

ENVIRONMENTAL ARTICLE

BEYOND STANDING: PROPOSALS FOR CONGRESSIONAL RESPONSE TO SUPREME COURT "STANDING" DECISIONS

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INTRODUCTION

The United States Supreme Court decisions within the past decade have narrowed the requirements for "standing" under article III of the Constitution.¹ Plaintiffs cannot bring suit unless a three-part test is met. A plaintiff's complaint must include allegations showing:

- (1) a distinct, palpable, not-abstract personal injury;
- (2) that the injury is fairly traceable to the defendant's allegedly unlawful conduct; and
- (3) that relief from the injury is "likely" to flow from the requested relief.²

This interpretation of the "case or controversy" language in article III arises from the need to avoid deciding cases "in the rarified atmosphere of a debating society" without a concrete factual context.³ This concept allows the courts to avoid unnecessary confrontations with the legislative and executive branches, and preserves the separation of powers.⁴

The three-part constitutional test raises particularly troublesome hurdles for contemporary environmental plaintiffs. Much environmental litigation now focuses upon processes and pollutants which are not specific to a given waterway, neighborhood, or locale.

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1. *Allen v. Wright*, 468 U.S. 737 (1984).

2. *Id.* at 751.

3. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473-74 (1982).

4. *Id.*

Instead, allegations of regulatory failure now typically assert that the plaintiffs' harm consists of increases in the incidence of illness, often cancer, among large populations over the span of two or three decades. Obviously, no one plaintiff can demonstrate that he or she *will*, or even *is likely to be* one of those victims. Allegations of regulatory misconduct also increasingly involve qualitative and quantitative shifts in the compositions of ecosystems, such as regulatory action affecting endangered species, acid precipitation, genetic engineering, or global climate. These allegations too are unlikely to inflict a distinct, palpable injury upon any given, presently-alive, plaintiff.

Where such regulatory actions do palpably injure a particular plaintiff, it remains difficult to demonstrate that the injury is "fairly traceable" to a particular regulatory decision. Often, a present or expected environmental harm is traceable to decades of neglect or mismanagement or to the actions of other nations, as well as to a challenged regulatory action. For the same reasons, few plaintiffs can demonstrate that the relief requested (a different regulation, or denial of a given permit) is "likely" to prevent the injury to this particular plaintiff. The relief requested cannot reverse the actions of prior decision makers or of foreign nations and foreign polluters. While regulatory action may be an important factor, it is rarely the sole determinant factor.⁵

This article will not attempt to critique the logic or constitutional soundness of the Court's decisions on standing. Others have ploughed that fertile field.⁶ Suffice it to say that a consensus has

5. For example, in a suit to compel the Administrator of the Environmental Protection Agency (EPA) to promulgate regulations limiting the emissions of chlorofluorocarbons (CFCs) and halons (ozone depleting chemicals), the plaintiff will have trouble proving both a palpable injury and that the injury is fairly traceable to a particular regulatory decision. The causal link between CFCs and halons, which reduce the levels of ozone in the stratosphere, and an increased risk of melanoma/non-melanoma skin cancer is in dispute.

Even if this causal link is established, a plaintiff still must demonstrate that he or she will contract, or is likely to contract, melanoma/non-melanoma skin cancer due to ozone depletion caused by the emissions of CFCs and halons. Given modern scientific capabilities, this is an impossible burden.

In addition, even if a palpable injury can be shown, demonstrating that the injury is fairly traceable to EPA's decision not to regulate emissions of CFCs and halons would be very difficult. Many sources of CFC and halon emissions, both within and without the United States, contribute to the problem. The EPA's decision not to regulate emissions of CFCs and halons may be an important factor, but it is not the sole factor.

6. Justice Brennan's dissent in *Allen v. Wright*, 468 U.S. 737, 782-83 n.10 (1984) (Brennan, J., dissenting) cites to some of the leading critical commentators. One of the most widely cited authorities on federal civil procedure notes that "at any single moment, there

emerged that these decisions have closed the courthouse door to many plaintiffs with legitimate claims under the Bill of Rights and under federal civil rights laws, as well as under environmental laws.⁷

This article will propose a congressional response, designed to reinstate the standing of citizen plaintiffs seeking redress for unlawful government action. Because the Court's standing decisions have been based upon article III of the Constitution, the Court's critics have almost universally made the mistake of assuming that the Congress is powerless to intervene.⁸ What have not been ex-

are almost unlimited opportunities to disagree in applying the currently fashionable phrases," and that "[m]any exasperated courts and commentators" agree with criticisms of the standing rules as worthless generalities, "often adding that standing doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise surreptitious ruling on the merits." 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531, at 347-48 (1984) [hereinafter *FEDERAL PRACTICE AND PROCEDURE*].

