity for state legislative initiative.

As described by Professor Seavoy, the corporate form has proven highly flexible throughout United States history. The corporate vehicle evolved to meet the exigencies of an expanding, industri-

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151. See SEAVOY, *supra* note 7, at 21-23; see also Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369 (1985).

152. Cf. *Alden v. Maine*, 527 U.S. 706 (1999) (finding that municipal corporations are not state sovereigns for the purposes of 11<sup>th</sup> amendment immunity). See also *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890).

153. See *id.* at 530.

154. Michigan Environmental Protection Act of 1970, Mich. Comp. Laws §§ 691.1201-691.1207, repealed by 1994 Mich. Pub. Acts No. 451 (Mich. Comp. Laws § 324.1701 (2000)).

155. See AXLINE, *supra* note 49, at § 1.02(A) at 1-5.

alizing nation, resulting in the genesis and evolution of the business corporation. The corporate form similarly evolved and was adapted to the needs of religious institutions and municipalities. Courts readily accepted this evolution, and did not flinch at the delegation to corporate entities of quintessentially sovereign powers such as the eminent domain power. This nation has evolved into a post-industrial society in which the exigencies of protecting and conserving environmental resources have replaced the exigencies of opening these resources up to exploitation. The time may be ripe for the corporate vehicle to evolve again, this time into an entity in which the State's *environmental* interests are similarly delegated.

What I propose is the creation of a new class of state-chartered not-for-profit corporations. Such a corporation, which might be dubbed a "chartered conservation corporation," would be similar to existing not-for-profits, with the exception that the governing statute would make an explicit grant of the State's sovereign interest in the integrity of its environmental resources. Such a grant might provide:

In addition to the other powers and authorities granted under this Chapter, a Chartered Conservation Corporation shall have the non-exclusive right to assert before any court of competent jurisdiction the State's sovereign interests in the protection of its environmental resources, including the air, lands, forests, flora, fauna, and waters located within the jurisdiction of the State. This authority shall be limited to the enforcement of claims for injunctive relief and penalties payable to the treasury of the State or the United States under any common law claim or statute providing for a private right of action, but shall not extend to permit the collection of compensation due to the State for environmental damage.

This grant should be available only to those not-for-profit corporations chartered explicitly for the protection of particular environmental resources within the State.<sup>156</sup> In order to ensure that chartered conservation corporations are truly representative, the availability of this status might be limited to those corporations organized as mem-

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156. In the 1990's, citizens' environmental enforcement litigation has largely devolved from actions instituted by national environmental organizations to claims more local and regional environmental organizations focused on a particular regional environmental resource such as a river, watershed, sound, lake, or bay. Compare MILLER, *supra* note 49, at 10-12 (describing Clean Water Act enforcement efforts by Natural Resources Defense Council), with Robert F. Kennedy, Jr. & Steven P. Solow, *Environmental Litigation as Clinical Education: A Case Study*, 8 J. ENVTL. L. & LITIG. 319, 324 (1993) (discussing Hudson Riverkeeper organization), and Cronin v. Browner, 898 F. Supp. 1052 (S.D.N.Y. 1995) (including plaintiffs Delaware Riverkeeper, San Francisco Baykeeper, Puget Soundkeeper, Long Island Soundkeeper, and the Baykeeper for the New York and New Jersey Harbor Estuary).

bership organizations. Opportunities for abuse should be limited, as the restriction against collecting damages otherwise due to the state, and the non-exclusive nature of the grant, should limit the opportunities for extortionate suits or collusive settlements.

This grant of the state's environmental interests is certainly less dramatic than the delegation of the sovereign power of eminent domain, which is routinely accepted by courts. The eminent domain power, after all, carries with it the power to take private property in the name of the state, and to evict persons from their homes if necessary. No similar consequences flow from the proposed grant of state environmental protection interests. Similarly, granting a state chartered corporation a direct interest in protecting the integrity of environmental resources is no more abstract than chartering religious corporations to advance religious interests.

Nor should such an explicit delegation of the sovereign interest in environmental resources run afoul of the *Morton* Court's rejection of organizational standing to represent environmental concerns generally. What the *Morton* and *Lujan* Courts emphatically rejected was the pursuit of environmental causes divorced from any connection to the tangible environmental resources affected. As the Court's most recent decision in *Laidlaw* makes clear, a legitimate interest in the affected environmental resource should suffice. One way to establish that interest is by showing regular use of the affected resource by members of the organization. The Court has also recognized in the past, however, that the State as sovereign has a direct and tangible interest in all of the environmental resources located within its borders. There is no reason that a State-delegated sovereign interest in the resource itself should not suffice. After all, if the State has a constitutionally cognizable interest in the "purity" of its air, lands, and waters, there is no reason that the State may not share this interest with a corporate entity it has chartered, particularly one that is organized specifically to protect a particular environmental resource that is at issue in the litigation.

If adopted, the chartered conservation corporation should put to rest most of the organizational and representational standing issues that currently plague citizens environmental enforcement litigation. The focus of such litigation could return to determining whether the defendant has violated the pertinent statutes rather than complex and intrusive inquiries into organizational structure, personal recreational habits of plaintiffs' members, and expert testimony about observable environmental harm or reasonable concern.

### CONCLUSION

Although business corporations have fared far better in recent years in establishing standing to litigate under the federal environmental statutes, there is nothing about the inherent nature of the corporate form or its history that would lend itself to the advancement of business interests rather than environmental resource interests. The business corporation has evolved since the founding of this nation (and since the drafting of the case or controversy clause of the Constitution). The not-for-profit corporation might similarly evolve to assert the resource protection interests of the State. An explicit grant of the State's sovereign interest in environmental resource protection should be recognized by federal courts to give such corporations standing to enforce environmental protections without regard to the individual interests of its members.