

**The Fight for Access: Comparing and Contrasting Standing Doctrine in the United States  
and the European Union, with a Focus on Environmental Litigation**

by

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One of the fundamental questions of law and policy making is who gets to participate in the process. While it is important to include various and diverse voices, rules exist to limit the participants to those parties whom the law deems appropriate. Participation in the legislative and executive processes is controlled via elections in the United States and the European Union. The controls on the judiciary's version of the law and policy making process are slightly more complex. Judges gain access by appointment or election, much like their legislative and executive counterparts. However, judges may only participate through the vehicle of a legal case; a civil or criminal trial or argument that only exists because of the parties involved. The rules that govern who are proper parties to a legal action are known as "standing" rules. Standing rules are the gatekeepers to the federal courts in the United States and Court of Justice of the European Union in the EU. These doctrines are the tools courts use to determine who are the proper non-judicial participants in the judicial law and policy making process.

The existence of standing requirements is important, but in their application, they become extremely significant for environmental litigation more specifically. American and European Union standing doctrines work as considerable barriers to any individual or citizen group seeking to participate in judicial policy making. While standing rules operate to exclude most citizens, they seem to be more inviting of the political subdivisions within the United States and the European Union. American states and European member states receive greater access to the judicial law and policy making process.

Article III, section 2 of the United States Constitution holds the textual foundation of standing doctrine for American federal courts: “The judicial Power shall extend to all *Cases...*[and] *Controversies...*”<sup>1</sup> The words “cases” and “controversies” may be the textual basis of this doctrine, however, the mere presence of these two words grants little guidance if they are meant as legal standards. In addition to the textual grounding of standing doctrine, the Supreme Court has cited many prudential considerations for standing doctrine, such as separation of powers, limited judicial resources, effective advocacy, concrete factual contexts, the prestige of the judiciary, and federalism.<sup>2</sup> The modern concept of constitution-based standing doctrine dates to the New Deal era.<sup>3</sup> Professor Sunstein presents the argument that Justices Brandeis and Frankfurter developed the doctrine to protect progressive new deal legislation.<sup>4</sup> Whether for legal, prudential, or political reasons, the Supreme Court applies standing doctrine to assure both compliance with the Constitution and the effectiveness of the judicial law and policy making process.

The current iteration of American standing doctrine requires satisfaction of a three-part test. The test is derived from Justice O’Connor’s opinion in *Allen v. Wright*: “A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>5</sup> Broken down into its components, the Court’s opinion in *Allen* requires every plaintiff to show 1) an injury-in-fact, 2) the defendant(s) caused the

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<sup>1</sup> U.S. Const. Article III, § 2, cl.1. Emphasis added.

<sup>2</sup> *Allen v. Wright*, 468 U.S. 737 (1984); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>3</sup> Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 Mich. L. Rev. 163, 179-181 (1992) (examining the history of standing doctrine).

<sup>4</sup> *Id.* at 179.

<sup>5</sup> *Allen v. Wright*, 468 U.S. 737, 751 (1984).

plaintiff's harm, and 3) the redress sought will redress the plaintiff's injury.<sup>6</sup> Examination of this rule calls for taking each prong in turn.

The injury-in-fact requirement is the most nebulous of the three prongs, thus requiring the most significant explanation on the part of the Court. The majority in *Allen* asked, "Is the injury too abstract, or otherwise not appropriate, to be judicially cognizable?"<sup>7</sup> In dicta, the *Allen* Court also stated, "The injury alleged must be... 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical'."<sup>8</sup> The facts alleged in *Allen* presented one cognizable and one non-cognizable injury, according to Justice O'Connor.<sup>9</sup> The Court judged the plaintiff's first alleged injury to be too general, too abstract.<sup>10</sup> The *Allen* plaintiffs alleged a "stigmatic injury...suffered by all members of a racial group."<sup>11</sup> This injury was not particularized enough to the specific plaintiffs at bar, thus failing the question posed earlier in the opinion.<sup>12</sup> The injury the Court recognized as justiciable was a claim that the plaintiffs were denied the opportunity to receive a racially desegregated education.<sup>13</sup> Justice O'Connor dedicated little attention to why this harm meets the injury-in-fact test, so it provides little guidance for future litigation.<sup>14</sup>