7. See, e.g., Note, *Standing and Injunctions: The Demise of Public Law Litigation and Other Effects of Lyons*, 25 B.C.L. REV. 765 (1984).

8. See, e.g., Connelly, *Congressional Authority to Expand the Class of Persons with Standing to Seek Judicial Review of Agency Rulemaking*, 39 ADMIN. L. REV. 139 (1987). The article also points out that a number of Supreme Court opinions have conceded that Congress can, and has, redefined what constitutes personal injury, or "injury-in-fact." *Id.* In particular, cases under the Fair Housing Act recognize this. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972).

But injury-in-fact is only the first of the three tests, each of which, according to *Allen v. Wright*, must be satisfied. Connelly, and the sources upon which he relies, notably Professor Tribe's outdated treatise, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 79-81 (1978), all fail to take into account the additional constitutional requirements that the personal injury be traceable to the allegedly unlawful conduct, and that the injury will "likely" be remedied by the requested relief.

The cases relied upon by Connelly, notably *Havens Realty*, may explain the confusion. Justice Brennan, writing for the majority, wrote that "injury in fact" is the sole constitutional requirement. *Havens Realty*, 455 U.S. at 372. This simplistic approach is no longer good law after *Allen v. Wright*. See *FEDERAL PRACTICE AND PROCEDURE*, *supra* note 6, § 3531.2, at 53-58 (Supp. 1988) (interpreting *Allen v. Wright* as emphasizing that injury-in-fact does not suffice).

No published work has grappled with congressional authority to overcome the second and third criteria of the article III test, firmly adopted in *Allen v. Wright*. More importantly, no Supreme Court decision has yet acknowledged congressional authority to do so. Even in those cases in which the Supreme Court has recognized implicit congressional intent to expand the definition of a personal injury, the Court has reminded us of its view that "[i]n no event, however, may Congress abrogate the Art. III minima." *Gladstone*, 441 U.S. at 100. This could be a suggestion that the second two criteria are not subject to congressional interpretation.

Dictum in *Gladstone* raises this possibility. In *Gladstone*, the Court at once recognized congressional intent to extend standing to the fullest extent allowed by article III, *id.*, and simultaneously declared that the second criterion—causation—remained unchanged despite the fact that intent and causation would have to be proven to the trial court. *Id.* at 114 n.29.

plored are the powers specifically allocated by the Constitution to Congress under article III itself, under the thirteenth, fourteenth and fifteenth amendments, and under article I.

Article III of the Constitution provides Congress with the authority to define the "judicial power" of the federal courts.⁹ Part I of this article explains how Congress may use that authority in the area of standing. The thirteenth, fourteenth, and fifteenth amendments explicitly grant to Congress the "power to enforce, by appropriate legislation" the provisions of each amendment.¹⁰ Part II of this article argues that Congress may utilize that power to overcome standing hurdles in the areas covered by each amendment. Part III of this article argues that under article I Congress may create "legislative courts" entirely free of the "case or controversy" restrictions imposed on article III courts.¹¹ This argument, while long-recognized as beyond debate, has not before been applied to the standing aspect of article III.

I. ARTICLE III AS AUTHORITY FOR CONGRESSIONAL ACTION

Article III of the Constitution states that the "judicial power of the United States" is vested in "one supreme Court" and in "such inferior Courts as the Congress may from time to time ordain and establish."¹² The article also states that the jurisdiction of the "supreme Court" is subject to "such Exceptions, and . . . such Regulations as the Congress shall make."¹³ Professor Hart's dialectic on the power of the Congress to limit the jurisdiction of the federal courts is well-known.¹⁴ Cases and scholarly discussions of the topic abound.¹⁵ The focus of discussion has been upon Congress' authority to *limit* court jurisdiction, generally to deprive federal courts of the authority to hear civil rights or habeas corpus matters. Relatively few cases or scholars have commented on the authority of Congress to *expand* the "judicial power" to include matters which the Court would otherwise deem not a "case or con-

Arguably this suggests that Congress lacks authority to address the second two criteria; that is, Congress can by statute affect only the definition of what constitutes an injury.

