Standing on the throttle, standing on the brake: Natural limits to the Supreme Court’s ability to limit Congress’ grants of standing for environmental citizen’s suits

(formerly Neither Fish nor Fowl: What to Make of Environmental Citizens’ Suits?)

Introduction

Environmental citizen’s suits (hereinafter “ECS”) have been authorized by Congress in every major piece of Federal environmental legislation enacted since 1970.\(^1\) ECS are suits in which a private citizen pursues a civil action against a second party based on that party’s violation of an environmental law or regulation\(^2\) — the citizen sues a party who has committed an environmental crime. Congress enacted into environmental legislation quite broad grants of standing to pursue these suits. Typically the acts empower “any person” to bring an ECS.\(^3\) The Supreme Court, however, by stringently applying judicially-created doctrines of standing, has subsequently severely curtailed these Congressionally-granted rights to bring ECS. “Through standing doctrine, the Court . . . erected a substantial barrier to citizen oversight of both governmental and non-governmental conduct.”\(^4\) This presents a classic separation-of-powers conflict: who determines citizens’ standing for ECS, Congress or the Court?

Both Congress and the Court have a legitimate stake in structuring citizens’ access to the courts. Congress clearly should be able to pass laws that create rights which citizens may enforce vi David Kronenbergera lawsuit. But Congress arguably should not be able to dictate unilaterally an “open season” wherein any citizen may bring any kind of suit; the Court rightly provides a check on Congress’ ability to grant standing. On the other hand, the Court should not be able to thwart all Congressional initiatives to grant citizens the ability to bring suit to protect their interests. What is the proper middle ground, the proper limit to the Court’s ability to limit Congress’ grants of
standing? Specifically, in this case, to what extent should the Court be able to restrict citizens’ ability to bring environmental citizen’s suits authorized by Congress?

This paper suggests that the appropriate framework for defining the Court’s power to restrict citizens’ ability to bring ECS may be found in ancient and basic principles of Anglo-American common law that grant citizens the right to enforce the law when the executive, for whatever reason, does not. This right, traditionally represented by the common law right of citizen’s arrest, is expressed for environmental infractions in the modern day by citizen enforcement suits. A test for standing for these suits, based on these first principles of Anglo-American law, provides the appropriate framework for the limits of the Court’s ability to in turn limit Congress’ power to grant citizens access to the courts for ECS.

Section 1 of this paper discusses the reasons why the Court has limited citizen standing to bring ECS, suggesting that much of the Court’s activism in this regard stems from a mischaracterization of ECS within the taxonomy of legal actions. The Court appears to view ECS as a mongrel, part private-law and part public-law action, when in actuality ECS are better understood as a modern expression of the historic citizens’ common law right to defend the public good.

Section 2 of the paper discusses the traditional origins and the modern status of the citizens’ arrest, for reference and comparison in Sections 3 and 4. Section 2 also describes a six-century-old English statute granting private citizens the right to arrest environmental transgressors. Section 3 discusses the complexity of modern environmental crimes and how these differ from the traditional malum in se crimes that are logically subject to citizen’s arrest. This complexity demands that the traditional “citizen’s arrest” procedure be mediated by the scientific and policy judgment of an executive regulatory agency and expressed through citizen’s suits.\[5\]

Section 4 of the paper introduces environmental citizen suits, including the mechanics of these suits and the current test for standing.\[6\] Section 5 then describes a
more appropriate test for standing to bring ECS based on the citizen’s defense model rather than either the private law or public law model. This narrowly-tailored test for standing enables ECS to fulfill Congress’ intention for these suits, while still honoring the Constitutional and jurisprudential issues that the Court has cited as underpinning its rules for standing to bring ECS.

Section 1: Why has the Court acted to limit standing to bring ECS?

The Court’s current test for ECS standing is at substantial odds both with Congress’ expressed legislative intent for ECS and with the broader principles of Anglo-American common law that support Congress’ initiatives. In limiting citizen’s standing to bring ECS, the Court is staking out an exception to both modern Constitutional and ancient common law principles. Why has it done so?

The Court’s actions to limit standing to bring ECS may be due to a limited degree to “animosity” attributed to some of the current justices toward these suits, but it is far more likely that the Court’s activism in limiting the ability of citizens to bring ECS stems from the common though in-apt categorization of these suits, endorsed by the Court, as being the actions of “private attorneys general.” This characterization leads to a polarized and erroneous view of ECS as somehow akin to vigilantism.