Turning to environmental litigation, the Supreme Court denied the plaintiffs standing in *Sierra Club v. Morton* on the same basis as the *Allen* plaintiff's first alleged injury.<sup>15</sup> In *Sierra Club*, the Court recognized that the injury the plaintiffs claimed could constitute an injury-in-fact

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<sup>6</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>7</sup> *Allen*, 468 U.S. at 752.

<sup>8</sup> *Id.* at 751. Citations omitted.

<sup>9</sup> *Id.* at 753-61.

<sup>10</sup> *Id.* at 754.

<sup>11</sup> *Id.* at 754.

<sup>12</sup> *Id.* at 756.

<sup>13</sup> *Id.* at 756.

<sup>14</sup> Justice O'Connor and the *Allen* majority dispose of the second alleged injury by the causation prong of the standing test, and do not fully examine the intricacies of what constitutes a judicially cognizable injury-in-fact. *Id.* at 756-57.

<sup>15</sup> *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

given the right circumstances.<sup>16</sup> However, the Sierra Club, as the plaintiff, failed to allege that any of its members specifically suffered the harm the Club was seeking to correct.<sup>17</sup> *Sierra Club* represents the unusual application of Justice O’Conner’s *Allen* rule: not that no injury exists, but that the plaintiff did not suffer the cognizable injury. The majority opinion in *Sierra Club* directly addresses participation in the law and policy making process. Justice Stewart restricts participation in the “judicial process” to “those who have a direct stake in the outcome.”<sup>18</sup>

Another environmental case that further examined the meaning of the injury-in-fact prong of the standing test is *Lujan v. Defenders of Wildlife*.<sup>19</sup> In *Lujan*, Justice Scalia further explains what “injury-in-fact” means. Justice Scalia avered that a judicially cognizable injury is “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical’.”<sup>20</sup> Justice Scalia did recognize, citing *Sierra Club*, that the potential injury the plaintiffs claimed was in fact a recognized injury-in-fact.<sup>21</sup> The plaintiffs in *Lujan* failed to adequately allege an injury because they had no past contact with the endangered species they wished to protect, and their future plans to revisit the endangered animals’ habitats were indefinite.<sup>22</sup> Reiterating Justice O’Connor’s sentiment from *Allen*, Justice Scalia observed that, “We have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more

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<sup>16</sup> Id. at 734-35.

<sup>17</sup> Id. at 735.

<sup>18</sup> Id. at 740.

<sup>19</sup> 504 U.S. 555 (1992).

<sup>20</sup> *Lujan*, 504 U.S. at 560. Citations omitted.

<sup>21</sup> Id. at 562-63.

<sup>22</sup> Id. at 562-71.

directly and tangibly benefits him than it does the public at large - does not state an Article III case or controversy.”<sup>23</sup>

In contrast to the failings of environmental citizen groups to achieve standing, and therefore access to judicial policy making opportunities, in *Sierra Club* and *Lujan*, the state of Massachusetts fruitfully satisfied the standing test in *Massachusetts v. EPA*.<sup>24</sup> Justice Stevens recognized that, due to climate change, the state of Massachusetts lost land area to rising sea levels.<sup>25</sup> He reasoned that Massachusetts’ status as a state made a fundamental difference when examining standing:

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi-sovereign*. *In that capacity 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.<sup>26</sup>

The Court also found that, since Massachusetts owned a portion of the land that they alleged to have lost, as a landowner the state of Massachusetts had a “particularized injury.”<sup>27</sup> The use of “particularized” mirrors Justice Scalia’s opinion in *Lujan*.<sup>28</sup> In further contrast to *Sierra Club* and *Lujan*, Massachusetts alleged a significantly more measurable injury, in loss of land (and therefore money), than did the *Sierra Club* and *Lujan* plaintiffs, in violation of a statute and failure to protect endangered species.