9. U.S. CONST. art. III.

10. *Id.* amends. XIII, XIV, XV.

11. *Id.* art. I.

12. *Id.* art. III.

13. *Id.*

14. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 393-423 (3d ed. 1988).

15. *Id.*

troversy.”¹⁶ The little case law and discussion extant reveal only that the Congress *may* have, in a number of statutes, attempted to expand the standing “to the full extent permitted by article III.”¹⁷ For example, in the fair housing area, Congress has attempted to overcome *non-constitutional* limits on standing by repealing the bar, imposed by case law, against raising the grievances of third parties.¹⁸

An express statement by Congress that it is defining, or redefining, standing is lacking. In other areas, Congress has explicitly exercised its own power to interpret the Constitution. Most notable has been the Congress’ assertion of jurisdiction under the commerce clause. The Court in modern times has, almost without exception, deferred to Congress’ determination that a given farming practice or business practice or criminal act is part of “the stream of interstate commerce” or “affects commerce,” no matter how trivial.¹⁹ Often, but not always, Congress has supported its assertions by taking testimony²⁰ and making explicit findings.

Casuistic adjudication of the standing issue could cease overnight were the Congress to take a purposeful, definite position on the question. Rather than imply somewhere in a committee report or during a floor debate that the sponsor of a given environmental statute intended to expand standing to the maximum extent per-

16. See, e.g., sources and cases cited *supra* note 8.

17. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

18. Generally, by this the courts mean that the non-constitutional, or “prudential,” limits on standing can be removed by Congress. See, e.g., *Havens Realty*, 455 U.S. at 372; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Prudential limits include the requirement that a plaintiff not raise claims of third persons or raise generalized grievances, and that the plaintiff’s injuries fall within the zone of interests sought to be protected by the legislature. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474-75 (1982).

A few cases have addressed congressional interpretation of what constitutes a recognizable injury, or injury-in-fact. This is not a prudential limit but one imposed by the Constitution. In each of these cases, congressional intent to modify injury-in-fact has been implied. Congress has yet to adopt an explicit interpretation or modification of any aspect of the article III criteria for standing. See *supra* note 8.

19. See, e.g., *United States v. Sullivan*, 332 U.S. 689 (1948) (“purely” intrastate commerce may be reasonably regulated as incident to regulating interstate commerce).

20. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (The Court upheld use of the commerce clause to support federal jurisdiction under the Civil Rights Act of 1964, 42 U.S.C. § 2000a-6 (1982), relying in part on the testimony developed during congressional hearings. Congress held hearings on the effects of discrimination on interstate commerce but had made no findings).

The Court has even reversed its own prior interpretation of article III, based on an intervening Congressional interpretation of that article. See *infra* note 66.

mitted by article III—which is as far as the statutes have proceeded to date—Congress could explicitly state that extent.

For example, the citizen suit provision of the Clean Water Act, as presently written, says only that a “citizen” is “a person or persons having an interest which is or may be adversely affected.”²¹ From this, and the legislative history of the section, the courts may or may not divine an intent to provide broad standing.²² The uncertainty could be eliminated if an additional section were added:

A case or controversy within the meaning of article III of the Constitution exists whenever a citizen has sufficient stake in the outcome of a lawsuit under this Act to present fully the facts and arguments of law, regardless of whether that party's injury is concrete or intangible and regardless of whether the injury is likely or unlikely to be ameliorated by the requested relief.

This wording specifically overrules the current decisional law on the constitutional requirements for standing and focuses instead on the stake of each litigant. Such a standard would be consistent with the earlier standing decisions. The leading standing decision predating the explosion of decisions in the 1970's was *Flast v. Cohen*.²³ *Flast* held that the issue of standing focuses primarily “on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.”²⁴ A person has standing, under *Flast*, if he or she has “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.”²⁵

The second two criteria of the three-part *Allen v. Wright* test necessarily focus on the issues—despite *Flast*—since they examine the connection between the party and the allegedly unlawful con-

21. 33 U.S.C. § 1365(g) (1982).