The Court wrote in *Bennett v. Spear* that “[t]he purpose of the ESA citizen suit provision is to encourage enforcement of mandatory duties by ‘private attorneys-general.’” Of course, in the American legal system there is no such thing as a private attorney-general. The Court’s borrowed analogy, comparing the role of the plaintiffs in an ECS to that of a government official, is symbolic of the continuing struggle to fit ECS into some kind of legal taxonomy. The debate over the nature and, indeed, even the propriety of ECS, has bordered at times on vituperative. The fundamental question underlying the debate is this: Are ECS plaintiffs seeking redress for a private injury, or are they representing or “standing-in” for the government in these actions? In other words, are these private law or public law actions?
The Court’s current formula for citizens’ standing to bring these suits attempts to fit the ECS into both categories, but it is an awkward and unstable fit. Because the Court mischaracterizes ECS, it overreaches in its effort to limit Congress’ ability to grant standing to pursue these suits. This paper suggests that in bringing an ECS, citizen plaintiffs are neither vindicating their own private rights nor standing-in for the government as the Court hypothesizes, but are instead pursuing a different type of legal right, one which has been a part of the Anglo-American legal tradition for at least six centuries. The environmental citizen suit belongs in a unique legal category which may be thought of as “citizen defense of common rights” or just “citizen defense,” and the Court’s treatment of these suits should therefore be tailored specifically for this category.

This category of legal right includes not only ECS but also anti-trust, qui tam or relator actions, and other types of private enforcement suit such as those civil rights actions which are authorized by legislation. The citizen defense category of legal action is typified, however, by its ancient archetype: the traditionally common-law and now largely statutory right of citizen’s arrest. The citizen’s arrest is the original action under English common law that enabled a citizen to defend the common good against criminal incursion. In effect, the act of bringing an environmental citizens’ suit parallels a citizen’s right under English and American common law to apprehend a party who the citizen had reason to believe was committing or had committed a serious crime – in this case, an environmental crime. Because of the complex nature of environmental crimes, the type of statutory penalties involved, and the difficulty in identifying the proper party defendant, direct arrest of polluter by a lay citizen is not appropriate. In order to assert what I have termed the citizens’ defense rights relative to environmental crimes, a citizen initiates a citizen’s suit rather than performing a citizen’s arrest.

The test for standing to bring an ECS, or any citizen’s defense action, should therefore not be based solely on either private law or public law models, but rather
should be tailored specifically to this third category. The proper test for standing to bring an ECS should therefore not be based on private law notions of standing that hinge on individualized injury to the plaintiff, but instead should mirror the logic of traditional and modern tests for the legality of a citizen’s arrest.
Section 2: Citizen’s Arrest

A citizen’s arrest is an arrest performed by an ordinary private citizen who does not otherwise possess governmental law enforcement responsibility. An arrest is defined as “[t]he apprehending or detaining of a person in order to be forthcoming to answer for an alleged or suspected crime.”[14] The term “citizen’s arrest” therefore refers to the ability of a private citizen to similarly “apprehend or detain” a person that the citizen has observed or has reason to believe has committed a crime, and compel that person to submit to government law enforcement authority.[15] The citizen performing the arrest need not have been the target of the crime committed by the arrestee, since the citizen is not protecting his own private interests but is rather enforcing against one who has committed an infraction against the common good.

The common law right of citizen’s arrest dates back at least to the medieval period in England.[16] In fact, during that period, the right of a private citizen to make an arrest was “virtually identical” to the right of a sheriff or a constable to arrest a lawbreaker.[17] Blackstone characterized these arrests as “popular actions . . . given to the people in general.”[18] During this period, citizen’s arrests were a fundamental part of law enforcement and were “encouraged and relied upon” by the sheriffs as a way to help keep the peace.[19] Because only limited enforcement resources were available to the State, with relatively large territories to cover, the ability of private citizens to apprehend lawbreakers was an important element of the rule of law.[20]

The common law right to perform a citizen’s arrest crossed the Atlantic with the larger body of English common law to become part of the American common law. Consistent with the English common law, during the initial development of American common law there was not a clear distinction between enforcement of private and public rights.[21] The right of private citizens to enforce public law in America substantially duplicated that of the government at least until the early 19th century.[22]
Citizen’s Arrest in Statute

The common law right to citizen’s arrest has since been codified into statutory law in many state jurisdictions. These rights vary somewhat from state to state.