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<sup>23</sup> Id. at 573-74.

<sup>24</sup> 549 U.S. 497 (2007).

<sup>25</sup> *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007).

<sup>26</sup> Id. at 518-19 (citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). Emphasis added.

<sup>27</sup> Id. at 522.

<sup>28</sup> Justice Scalia dissented in *Massachusetts*.

Examination of standing does not rest solely on the injury claimed, but also looks at the alleged causal chain and possibility of redress. In *Allen*, the Court held that even though the plaintiffs' alleged a judicially cognizable injury, that injury was not "fairly traceable" to the defendant's conduct.<sup>29</sup> Like in the injury-in-fact context, Justice O'Connor posed a question as to causation: "Is the line of causation between the illegal conduct and injury too attenuated?"<sup>30</sup> The *Allen* Court established that the causation analysis would look to the length and complexity of the causal chain, if one existed at all. In *Allen*, the Court found no causal chain existed at all.<sup>31</sup> The plaintiffs in *Allen* sued the Internal Revenue Service when, as the Court decided, they should have sued the schools that discriminated against the black children.<sup>32</sup> Justice O'Connor concluded that, "The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing."<sup>33</sup> The discriminating schools would have been more appropriate defendants because their actions fall closer to the plaintiff's injuries on the causal chain than do the actions of the IRS.

If injury-in-fact is difficult to prove in environmental litigation, then causation is even more difficult. While Justice Stewart's analysis in *Sierra Club* did not advance beyond the injury prong, thus not addressing causation, Justice Scalia's opinion in *Lujan* did examine the alleged causal chain. The causation analysis in *Lujan*, like the injury-in-fact analysis, turns on the plaintiff's status. Justice Scalia determined that the plaintiffs were not "an object of the action (or forgone action) at issue."<sup>34</sup> As such, the plaintiff's alleged causal chain "hinge[s] on

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<sup>29</sup> *Allen*, 468 U.S. at 756-57.

<sup>30</sup> *Id.* at 752.

<sup>31</sup> *Id.* at 756-761.

<sup>32</sup> *Id.* at 758-60.

<sup>33</sup> *Id.* at 759.

<sup>34</sup> *Lujan*, 504 U.S. at 561.

the response of the regulated (or regulable) third party to the government action or inaction-and perhaps on the response of others as well...[and] ‘depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict’.”<sup>35</sup> Justice Scalia, like Justice Stewart in *Allen*, reasoned that the causal chain at issue in *Lujan* was too attenuated.<sup>36</sup>

Continuing its success from the injury-in-fact prong of the standing test, Massachusetts, in *Massachusetts v. EPA*, successfully established an adequately short causal chain.<sup>37</sup> In the very first sentence of his causation analysis, Justice Stevens points out that the Environmental Protection Agency did not dispute the connection between climate change and man-made greenhouse gases.<sup>38</sup> Justice Stevens reasons that it follows from the EPA’s failure to dispute the causal chain that, since the Court has already recognized the EPA’s failure to regulate greenhouse gas emissions, the EPA has “contribute[d] to Massachusetts’ injuries.”<sup>39</sup> The causation analysis proceeds to dismiss the EPA’s argument that its failure to regulate has too insignificant an effect on Massachusetts’ territorial losses.<sup>40</sup> Justice Stevens asserted that the Court may intervene despite the “increment[ality]” of the alleged violation.<sup>41</sup> He reasoned that since administrative agencies regulate in increments, then the Court might take the same approach.<sup>42</sup> Justice Stevens concluded the causation analysis with an argument that regulation of automobile emissions is hardly the insignificant step that the EPA argued it is.<sup>43</sup>

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<sup>35</sup> Id. at 562.