22. The Court of Appeals for the Third Circuit interpreted this section as authorizing *non-injured* citizens to sue as “private attorneys general.” The Supreme Court disagreed. Citing the legislative history, the Court interpreted this section as applying only to persons who had suffered injuries within the meaning of the traditional injury-in-fact test. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15-17 (1981). The citizen-suit provisions of all the other major environmental laws use language similar to 33 U.S.C. § 1365.

23. 392 U.S. 83 (1968).

24. *Id.* at 99.

25. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

duct. In some contexts, the judge is forced to make a preliminary ruling on the merits of the controversy.²⁶

Were the Clean Water Act also amended to include findings, such findings might read as follows:

The Congress finds and declares that public participation in the statutory effort to clean up the nation's waterways is essential. Over a decade of experience under this Act has proven that state and federal agencies acting alone lack the resources, energy, and commitment to fulfill congressional mandates. A critical component of public participation is the ability to bring suit. Without this ability, public participation fails to act as the impetus to regulatory action.

This experience also has demonstrated without question that individual citizens and citizen groups often exhibit far greater zeal in researching and presenting such litigation, thus implementing the Act, than is frequently demonstrated by the parties to more traditional litigation such as disputes over contracts, negligence torts, or family affairs. This is true even where the injury is intangible or where the requested relief may not contribute to enforcement so directly that the citizen could prove it "likely" that his or her own injury would be lessened by the requested relief. The Congress finds, therefore, that litigation under the Act, brought by citizens, may constitute a case or controversy within the meaning of article III even where the citizen's injury is intangible or the citizen cannot show that his or her own injury is likely to be ameliorated by the requested relief.

Former government regulators, environmental lawyers, and citizen groups undoubtedly could provide many days of testimony upon which to base such findings.²⁷

26. See the separate dissenting opinions in *Allen v. Wright* of Justice Brennan, *Allen v. Wright*, 468 U.S. 737, 766 (1984) (Brennan, J., dissenting) and of Justice Stevens, *Id.* at 789-91 (Stevens, J., dissenting). See also *FEDERAL PRACTICE AND PROCEDURE*, *supra* note 6.

Apparently, the judge is to make a preliminary ruling after ample opportunity for discovery, suggesting that mere allegations meeting the three-part test will not suffice. Proof and a hearing, presumably a summary judgment hearings, are necessary. See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 (1979).

27. The legislative history of the existing citizen suit provision of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972) leaves precisely the opposite impression; that there can be no private enforcement of the Act. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 n.26 (1981).

II. THE THIRTEENTH, FOURTEENTH AND FIFTEENTH AMENDMENTS AS AUTHORITY FOR CONGRESSIONAL ACTION

The three Reconstruction-era amendments, the thirteenth, fourteenth, and fifteenth, each conclude with a clause granting to Congress the "power to enforce, by appropriate legislation," the provisions of each amendment.²⁸ The Supreme Court has held that this clause does not limit Congress to enforcing rights which the courts have held are guaranteed by each amendment. Rather, Congress, by legislation, can determine the meaning of the amendment, and then by legislation, Congress can enforce that meaning.²⁹

For example, the Supreme Court held that its role was not to decide whether it agreed with Congress that English literacy requirements violated the fourteenth amendment.³⁰ Congress, in adopting the 1965 Voting Rights Act, had already decided that. Rather, the only question that the Court found proper for consideration was whether Congress had acted appropriately in the manner in which it was enforcing that determination.³¹

Here congressional power is at its zenith. The Court does not merely give deference to a congressional finding or a congressional conclusion, as in commerce clause cases. The Court accepts as a given the congressional interpretation, subject only to minimal review under the "necessary and proper" clause.³² It seems likely, therefore, that the Court would uphold a carefully crafted congressional interpretation of the fourteenth amendment which supersedes the judicially developed three-part test for standing under article III.

Litigants challenging discriminatory zoning under the fourteenth amendment, or challenging racial "steering" under the Fair Housing Act³³ and the fourteenth amendment, for example, presently must navigate the shifting sands of article III. Many fail.³⁴ As

28. U.S. CONST. amends. XIII, XIV, XV.

29. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970).