New York State law provides that a citizen may make an arrest without a warrant if the arrestee has committed a felony or has committed a non-felony crime in the citizen’s presence. California’s Penal Code similarly gives any citizen the right to make a citizen’s arrest if:

1. Any public offence was committed or attempted in the citizen’s presence; or
2. The person arrested has committed a felony, not in the citizen’s presence; or
3. A felony has been committed and the citizen performing the citizen’s arrest has reasonable cause to believe the person arrested committed the felony.

The New York and California statutes are typical of many of the state laws governing citizen’s arrest. Some jurisdictions narrow the right somewhat; others expand it. In Washington, D.C., a private person may arrest another whom he has reason to believe is committing either a felony or one of a list of enumerated offenses, but only if the offense is being committed in the citizen’s presence. Utah law permits citizen’s arrest, but explicitly prohibits exerting deadly force in the performance of that arrest. Kentucky law, in contrast, holds that a citizen witnessing a felony “must take affirmative steps to prevent it, if possible,” and in Kentucky a citizen is permitted to use deadly force, if necessary, to effect the citizen’s arrest of a fleeing felon.

Kentucky’s position is an extreme one, but most states that have statutes concerning citizen’s arrest hold that citizens have a personal right to protect the community from the harms committed by lawbreakers. This right generally extends to crimes committed in the citizen’s presence as well as to more serious crimes which the citizen has reason to believe have been committed, though not in their presence. There is typically no geographic limit to the right, or any test for a relationship between the
citizen and the crime committed, merely a requirement of actual knowledge or reasonable belief.

The 600-year-old right to make an environmental citizens arrest

Interestingly, a citizen’s right to apprehend those who committed environmental crimes was codified as early as the 14th Century in England. In 1388, the English Parliament passed a statute to combat the water pollution problem of “so much Dung and Filth of the Garbage and Intrails [sic] as well as of Beasts killed, as of other corruptions, be cast and put in Ditches, Rivers, and other Waters, . . . that the air there is greatly corrupt and infect, and many Maladies and other intolerable Diseases do daily happen.” Primary enforcement responsibility for this statute was with the local authorities, but the statute gave secondary enforcement rights to ordinary citizens, as described below:

. . . all they which do cast and lay such Annoyances . . . in . . . Waters . . . shall cause them utterly to be removed, avoided, and carried away . . . every one upon Pain to lose and to forfeit to our Lord the King [twenty livre] . . . the mayors and Bailiffs . . . shall compel the same to be done upon like Pain. . . And if any feel himself grieved, that it be not done in the Manner aforesaid, and will there upon complain him to the Chancellor after the Feast of St. Michael, he shall have a Writ to make him of whom he will complain come into the Chancery, there to shew why the said penalty should not be levied of him, and if he cannot excuse himself, the said penalty shall be levied of him.

The 1388 statute developed into part of the English common law, and later was incorporated into the law of public nuisance. Common and statutory law asserts citizens’ rights to defend the common good; historical English common law suggests this right extends to the ability to protect the citizens’ common environment. But environmental crimes in a modern manufacturing economy are rarely as simple as “. . . Filth of the Garbage and . . . Beasts killed” being discharged into the waterways. How would this traditional right be expressed in a modern technological society in relation to modern environmental crimes?
Section 3: Environmental Crimes

Modern environmental crimes typically consist of a discharge of industrial chemicals either without a regulatory permit or in excess of permit conditions. In contrast to “casting Dung and Filth of the Garbage...” into rivers, the modern offense is not likely to be capable of direct apprehension by citizens.

Traditional common-law crimes such as assault or burglary, sometimes referred to as *malum in se* crimes, typically involve obvious infractions against discrete, easily understood interests. They are considered obvious crimes, “bad in themselves.” It is fairly easy to decide if an assault or a burglary is being committed – as Yogi Berra once said, you can observe a lot just by watching.[34] On the other hand, a citizen might observe an industrial discharge from a smokestack or waste pipe but would be unable to tell just by watching if an environmental crime is being committed.