<sup>36</sup> Id. at 562.

<sup>37</sup> *Massachusetts*, 549 U.S. at 523.

<sup>38</sup> Id. at 523.

<sup>39</sup> Id. at 523.

<sup>40</sup> Id. at 523-26.

<sup>41</sup> Id. at 524.

<sup>42</sup> Id. at 524.

<sup>43</sup> Id. at 524-25.

While causation and redressability are distinct steps in standing analysis, they are generally examined either together. The possibility of redress necessitates the plaintiffs to have already proven causation, because a defendant cannot remedy that which it has not caused. In her analysis of causation in *Allen*, Justice O'Connor reaches into an examination of redressability. She detailed the uncertainty present in the circumstances that would lead to redress of the plaintiff's alleged injuries:

It is, first, *uncertain* how many racially discriminatory private schools are in fact receiving tax exemptions. Moreover, it is *entirely speculative*...whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. It is *just as speculative* whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also *pure speculation* whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.<sup>44</sup>

The improbability of all of these events transpiring led Justice O'Connor to conclude that the *Allen* plaintiffs' injuries were near irredeemable.

Like Justice O'Connor's reasoning in *Allen*, Justice Scalia determined that the *Lujan* plaintiff failed to adequately show their injuries to be redressable.<sup>45</sup> The Court ruled that, "any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action."<sup>47</sup> Justice Scalia concluded that, because the plaintiff attacked an executive agent, who possess wide ranging discretion, the plaintiff was unlikely to receive the redress demanded precisely because the Secretary of the Interior had the discretion to grant the redress

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<sup>44</sup> *Allen*, 468 U.S. at 758. Citations omitted. Emphasis added.

<sup>45</sup> *Lujan*, 504 U.S. at 568-71.

<sup>46</sup> In addition to causation, the *Sierra Club* Court did not consider redressability.

<sup>47</sup> *Id.* at 571.

or not, the Court's order notwithstanding.<sup>48</sup> In addition to the apparently insurmountable discretion of the Secretary, Justice Scalia found a further barrier to redressability in the fact that the redress the plaintiff sought would be carried out over seas, and the paltry funding available to the Department of the Interior for such a remedy would make the eventuality of the Secretary exercising his discretion in this case highly unlikely.<sup>49</sup>

As in the injury-in-fact and causation analyses, Massachusetts succeeded in the redressability examination as well in *Massachusetts v. EPA*.<sup>50</sup> Justice Stevens held that EPA action to regulate automobile emissions would “*slow or reduce*” the effect of climate change on the state of Massachusetts.<sup>51</sup> The Court did not require the plaintiff to seek a remedy that would totally alleviate the injury suffered, because such a remedy would be impossible.<sup>52</sup> The Court recognized that neither the United States, the automobile industry, nor any one actor could bear responsibility for climate change, but despite that the Court was not barred from enforcing a remedy against a singular actor, especially when that actor has as broad an impact as the EPA.<sup>53</sup> Having found that Massachusetts possessed an injury-in-fact that was caused by the EPA that could be redressed by an action of the EPA, the *Massachusetts* Court held that Massachusetts did have standing.<sup>54</sup>

Given the explanation above, standing doctrine represents a barrier to achieving environmental law or policy making goals through the American judicial system. Each prong of the standing test presents its own challenge to prospective plaintiffs. The evidence from *Sierra Club* and *Lujan* would seem to show that both individuals and citizen groups would have a

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<sup>48</sup> Id. at 568-71.

<sup>49</sup> Id. at 571.

<sup>50</sup> 549 U.S. 497.

<sup>51</sup> *Massachusetts*, 549 U.S. at 525. Emphasis in original.

<sup>52</sup> Id. at 525-26.

<sup>53</sup> Id. at 525-26.