30. *Katzenbach*, 384 U.S. at 648.

31. *Id.* at 649.

32. *Id.* at 649-50.

33. Civil Rights Act of 1968, tit. VIII, 42 U.S.C. §§ 3601-3631 (1982).

34. Few plaintiffs have such direct stakes as the plaintiffs in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In *Arlington Heights*, one plaintiff had already invested in the project which was restricted by exclusion-

in all standing cases, the plaintiffs' lack of success does not indicate the absence of a violation of the law. Indeed, the courts often assume, for purposes of decision, that plaintiffs are correct in alleging unlawful conduct. Were Congress to respond to this problem, such cases could be decided on their merits. Congress could remedy the problem by amending the basic civil rights jurisdictional statute³⁵ to include the following:

A suit filed by any person who claims to have been injured by a discriminatory practice, or who believes he or she will be irrevocably injured by a discriminatory practice [a paraphrase of the existing "standing" language in section 810 of the Fair Housing Act] shall be deemed to be a case or controversy within the meaning of article III of the Constitution so long as that person has suffered, or is under threat of suffering, a violation of the fourteenth amendment or the Fair Housing Act or that person is found by the Court to belong to or to fairly represent a class of persons who have suffered or are under threat of suffering a violation of the fourteenth amendment or the Fair Housing Act. No individualized proof of causation connecting the alleged unlawful conduct and the injury shall be required.

Congressional findings could be added to section 1983 to support this position. They might state that Congress has determined, based on testimony at hearings, that section 1983 and the Fair Housing Act have proven excessively difficult for citizen-plaintiffs to enforce because of the inherent difficulty of proving a causal connection between segregation of neighborhoods and various discriminatory practices, such as exclusionary zoning and "steering" by realtors. The findings could state that Congress, under the fourteenth amendment, has concluded that *all* exclusionary zoning and *all* racial steering cause injury-in-fact to minority group members, and that all court imposed remedies deter this steering, thereby lessening the injury.

Amendments of this sort would have the effect of eliminating decisions such as *Warth v. Seldin*.³⁶ The very restrictive dictum in

ary zoning, and another testified he lived nearby and planned to move into the project. Compare *Warth v. Seldin*, 422 U.S. 490 (1975), in which none of the plaintiffs were found to have standing, though several minority-group plaintiffs alleged that they had attempted to live within the exclusionary area and had been unsuccessful because the zoning did not allow low-income housing.

35. 42 U.S.C. § 1983 (1982).

36. 422 U.S. 490. See *supra* note 34.

Gladstone, Realtors v. Village of Bellwood, limiting even the supposedly broad standing granted under the Fair Housing Act, would also become moot.³⁷

III. AUTHORITY UNDER ARTICLE I FOR CONGRESSIONAL ACTION

The two approaches advanced above have inherent limitations. The Court must heed, but need not accept, the congressional interpretation of article III. In addition, the Reconstruction-era amendments apply only to state action. To protect fully citizen enforcement of federally-administered programs³⁸ and of constitutional limits on federal actions,³⁹ Congress must utilize its powers under article I of the Constitution.

The Supreme Court has left no doubt that Congress has the authority under article I to create "legislative courts." These are courts, created by an Act of Congress, whose judges are unlike article III judges who serve for life subject only to impeachment. Nor are article I judges' salaries protected against congressional diminution, as are the salaries of article III judges. There is no constitutional requirement that an article III judge preside over a federal criminal trial,⁴⁰ over any matter arising in the territories or the District of Columbia,⁴¹ over a court-martial,⁴² or over cases adjudicating "public rights"—those cases involving disputes between the government and individuals,⁴³ as opposed to disputes strictly among individuals. Environmental cases and other regulatory disputes involve such "public rights."⁴⁴ Notably, there is no requirement that article I "legislative courts" restrict their jurisdiction to cases and controversies, because that limitation is found only in article III.⁴⁵

37. See *supra* note 18 and accompanying text.

38. See, e.g., Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982); Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982).

39. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984) (allegedly unconstitutional tax preferences given to whites-only schools).

40. *Palmore v. United States*, 411 U.S. 389 (1973).

41. *Id.*

42. For a discussion of the authority of legislative courts, see the plurality and dissenting opinions in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality and dissenting opinions).