This is because, for reasons discussed below, most environmental crimes belong to a class of offenses known as *malum prohibitum*: actions which may not immediately be apparent as comprising a wrong against an identifiable individual or interest but which are illegal because the conduct, if allowed to continue unmoderated, will aggregate to an unacceptable harm or risk of harm to society. An example of *malum prohibitum* offenses is found in the traffic laws: there may not be any immediate harm caused by a car driven at 85 miles per hour rather than 65, but society has determined through expert regulatory judgment that cars driven at that speed present an unacceptable risk to all citizens, so the behavior is regulated and made unlawful.

Environmental crimes: Private Acts and Public Harms

There is an old saying that goes, “Your right to swing your fist ends at the tip of my nose.” Every first-year law student knows this is only partly correct: under criminal and tort theories of assault, your right to swing your fist actually ends at the point where
it causes me to have a reasonable apprehension of an imminent contact with my nose.\footnote{35}

But the original saying’s core idea concisely expresses the basis of environmental protection regulations. In a society governed by the rule of law, individual freedoms are constrained by the requirement that our actions not cause harms, whether bodily, dignitary, or property, to those who have not expressly or impliedly contracted for or consented to those harms.

And that principle extends under the rule of law not only to privately-owned property but to property held in common: public property. As a superficial example, it would be unlawful for an individual to quarry out and sell the marble that currently comprises the Washington Monument – that is public property which belongs to all of us, and no individual is allowed to expropriate it for private gain to the detriment of every other American. Similarly, no individual is allowed to expropriate or to damage for private gain a common environmental good, such as a clean drinking water supply or the air we all breathe. These things are public property and belong to all citizens; no one is allowed to damage them for their own private gain to the public detriment.

**When has a private act damaged the environment?**

Unlike conventional *malum in se* crimes, however, like theft or battery which are easily perceived by ordinary citizens and which have historically been susceptible to citizen’s arrest, direct observation and personal judgment is usually not adequate to determine if an environmental discharge constitutes a crime, i.e. an unacceptable risk of environmental damage to the public health or common property. The reason for this is simple though not obvious. Most natural environments have a natural assimilative capacity, referred to hereinafter as ACE (assimilative capacity of the environment.) ACE describes the ability of a natural environment to absorb, transform, or transport pollutants in such a way that the environment is not ultimately harmed by them. For example, the natural biota of the oceans, rivers and lakes are able to
assimilate and neutralize many organic waste components, while the sheer volume of some waterways and water bodies is able to dilute other contaminants to the point they are not harmful. Sunlight breaks down certain types of organic emissions in the atmosphere, rain washes particulate matter out of the air and onto the earth, and natural microorganisms in soil can degrade many pollutants. These and other mechanisms allow most natural environments to protect themselves to some degree and in turn to protect human beings in those environments from the harmful effects of pollution. In addition, both human and non-human species have an innate biological ability to guard against the impact of a certain amount of certain types of pollution.

While there is some comfort in the fact that both we and the environment have these natural protective and cleansing processes, there are limits to the ability of all these processes to cleanse the environment and protect the organisms within it; if those processes are overloaded the results can be dire. A little pollution may cause no harm whatsoever, but too much may cause catastrophic and in some cases, for all practical purposes, irreversible damage.

Epidemiology studies have established a link between air pollution levels and mortality in the general population,[36] as well as correlating episodes of severe air pollution with increased hospital admittances for asthma and other respiratory ailments, and in some cases with wide-spread fatalities.[37] In December 1952 a London air pollution episode killed 4,000 people in less than a week.[38] There are areas of the former Soviet Union where industrial air pollution control regulations were discontinued, as an economic strategy. In one of these areas, every child of grade school age and higher showed clinical signs of lead poisoning.