<sup>54</sup> Id. at 526.

difficult time attaining standing in American federal courts. The standard set for individual's standing in *Lujan* requires specific pleadings that go beyond expressions of desire or possible future deprivation of some pleasure. In the context of endangered species, as in *Lujan*, the Court might require plaintiffs to show a more personal interaction with the species in question, such as frequent sightings, or a financial stake in the continued existence of the species, such as a commercial fishing company who would be harmed by the extinction of a specific species of fish.

Both *Sierra Club* and *Lujan* recognize that destruction of an aesthetic would satisfy the injury-in-fact prong, if the plaintiff pleads properly. The recognition of this injury may bode well for future litigation with careful selection of individual plaintiffs. A frequent tourist of the Sequoia National Forest or a park ranger may have been able to satisfy the injury requirement in *Sierra Club* if they could show the construction of the resort would have negatively impacted them. As for *Lujan*, better plaintiffs might have been scientists in the United States who study the endangered species, and therefore have a professional stake in the preservation of the species.

*Sierra Club* and *Lujan* not only present tough injury-in-fact hurdles for environmental litigation, *Lujan* also created potentially tougher standards for individuals to prove causation and redressability. Future plaintiffs will need to sue under more specific programs than the more general suit brought in *Lujan*. Assuming Justice Scalia's acknowledgement of administrative discretion continues to play an important role in the causation and redressability analyses when administrative agencies serve as the defendant, plaintiffs will have to attack specific programs, with specific monetary allocations, to have a chance at overcoming a cabinet secretary's discretion.

Neither *Sierra Club* nor *Lujan* really demonstrate the potential for causation and redressability analyses to disrupt climate change legislation. The causal chain from any one emitter or climate change-contributor to any one individual who suffers a climate change related injury might be far too attenuated for the Supreme Court to recognize. Furthermore, the Court will probably be unwilling to assign blame for climate change, a clearly global phenomenon, to one or even a group of emitters, large or small, because the problem will always be larger than any group of parties to a lawsuit. From a redressability standpoint, the scope of climate change makes it nearly impossible for a defendant or group of defendants to remedy certain injuries, like coastal land loss, snowcap melting, or extinction of an endangered species.

In contrast with the difficulties *Sierra Club* and *Lujan* present, *Massachusetts* seems to set a precedent for states to be able to participate in judicial law and policy making more easily than individuals. The state's sovereignty represents an inherent stake in the environment of the state that an individual resident does not necessarily possess. Therefore, the injury-in-fact prong is easier to satisfy. In *Massachusetts*, the status of the defendant played a major role in the finding of a causal link and availability of redress.<sup>55</sup> The EPA is uniquely situated in the United States to be able to have a direct impact on the regulation of greenhouse gas emissions. As such, the EPA may represent the best target of litigation, if the Court continues to hold the EPA accountable in climate change litigation.<sup>56</sup>

However, the perpetuation of this status quo is not assured. *Massachusetts* was decided five to four, with Justices Stevens, Ginsburg, Breyer, Souter, and Kennedy in the majority, and

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<sup>55</sup> *Massachusetts*, 549 U.S. at 526.

<sup>56</sup> Suing a government agency requires that sovereign immunity has been waived or abrogated in the context in question. For more on sovereign immunity see Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1, 1-65

Chief Justice Roberts and Justices Scalia, Thomas, and Alito dissenting.<sup>57</sup> Justices Stevens and Souter have since retired, being replaced by Justices Sotomayor and Kagan.<sup>58</sup> The two changes to the Court's roster place the *Massachusetts* holding in jeopardy. All four dissenters remain on the Court. To date, how Justices Sotomayor and Kagan will treat standing issues like those presented in *Massachusetts* is unknown. However, potentially the more significant development is the absence of Justice Stevens, and his ability to bring Justice Kennedy onto his opinions.<sup>59</sup> If the four *Massachusetts* dissenters can convince Justice Kennedy of their thinking in the future, not a totally implausible idea, they may be able to obfuscate or overturn *Massachusetts*.