43. *Id.*

44. *Id.* at 67-70.

45. The "public rights" category of legislative courts is based upon the notion that Congress may delegate to a tribunal any decision which an executive officer could have decided. The tribunal is but one additional level of delegation, the first having been from the legisla-

Many disputes between the government and citizens already are resolved by article I courts, in the form of specialized administrative tribunals.⁴⁶ These tribunals often address disputes over individual statutory entitlements, such as social security or black lung benefits, in which there is never any question of standing. However, legislative courts can also entertain the type of action in which a citizen seeks injunctive or declaratory relief to enforce a federal statute, even where the plaintiff's claim would fail the three-part article III test.

For example, consider the "standing" problems of citizen-plaintiffs seeking to challenge the recent decision of the Department of the Interior to delete all foreign species from the protection of its Endangered Species Act regulations.⁴⁷ The various species may be on the verge of extinction and the Department's action may fly in the face of legislative intent, but no American plaintiff can hope to satisfy the three-part article III test. The injury will not be concrete, palpable, or personal for these plaintiffs, because it will occur overseas. The injury—extinction of a given species—may well occur even without the connivance of the Department of the Interior and therefore may not be "fairly traceable" to the Department. Nor is extinction "likely" to be prevented by appropriate federal action, since at best federal action may be only one, albeit an important, factor in preserving a foreign species.⁴⁸

ture to the executive. Thus, the authority of such courts includes any matter proper for decision by the executive branch and is not limited to cases or controversies. *Crowell v. Benson*, 285 U.S. 22 (1932). See also *Northern Pipeline*, 458 U.S. at 67-69.

46. See *Northern Pipeline*, 458 U.S. at 70 n.22; See also *Northern Pipeline*, 458 U.S. at 92-118 (White, J., dissenting).

47. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn. 1987).

48. These were the allegations in *Defenders of Wildlife*, 658 F. Supp. at 45. The plaintiffs challenged the Secretary of the Interior's June 3, 1986 final rulemaking, which modified 50 C.F.R. § 402.04, as violating Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1982). See 51 Fed. Reg. 19930 (1986). The Government moved to dismiss, arguing that the three-part article III test could not be met. *Defenders of Wildlife*, 658 F. Supp. at 46. At oral argument on the motion in the District Court, Judge Alsup questioned whether application of the article III test would make it "virtually impossible" for any citizen-plaintiffs to challenge the regulation. Transcript of Hearing on Motion to Dismiss at 9, *Defenders of Wildlife*, Doc. # 3-85CV1236 (Nov. 21, 1986). By order dated July 25, 1986, Judge Alsup dismissed all of the claims under the Endangered Species Act, holding that the plaintiffs could not meet the causation test of article III. As of this writing, the decision of the Court of Appeals for the Eighth Circuit is pending.

Some would argue that the application of the Endangered Species Act to projects funded by the United States overseas, particularly in the rainforest, represents one of the most critical areas of contemporary environmental law. Countless species already have been extinguished, with many more in imminent jeopardy. The nations where this development,

Similar problems face many public interest plaintiffs.⁴⁹

There is no constitutional obstacle to implanting, within any or all of the existing federal environmental and regulatory laws, as Congress may choose, a provision for an article I court. It could be a court specially created to hear, and conclusively determine, complaints under a given act. Alternatively, it could be a court with open-ended jurisdiction to hear and determine complaints under a range of statutes. The court could include an appellate route, again to an article I court. One uncertainty, however, is whether the Supreme Court or any other article III court could entertain an appeal from an article I court in which there were no article III case

funded by American dollars, occurs, lack meaningful environmental planning, much less control. C. CAUFIELD, *IN THE RAINFOREST* (1984) (documenting massive extinctions and other effects of rainforest development, primarily in Brazil); *Preserving Endangered Species: Why Should We Care?*, 5 PHIL. AND PUB. POL. No. 4 (1985) (noting economic and medicinal importance of endangered plant species); Rich, *The Multilateral Development Banks, Environmental Policy, and the United States*, 12 *ECOLOGY L.Q.* 681 (1985) (discussing role of United States in multilateral development, particularly development of rainforest); Holden, *World Bank Launches New Environmental Policy*, *SCIENCE*, May 15, 1987, at 769 (World Bank President Conable acknowledges environmentally destructive effects of rainforest development). Yet, because no one can meet the article III test, no plaintiffs may have standing to assert the fact that the Act prohibits the Department of the Interior from ceasing review of the impacts of federally-funded projects on overseas species.