In addition, some pollutants are so difficult to assimilate or guard against or take such a long time to detoxify that, again, for all practical purposes the natural processes are ineffective in preventing harm. Scientists predict that environmental damage from the use of ozone-depleting chemicals may lead to significant increases in human deaths.
from cancer;\textsuperscript{39} NASA estimates that it could take fifty years or more for the environment to recover from this damage.\textsuperscript{40} Algal blooms caused by excessive pollutant-nutrients discharged into closed water bodies such as lakes may result, in effect, in the ecologic death of the entire water body due to eutrophication.\textsuperscript{41}

Scientists deduce the limits of the human and environmental ability to tolerate levels of different pollutants by means of epidemiological studies, bioassays, analytical modeling, and clinical and laboratory studies. For any given pollutant, environment, and human population, it requires complex scientific analysis, modeling, and calculation to determine whether a given emission, when summed with all other industrial emissions, in that region or worldwide, will be within the assimilative capacity of the environment and below harmful levels for humans. Since this is an inexact science, and since the consequences of error may be dire, environmental scientists and policymakers apply safety factors to what have been calculated as “safe” levels of pollution. These, in turn, are used by regulatory agencies to set maximum emission levels for any given industrial site and process, usually by issuing emissions permits for that site and/or process. If an entity releases into the environment emissions in excess of the levels specified in their permit, this is a regulatory offense -- i.e. a \textit{malum prohibitum} environmental crime. A discharge in excess of permitted limits may not in itself create an identifiable environmental harm – of the 5000 that died during the air pollution episode in London, it is doubtful that any fatality could have been linked to any one industrial discharge. Nevertheless, like driving 20 miles per hour over the speed limit, a discharge in excess of the permitted, calculated safe levels is considered by regulatory judgment to constitute an unacceptable risk of harm to the environment, or the public health, or both, and is therefore a \textit{malum prohibitum} illegal act. If an entity discharges a chemical in excess of permitted levels, or without a permit, they have committed an environmental crime and are susceptible to enforcement action, primarily by the
executive enforcement agency but also by citizen enforcement suit (ECS) if the executive does not take action.

Section 4: Environmental Citizen Suits

In a sense, ECS provisions in federal environmental legislation provide for concurrent enforcement authority for the environmental agencies and American citizens. ECS provisions typically authorize citizens to sue either private law breakers or government enforcement agencies, or both, though each under different circumstances. Citizens may sue a private party if that party is in violation of an environmental law or regulation, but only if the enforcement agency has not previously initiated an enforcement action or has not prosecuted that action “diligently.”[42] Citizens may also invoke ECS provisions to sue a government environmental agency if that agency fails to create or to effectively implement a regulatory program required by the corresponding environmental law enacted by Congress.[43]

Congress first introduced environmental citizen suit provisions in the Clean Air Act of 1970, although other-than-environmental private citizens’ enforcement actions had been enacted into legislation before that time. The ECS provision in the Clean Air Act was intended to “motivate” the governmental pollution control agencies and spur enforcement efforts that the legislation’s authors described as being “restrained” up to that point.[44] When ECS provisions were enacted into the Federal Water Pollution Control Act two years later, the Senate Report on the bill referred to “an almost total lack of enforcement” of existing water pollution control statutes.[45] Although federal water pollution control laws had been in place since 1948, the Senate report noted that “only one [enforcement] case [had] reached the courts in more than two decades.”[46] These two laws, the Clean Air Act and Clean Water Act, have provided the greatest share of ECS actions; the remainder of this section will be based on ECS provisions in these two laws.
ECS provisions require that a prospective plaintiff give 60-days notice to both the putative defendant and the federal and state enforcement agencies. This notice period has different purposes for the different players. In the case of an ECS against the enforcement agency, the notice period allows the agency to implement the required legislative program and moot the ECS. If the suit is to be lodged against a violator, the 60-day period gives the defendant an opportunity to come into compliance and at the same time affords the enforcement agency a chance to institute its own enforcement action. If the agency brings its own suit during the 60-day notice period, or if the agency was already prosecuting an enforcement action, the citizen’s suit is barred. If the agency chooses not to pursue its own enforcement action, it may intervene as a matter of right in the citizen’s suit.

ECS provisions provide for federal court jurisdiction, but state courts may provide alternate fora under theories of concurrent jurisdiction. Venue clauses in the major environmental laws “could be read to signify exclusive federal jurisdiction” but these clauses are not dispositive in all cases, and there are strong arguments for concurrent state jurisdiction.

Some of the benefits that have been ascribed to ECS include that such suits provide additional enforcement resources, in the form of citizen initiative and effort in researching and bringing the suits, without incurring any additional government enforcement costs. If the plaintiffs lose an ECS, they bear their own costs. If the plaintiffs prevail, the ECS provisions provide for fee shifting so the defendants bear the cost of litigation.