Like American standing doctrine European Union standing doctrine has a textual basis in one of the European Union treaties. Article 263(4) of the Treaty on the Functioning of the European Union states that, "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."<sup>60</sup> Also like American standing doctrine, the mere words of the foundational document provide little illumination if the words are to have actual effect. Here, the words "direct and individual concern" create the rule in European Union courts.

European standing is a two-part test: 1) direct concern and 2) individual concern.<sup>61</sup>

Direct concern refers to the effect a Union act has on the legal status of a person or business.<sup>62</sup>

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<sup>57</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>58</sup> Adam Liptak, *Heavy Workload of Complex Cases Awaits New Justice*, N.Y. Times, August 7, 2009, at A12. Carl Hulse, *Senate Confirms Kagan as Justice In Partisan Vote*, N.Y. Times, August 6, 2010, at A1.

<sup>59</sup> David A. Graham, *John Paul Stevens's Legacy in Five Cases*, Newsweek, April 9, 2010, at <http://www.newsweek.com/blogs/the-gaggle/2010/04/09/john-paul-stevens-s-legacy-in-five-cases.html>.

<sup>60</sup> Treaty on the Functioning of the European Union, art. 263, Dec. 13, 2007.

<sup>61</sup> Xavier Lewis, *Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, where Should it be Fixed?*, 30 Fordham Int'l. L.J. 1496 (2007).

<sup>62</sup> Cases 41-44/70, *International Fruit Company v. Commission*, 1971 ECR 411.

In *International Fruit v. Commission*, the court held that, because the Decision in question necessarily affected the issuance of licenses, “the measure whereby the Commission decides on the issues of the import licenses thus directly affects the legal position of the parties concerned.”<sup>63</sup> The individual concern requirement necessitates the plaintiff be a member of a closed class, as to time and type.<sup>64</sup> *Plaumann v. Commission* dealt with a German clementine importer who brought suit challenging the Commission’s refusal of an exemption from the European Union customs duty on clementine imports.<sup>65</sup> The court held that while the type of class was closed as to clementine importers, the class was not closed as to time since new clementine importers could enter the market at any time.<sup>66</sup> The lack of class closure, both at the time the decision was made and in the future, means the Commission’s action did not individually concern the plaintiff.<sup>67</sup>

The leading environmental standing case is *Stichting Greenpeace Council v. Commission*.<sup>68</sup> In *Stichting Greenpeace* the court again enforced the individual concern prong of the European Union standing test.<sup>69</sup> As in *Plaumann*, the plaintiff in *Stichting Greenpeace* failed the test.<sup>70</sup> Greenpeace challenged a Union action permitting the construction of a power plant on the Canary Islands.<sup>71</sup> Perhaps anticipating a lack of standing under the conventional test, Greenpeace requested the court carve an exception to the general standing test for the

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<sup>63</sup> Id. at para. 26-27.

<sup>64</sup> Case 25/62, *Plaumann v. Commission*, 1963 ECR 95.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Case C-321/95 P, *Stichting Greenpeace Council v. Commission*, 1998 ECR I-1651.

<sup>69</sup> Id. at para. 21.

<sup>70</sup> Id. at para. 35.

<sup>71</sup> Id. at para. 2.

environment.<sup>72</sup> The court, however, paid no attention to the plea and treated Greenpeace like any other plaintiff, thus denying standing for lack of individual concern.<sup>73</sup>

While American states are subject to the same standing rules as any other plaintiff, European Union institutions and member states have their own set of standing rules. Once again Article 263(2) of the Treaty on the Functioning of the European Union holds the textual foundation for the doctrine: “[The Court of Justice of the European Union] shall for this purpose (judicial review) have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.”<sup>74</sup> The potential plaintiffs listed in paragraph two of Article 263 are called “privileged applicants.”<sup>75</sup> They enjoy unfettered access to Union courts and are not subject to the direct and individual concern requirements placed on “non-privileged applicants.”<sup>76</sup>

The Treaty on the Functioning of the European Union contains a further avenue to Union courts. Article 267 contains the provision that allows the Court of Justice of the European Union to “give preliminary rulings... Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may . . . request the Court to give a ruling thereon.”<sup>77</sup> The preliminary reference procedure provides a means by which plaintiffs can circumvent the direct and individual concern requirements.<sup>78</sup> Plaintiffs are not required bring their claims under

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<sup>72</sup> Id. at para. 7.