Application of any federal environmental law to federally-funded projects in other nations, or to issuance of federal regulations affecting the extra-territorial environment, will encounter the same article III hurdle. For examples of cases that will never reach their merits because of this problem, see *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981) (challenging adequacy of environmental impact statement for export of nuclear power plant technology); *N.O.R.M.L. v. United States Dep't of State*, 508 F. Supp. 1 (D.D.C. 1979) (challenging adequacy of review of the impact of herbicide spraying in Mexico on the United States).

49. So long as an environmental hazard may be affected by variables in addition to those imposed by federal regulation, plaintiffs may be unable to prove that their injury is causally connected to the regulation—and unquestionably will be unable to prove that their injury is "likely" to be ameliorated by court relief. Therefore, plaintiffs can not meet the article III test. For example, most hazardous air or water pollutants, pesticides, and toxic waste disposal practices are subject to scientific uncertainty. Most have health effects with long latency periods, discoverable only by use of differential analysis of the effects of many variables on large populations. A pollutant or practice may be deemed unsafe or unwise by the scientific community years before a court could find that a given increase in mortality or morbidity is "likely" to occur because of the pollutant or practice. If Congress cannot modify or override *Allen v. Wright*, that decision portends the end of citizen oversight of the major environmental laws, at least in the area of hazardous or toxic pollutants.

One of the grounds upon which government agents are forced to produce environmental impact statements has been the existence of scientific uncertainty about environmental impacts. See, e.g., *State of Alaska v. Andrus*, 580 F.2d 465 (1978) *vacated in part sub nom.* *Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978). *A fortiori* under the current analysis, a plaintiff lacks standing to bring such a challenge. *Allen v. Wright*, 468 U.S. 737 (1984).

or controversy.⁵⁰

An article I court also could, under appropriate legislation, determine constitutional challenges to government action. The local courts of the District of Columbia do this on a daily basis. Were an article I tribunal legislatively empowered to hear such cases, constitutional challenges such as *Allen v. Wright* would cease to be derailed by the three-part article III test.

The authority of Congress to create a tribunal to determine such non-statutory claims is not entirely free from doubt. The Court has said that article I judges can and should decide federal constitutional claims.⁵¹ As Justice White wrote in 1982:

There is no difference between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts. Unless we want to overrule a large number of precedents upholding a variety of Art. I courts—not to speak of those Art. I courts that go by the contemporary name of “administrative agencies”—this conclusion is inevitable.⁵²

Justice White, however, wrote this in his dissent to *Northern Pipeline Co. v. Marathon Pipe Line Co.*⁵³ The four-member plurality argued that a purely state-law dispute between private parties cannot be decided by an article I bankruptcy judge.⁵⁴ The plurality also argued, in dictum, that there are but three exceptions to the general rule that article III courts must preside over federal litigation.⁵⁵ The three historically-derived exceptions are the territorial courts, such as the District of Columbia courts, the military courts, and cases involving public rights.⁵⁶ Although *Northern Pipeline* was a public rights/private rights issue, the plurality's apparent concern was a constitutional one: the need to “distinguish[] between congressionally created rights and constitutionally recognized rights.”⁵⁷ Justice White's position, the plurality feared, would allow Congress to replace entirely article III courts with arti-

50. For a summary of the Court's treatment of this question, see *Northern Pipeline*, 458 U.S. at 111 (White, J., dissenting).

51. See, e.g., *Swain v. Pressly*, 430 U.S. 372 (1977).

52. *Northern Pipeline*, 458 U.S. at 113 (White, J., dissenting).

53. *Id.*

54. *Id.* at 84-87 (plurality opinion).

55. *Id.* at 70.