ECS may also serve as a citizen’s check on what has been termed “capture,” the tendency for regulatory agencies over time to become familiar and then collegial with the entities that they regulate, leading to what some believe is an overly lenient approach to regulation. There is also substantial evidence that ECS have fulfilled Congress’s original intentions for these suits: they have prompted required government
agency actions. It took a citizen’s suit and resulting court order, four years after Congress passed RCRA, the waste management statute, to spur EPA to enact regulations governing the handling of hazardous waste.\[55\]

**Standing to Bring ECS**

The doctrine of standing is a relatively recent judicial invention, first developed to protect Congressional initiatives from ideological litigation.\[56\] But over time, the Court “has transmuted standing from a means of protecting the majoritarian process into a judicial weapon that can override congressional judgments about the optimal enforcement of particular laws.”\[57\]

The courts first invoked standing as an explicit means of controlling access to the judicial process during the New Deal period.\[58\] The Court, in particular Justices Brandeis and Frankfurter, “sought to insulate progressive and New Deal legislation from . . . judicial attack” by those who sought to invalidate the legislation.\[59\] In order to limit these attacks, the Court established the principle that a plaintiff must have some specific legal right to bring a cause of action in federal court.\[60\]

This narrow concept of standing fell out of judicial favor during the 1940’s.\[61\] In the 1940 case of *FCC v. Sanders Bros. Radio Station*,\[62\] the Court acknowledged that a radio station that was not asserting the invasion of any private interest nevertheless had standing as an “aggrieved party” who could sue on the basis of a competitor’s alleged violation of the Communications Act of 1934.\[63\] That act’s purpose was “the protection of the public’s interest in adequate communications service.”\[64\] The Court stated that “[i]t is within the power of Congress to confer such standing to prosecute an appeal”\[65\] under the Communications Act, even though that standing was conferred on a private plaintiff suing to vindicate a public interest.\[66\]

When Congress passed the Administrative Procedures Act in 1946, it incorporated into the Act the notions of standing that were prevalent in the federal courts at that time.\[67\] These included the proviso that Congress could authorize
standing for citizens “adversely affected or aggrieved by agency action.” Under this test, a citizen could pursue a cause of action under an authorizing statute even though the citizen had suffered no specific “legal wrong.”[68]

By the time that ECS provisions were explicitly enacted into environmental legislation in 1970, however, prevailing concepts of standing had swung back towards a private-law model. The Supreme Court held in *Sierra Club v. Morton*[69] that plaintiffs in citizen’s suits must have “a sufficient stake in an otherwise justiciable controversy” -- the alleged environmental violation -- to assert standing.[70] By 1992, in *Lujan v. Defenders of Wildlife*,[71] the Court further had refined the standing test for ECS outlined in *Sierra Club*.[72] The Court held in *Lujan* that:

- the plaintiff must have suffered an injury in fact,
- there must be a causal connection between the injury and the conduct complained of, and
- there must be a likelihood that the injury will be redressed by a favorable decision.[73]

The Court further elaborated that the “injury in fact” must be “concrete and particularized” and “actual or imminent,” not conjectural or hypothetical.[74] The *Lujan* Court, “for the first time . . . blunted a congressional effort to create a new interest whose violation could give rise to injury in fact.”[75]

The 2000 case of *Laidlaw*[76] was widely seen as marking a shift in the Court’s rules for standing, reversing as it did the trend toward narrowing these rules which was suggested by *Lujan* and the subsequent case of *Steel Co*.[77] The Court in *Steel Co.* had again extended the doctrine of standing to further restrict access to the Courts, this time by expanding on the concept of redressability. The dissent in *Steel Co.* pointed out that in every case before Steel Co. “in which the Court has denied standing because of a lack of redressability, the plaintiff was challenging some governmental action or inaction. None of [the prior] cases involved an attempt by
one private party to impose a statutory sanction on another private party. . . . This distinction is significant, as our standing doctrine is rooted in separation-of-powers concerns.  

The concurrence in Steel Co. stated that the "gist of the question of standing" is whether plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." This, of course, is not likely to be an issue in most environmental citizen's suits – it is hard to imagine a more concrete adverseness than that existing between an environmental advocacy organization plaintiff and an accused environmental lawbreaker defendant.