<sup>73</sup> Id. at para. 35.

<sup>74</sup> Treaty on the Functioning of the European Union, art. 263, Dec. 13, 2007.

<sup>75</sup> Lewis, *supra* note 61.

<sup>76</sup> Id. at 1500-06.

<sup>77</sup> Treaty on the Functioning of the European Union, art. 267, Dec. 13, 2007.

<sup>78</sup> Lewis, *supra* note 61.

Article 263 before bringing the question by preliminary reference.<sup>79</sup> A plaintiff need only have standing in a member state and raise a question of European Union law to avail itself of Article 267.<sup>80</sup> Preliminary references can pose questions as to interpretations of Union law and questions as to the validity Union law.<sup>81</sup>

European Union standing doctrine presents serious obstacles to participation in the judicial law and policy making process within the Union. European Union standing is harsher on individuals than on the Union's internal political subdivisions. The direct and individual concern test is extremely stringent. Being a member of a permanently closed class is almost impossible without a regulation that specifically names an individual or company. In the context of environmental litigation, the direct and individual concern requirement is nothing less than fatal. As seen in *Stechting Greenpeace*, advocacy groups have no ability to gain standing where they have not been specifically named in the regulation. Since the Court of Justice of the European Union refused to create an exception for environmental cases in *Stechting Greenpeace*, the best hope for citizen groups to play a part in litigation initiated at the Union level is to lobby the Commission to be specifically named in the Union regulation.

Political subdivisions within the European Union (member states) enjoy greater access to judiciary. The unabridged access of member states to the Union courts make them perfectly situated to protect their own environment. A member state can challenge any action of the Union institutions the individual member state believes jeopardizes its environmental integrity. Member states can also attack the Union for inaction, seeking performance of duty the Union possesses but is not adequately performing.

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<sup>79</sup> Case 216/82, *Universität Hamburg v. HZA Hamburg-Kehrwieder*, 1983 ECR 2771.

<sup>80</sup> Treaty on the Functioning of the European Union, art. 267, Dec. 13, 2007.

<sup>81</sup> Lewis, *supra* note 61.

Citizen-plaintiffs and advocacy groups should focus on using the preliminary reference procedure for environmental litigation. The preliminary reference mechanism allows individuals or groups to access the Union courts, while avoiding the direct and individual concern scrutiny. Member state courts are also probably more likely to protect the environment of their sovereign territory than a Union court would be.

American and European Union standing doctrines are very different in their conception; yet operate very similarly in practice. While American standing doctrine relies on a three-part test founded in a constitution, European Union standing doctrine, for people, utilizes a two-part test derived from a treaty. However, both the American and European doctrines work to restrict the participants in the judicial process to those who have the most, and most valid, interest in the case at bar. While the European version general bars all individuals and groups from direct Union level litigation, American rules operate to restrict access to those plaintiffs with very specific claims.

In the context of environmental litigation, both the American and European rules make citizen-brought legal action between extremely difficult to virtually impossible to win. The European Union rule prevents almost all citizen litigation, regardless of the subject matter. However, the *Sierra Club* and *Lujan* demonstrate the difficulties plaintiffs face when litigating environmental claims under a rule most easily applied in cases of physical or monetary harm. Unlike in the European Union, if an American plaintiff were to artfully plead his or her case, the plaintiff might succeed as an individual or a member of an advocacy group. In the European Union, the quality of the plaintiff's pleadings is irrelevant as the question of standing, which was already de facto determined when the Commission drafted the challenged legislation.