56. *Id.*

57. *Id.* at 82 n.34.

cle I courts to decide constitutional claims,⁵⁸ even claims under the Bill of Rights. This would threaten the separation of powers⁵⁹ and the rights of minorities. Ironically, it is the Court's interpretation of the "case or controversy" language in article III which, according to many, has already had a similar effect, preventing the federal courts from hearing complaints of constitutional violations.⁶⁰

The two concurring justices in *Northern Pipeline* agreed only that this particular action did not fall under the "public rights" exception to article III jurisdiction.⁶¹ They were unwilling to agree with the broader discussions of the limits on article I judges found in the plurality opinion, to which they referred somewhat lightly as "a general proposition and three tidy exceptions."⁶²

A reasonably framed statute establishing a legislative court to hear claims of constitutional violation would not divest article III courts of their present authority to entertain these matters. Jurisdiction would be in the alternative, at the option of the plaintiff. This would avoid the dilution of constitutional protections feared by the *Northern Pipeline* plurality.⁶³ At the same time, it would unlock the courthouse doors to plaintiffs of the type foreclosed by *Allen v. Wright*⁶⁴ and *Warth v. Seldin*.⁶⁵ The District of Columbia Superior Courts and the District of Columbia Court of Appeals, or courts similarly constituted, could be empowered to hear these cases.⁶⁶

This could be accomplished by a relatively simple amendment to the statute currently vesting jurisdiction in the United States

58. *Id.* at 84.

59. *Id.*, at 83. The subliminal theme seems to be that of Hart's dialectic. See *supra* note 14 and accompanying text.

60. See *supra* note 7 and accompanying text.

61. *Northern Pipeline*, 458 U.S. at 89-92 (concurring opinion).

62. *Id.* at 91.

63. See *supra* notes 54-60 and accompanying text.

64. 468 U.S. 737 (1984).

65. 422 U.S. 490 (1975). See *supra* note 34.

66. Another, apparently constitutional, approach would be to invest article III judges with the jurisdiction to *also* hear article I claims. That is precisely what the judges of the Court of Customs and Patent Appeals, and the Court of Claims do, and such judges are article III judges. See *Glidden v. Zdanok*, 370 U.S. 530 (1962) which accepted as constitutional 67 Stat. 226 (1953) (codified at 28 U.S.C. § 171 (1988)). That Act overruled the Court's earlier decisions which had held that the Court of Claims and the Court of Customs and Patent Appeals were article I courts, not article III courts. The Supreme Court accepted these two courts as article III tribunals even though their work was not inherently judicial. These two courts are now known as the Court of Appeals for the Federal Circuit. 28 U.S.C. § 171 (1982).

District Courts to hear civil rights cases.⁶⁷ A new subsection (c) could be added:

(c) The Superior Court for the District of Columbia shall have jurisdiction of any civil action authorized by law or by the Constitution, to recover damages, or to prevent or redress the deprivation under color of state or federal law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. This jurisdiction shall not be exclusive, nor shall this section be interpreted as limiting jurisdiction established by any other provision of law. The court's jurisdiction shall not be invoked unless the court finds that the parties possess a sufficient stake in the outcome to fully present the facts and arguments of law, regardless of whether or not a case or controversy exists within the meaning of article III of the Constitution. Appeal shall be to the Court of Appeals for the District of Columbia. Appeal or certiorari from the Court of Appeals to the Supreme Court shall be in the manner set forth by law for appeals from a Circuit Court of Appeals.⁶⁸

CONCLUSION

Without congressional action, the role of citizens in enforcing important constitutional, environmental, and regulatory rights may dwindle to relative insignificance. This article proposes that Congress assert its authority under articles I and III of the Constitution and under the thirteenth, fourteenth, and fifteenth amendments, to provide standing to plaintiffs barred by existing decisional law.

Current statutes in this area generally attempt to assert standing to the full extent allowed by article III. However, standing to the full extent allowed by article III is not defined by these existing statutes. Nor do they attempt to extend standing beyond the narrow confines of precedent. The proposals advanced here call on

67. 28 U.S.C. § 1343 (1982).

68. This wording, like the proposal made under Congress' authority under the thirteenth, fourteenth, and fifteenth amendments, is modeled after the wording in *Flast v. Cohen* and *Baker v. Carr*. See *supra* notes 21-25 and accompanying text. This proposal for an article I court does not prejudice whether the Supreme Court could accept and decide the appeal of a non-article III case. Were the Court not able to accept such an appeal, the decision of the Court of Appeals would be final.

Congress both to interpret article III for itself, and to proceed beyond the Supreme Court's interpretation.