The test articulated in Laidlaw, however, while comparatively more liberal in its approach to standing than the trend outlined by Sierra Club, Lujan and Steel Co., is nevertheless firmly based in the concepts of injury-in-fact and redressability. Both of these concepts are integral to private law notions of justiciability, but largely irrelevant to the purposes of the actions in the citizen’s defense category of legal rights.

The Court’s current formulation for standing translates in practice into a requirement that a citizen plaintiff in an ECS must have some individual, personal stake in the environment which is alleged to have been harmed by the defendant’s actions, either by living within it or in close proximity to it or by actual recreational use of the area. The net effect of this meticulous test is that "through standing doctrine, the Court has erected a substantial barrier to citizen oversight of both governmental and non-governmental conduct related to environmental compliance and environmental protection. The current test for standing to bring an ECS is based on explicit private law notions of interest and injury. Is this the right test for standing for an environmental citizen’s suit?
Section 5: Conforming the test for standing for ECS

If ECS were a form of private action to vindicate a private right, there would be no question that the Court’s current test would be the appropriate measure of standing. But ECS are not actions to protect or recover private rights. They actually more nearly resemble citizen’s arrests in that they are actions to protect or recover rights held in common by all citizens. In order for a citizen lawfully to perform a citizen’s arrest, she need not demonstrate that it was her store that was robbed or that the defendant assaulted her personally. She need only assert, typically, that she had knowledge that the defendant committed a felony, or had committed or was committing a misdemeanor in her presence.

This, then, provides the alternate and more appropriate framework for the demonstration of standing in ECS, one that more accurately reflects the role of ECS in protecting citizens’ rights. The test for standing for an ECS should be two-pronged, like that for citizen’s arrest. If the defendant to an ECS is alleged to have committed a minor environmental offense, analogous to a common-law misdemeanor, then the offense must have been committed “in the presence” of the citizen plaintiff for the plaintiff to assert standing; i.e. the plaintiff should actually be present in or have a stake in the environment protected by the environmental regulation that was violated. This is the test for standing enumerated in *Lujan*.

If, however, the offense alleged to have been committed by the defendant was a major one, comparable to a common-law felony, then any citizen who has reason to know of the offense should be able to assert standing to bring citizen suit. This mirrors the test for legality for a citizen’s arrest performed on a felon: the citizen must have a reasonable belief that the criminal committed a serious crime in order for the arrest to be proper. The citizen need not assert that the crime was committed against the arresting citizen, only that the crime was committed by the defendant. Arrest of a felon
under these circumstances expresses the citizen’s right to citizen’s defense, as does the environmental citizen’s suit relative to a felonious environmental crime. The natural environment of America is possessed in common by all its citizens, and any American citizen should be able to assert standing to defend this common possession and to prevent or redress any serious injury inflicted on it.
Appendix A: Are ECS plaintiffs “private attorneys general”

In *Bennett v. Spear* [81] the Supreme Court offhandedly endorsed a common if fundamentally flawed view of the parties who bring environmental citizen suits. The concept that environmental citizen suitors are acting as “private attorneys general” is echoed often by detractors of citizen suits. A press release by the Equipment Manufacturer’s Institute states that, “Many environmental laws contain provisions allowing such lawsuits, which effectively empower private citizens to act as ‘private attorneys general.’” The concept of a “private attorney general” may rightly elicit concerns about the unbridled private exercise of public power. But citizen suitors do not wield anything remotely approaching the power implied by the term “private attorneys general.” A citizen suitor:[82]

- brings suit under their own name, not in the name of the government;
- has only the powers of investigation available to an ordinary civil plaintiff, i.e. a citizen plaintiff cannot use or direct the investigatory and prosecutorial resources of the government;
- must fund the suit’s prosecution themselves, without recourse to a taxpayer-funded public prosecution budget;
- has no power over the government’s enforcement decisions. [83]

A citizen suit plaintiff has essentially only one enforcement option: to sue or not. In contrast, the federal and state agencies responsible for environmental regulatory enforcement have numerous enforcement options. [84]

These include: 1) informal regulatory action; 2) formal administrative enforcement; 3) formal civil judicial enforcement; and 4) criminal enforcement. [85]

Informal Response.

The enforcement agency can notify a source that its discharge is believed to be in violation, and request that source to come into compliance. No formal legal action need
follow, although EPA may request that the source operator certify in writing that it has come into compliance.