In keeping with their treatment of individual citizen standing, the United States and the European Union define the standing available to their political subdivisions differently, while actually providing similar levels of access to the courts. American states possess fundamental authority over their sovereign territory, as recognized in *Massachusetts v. EPA*. However, they must still satisfy the same test that people must meet to establish standing. European Union member states have even greater access to the Court of Justice and American states do to United States federal courts, because the European states have automatic standing as privileged applicants. Compared to the standing requirements placed on individuals, American states and European Union member states have an easier standing burden across the board. As far as environmental litigation is concerned, American states and European member states are better poised, than individuals, to act to preserve their ecosystems, based on standing rules.

The most significant difference between American and European Union standing doctrines is the presence of the preliminary reference procedure. One of the long settled facts of the American federal judicial system is the unavailability of advisory opinions.<sup>82</sup> The European Union's preliminary reference procedure is part advisory opinion, part certified question.<sup>83</sup> The preliminary reference grants the access to the European Union courts that the standing test denies to individuals.

One similarity between the European Union's preliminary reference feature and American jurisprudence is the availability of appeals to the United States Supreme Court from state supreme courts. Just as in the European process, where cases move from lower political subdivisions to the highest judicial body in the larger political entity, American court cases may seek access to the highest court in the land. However, very different from the preliminary

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<sup>82</sup> Letter from John Jay, Chief Justice of the Supreme Court of the United States, to George Washington, President of the United State (Aug. 8, 1793)

<sup>83</sup> Certified questions are allowed in some American jurisdictions. See Fla. Const. of 1968, art. V, § 3(b)(4) (1968).

reference procedure, is the Supreme Court's ability to deny certiorari, whereas the Court of Justice "shall" hear preliminary references.<sup>84</sup>

Standing doctrine is one of the tools governments and legal systems employ to manage who has access to judicial law and policy making process. The United States and the European Union employ strict standing rules, while not entirely eliminating all access to the highest courts. Both the United States and the European Union limit access to the judicial process to worthy applicants, albeit through very different rules. The United States requires all plaintiffs to have suffered an injury-in-fact, caused by the defendant, which is judicially redressable.<sup>85</sup> The European Union requires individuals and businesses to belong to a closed class based on whether the regulation in question is of direct and individual concern to the plaintiff.<sup>86</sup>

Both iterations of standing doctrine present extra barriers to those wishing to influence judicial law and policy making in environmental contexts. The very nature of bringing a legal case attempting to protect the environment violates the basic legal notion of suing to protect a personal right. Questions of what rights, if any, an individual has, separate from society at large, to a clean or consistent environment are both nuanced and continually evolving. American courts have recognized some environmental rights, but it is unclear if those rights have been recognized because of a new understanding of individual rights or merely through the application of general rules to the facts at bar. Both American and European courts have expressly rejected creating exceptions to their broader standing rules for the environment. If citizen and advocacy group standing continues to be difficult to attain, environmental litigation will probably become

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<sup>84</sup> Treaty on the Functioning of the European Union, art. 267, Dec. 13, 2007.

<sup>85</sup> See *Allen, Sierra Club, Lujan, and Massachusetts*, *supra* notes 5, 6, 15, and 25.

<sup>86</sup> See Treaty on the Functioning of the European Union, art. 263, Dec. 13, 2007. and *International Fruit, Plaumann* and *Stichting Greenpeace*, *supra* notes 62, 64, and 68.

more and more the province of American states and European Union member states, in the respective systems.

This is not necessarily a bad situation. State and member state litigation should be able to increase the impact favorable judgments because they possess enforcement mechanisms not available to advocacy groups, let alone individuals. Courts will probably also be more likely to side with political entities that have formal legitimacy to speak for the people, than with one person or a group only represents a portion of society. Ultimately, standing requirements are not going away any time soon, and those people, groups, and states wishing to participate in the judicial law and policy making process, in any context, have to follow the rules or suffer the consequences.