**Formal administrative enforcement.**

EPA can issue an administrative order to compel compliance, and can also administratively impose a monetary penalty for past infractions.

**Formal civil/judicial enforcement.**

EPA, through the U.S. Department of Justice, can initiate a civil lawsuit in the federal courts against a violator. Such a lawsuit may seek a court order compelling compliance and imposing a monetary penalty. Civil lawsuits may result in penalties, injunctive relief, and court orders.

**Criminal enforcement.**

EPA and DOJ also retain the option of prosecuting cases as criminal actions which a citizen plaintiff may not. Finally, while a government prosecutor may bring an action for wholly past violations, the Court foreclosed this option for ECS plaintiffs by its decision in *Steel Co.*

*Note: cross-reference FN 33: see also Van Noppen article: Standing constitutionality defenses*
environmental citizen’s suit of the “private enforcement” type. This fact goes far to moot the alleged “controversy” surrounding ECS and Article II separation of powers considerations.

A discussion of the ways the plaintiffs in these suits are significantly unlike “private attorneys general” -- the analogy endorsed by the Supreme Court in Bennett -- appears in Appendix A.

FN

Supra note 1

Endangered Species Act, 16 U.S.C. § 1540

Bennett, 520 U.S. at 165


For a definitive analysis of the public law/private law dichotomy in relation to citizen standing, see Cass Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432 (November, 1988)

Qui tam actions are those in which citizens bring civil suits alleging that other private parties have violated certain Federal laws or regulations, and that those violations caused excess expense to the government. See Percival and Goger, infra Note __ at 128

Black’s Law Dictionary

Different jurisdictions specify the types of crimes or the state of knowledge the citizen must have; in some jurisdictions the citizen’s arrest is prohibited by statute.

David C. Grossack, Citizen’s Arrest, [website, visited]


William Blackstone, Commentaries *160, cited in Winter, supra Note 4 at 1

Grossack, supra Note 12.

Both the English and American concepts of posse comitatus stem from the traditional common law right of citizen’s arrest.

Footnote

Justice Marshall wrote in 1805 that “[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information.” See Adams, qui tam v. Woods, 6 U.S. (2 Cranch) 336 (1805), cited in Winter, supra Note 4


California Penal Code Section 837

D.C. Law 7-104 § 7(e), 35 DCR 147, April 30, 1988 cited in Grossack, supra Note 7

Id.

See Gill v. Commonwealth, 235 KY 351 (1930), cited in Grossack

Kentucky Criminal Code § 37, § 43, § 44, cited in Grossack.


Id {Boyer} at 947, citing The Statute of 12 Richard II, ch. 13 (1388)

Id. at Note 279 at 947

S. Milsom, Historical Foundations of the Common Law, cited in Boyer and Meidinger, Note 30 supra

See e.g. McRae, The Development of Nuisance in the Early Common Law, 1 U. Fla. L. Rev. 27, 35 (1948) cited in Boyer and Meidinger, supra Note 30

http://www.bostonbaseball.com/whitesox/yogi.html, visited April 7, 2002

Personal communication, Professor Richard Wright, Torts I, Chicago-Kent College of Law, September 1999.


http://www.hsph.harvard.edu/review/a_tale.shtml, visited March 6, 2002

Id.


Eutrophication refers to a condition wherein an excess of nutrient causes uncontrolled aerobic growth in an oxygen-limited environment, which in turn leads to a reduction in oxygen levels below the point that will sustain oxygen-dependent species.

Boyer & Medinger, Supra Note 30 at 849


Id.


Boyer & Medinger, Supra Note 30 at __.

Id.


Id.


Id.

Boyer and Medinger, Supra Note 30 at __


Percival and Goger, infra Note 40


Id.


Id.

309 U.S. 470 (1940)

Percival and Goger, supra Note 440 at 123

Supra note 42 at 475-76, *cited in* Percival and Goger, supra note 40 at 123

See id. at 477.

Percival and Goger, supra Note 40 at 123.

Id.

Id.

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

Id. at 731


Supra Note 66

Id. at __

Id. at __

Krent, supra Note 54 at *90


Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003

Steel Co., (dissent) supra Note __ at 125

Steel Co., supra Note __ at 121

Krent, supra Note 54

Bennett v. Spear, 520 U.S. 154 (1997)


Id. from FN 7 to here

Id.