
ARTICLES

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Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation

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The primary purpose of this Article is to provide citizen enforcers of environmental laws with an efficient tool for establishing standing in the face of Justice Antonin Scalia’s heightened standing doctrine. This Article also significantly contributes to the literature on ultra vires statutes in corporate law by tracing their historical origins in

greater detail, clarifying terminology, and summarizing recent case law that explicitly affirms the power of ultra vires statutes.

Given the scope and severity of environmental problems¹ and the limited resources of government to enforce environmental protection laws, citizen lawsuits can play an important role in assuring that relevant statutes and regulations are obeyed. However, it has become increasingly difficult for citizens who are suing to enforce environmental legislation to establish standing. Amorphous yet sometimes harshly applied standards require that a direct injury-in-fact that is specific to the plaintiff, redressable, and within a statutorily implied zone of interest be demonstrated, which is not always easy for plaintiffs alleging environmental harms.

Ultra vires statutes in corporate law may provide a solution in some contexts. These statutes allow a shareholder of a company to sue to enjoin the company from acting in a manner outside of what is authorized by its corporate charter. Since corporations are still required to commit to only lawful activities in their charters, an individual may sue to enjoin the unlawful activities of a corporation in which the individual owns shares.

A popular misconception persists that ultra vires lawsuits are an obsolete phenomenon. On the contrary, recent court opinions explicitly state that ultra vires statutes are still a legitimate basis for pursuing injunctions.

Standing to sue corporate environmental malfeasors may therefore be established by purchasing shares in a corporation. An ultra vires lawsuit then allows plaintiffs to pursue injunctions and equitable remedies, such as court monitoring of the defendants.

While there are foreseeable objections to this theory, reference to legislative intent, the historical evolution of doctrines, respect for state statutes, precedent, public policy, concern for the protection of investors, and even constitutional law all militate in favor of a conclusion that ultra vires statutes may, and ought to, be used and recognized as a basis for establishing standing to enforce environmental statutes.

However, as explained in Part I, since the early 1990s, this major component of federal environmental protection legislation—the right

¹ While it is not a key point of this Article, footnote 192 features a brief review of respected sources asserting that there are worldwide environmental crises. *See infra* note 192.

of citizens to sue to enforce the law—has been eroded.² In his opinions on behalf of the U.S. Supreme Court, Justice Antonin Scalia narrowed the range of violations amenable to citizen enforcement by applying amorphous standing tests more stringently.³ These newly enhanced standing tests—what could be fairly characterized as the Scalia standing gauntlet—contradict the letter, spirit, and historical intentions of the relevant legislation.⁴ These additional procedural hurdles also create inefficiencies for all those involved in the litigation.⁵ The outcome is clear; it is less certain that citizens and public interest groups will succeed in enforcing environmental laws

² The trend has been the topic of extensive scholarly analysis and comment. See, e.g., Ellyn J. Bullock, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right*, 1990 U. ILL. L. REV. 605 (1990); Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383 (2001); James R. May, *Now More than Ever, Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1 (2003); Charles N. Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?*, 15 WM. MITCHELL L. REV. 327 (1989); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999); Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179 (1998); Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995–2000*, 29 COLUM. J. ENVTL. L. 359 (2004); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); John Dolgetta, Comment, *Friends of the Earth v. Crown Central Petroleum: The Surrogate Enforcer Must Be Allowed to "Stand Up" for the Clean Water Act*, 15 PACE ENVTL. L. REV. 707 (1998); Matt Handley, Comment, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 REV. LITIG. 97 (2002); Kristi G. Lewis, Case Notes, *The United States Supreme Court Creates Dangerous Precedent*, 24 S. ILL. U. L.J. 361 (2000); Elizabeth Rae Potts, Comment, *A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in Common Resources*, 36 SAN DIEGO L. REV. 547 (1999).

³ One scholar has gone so far as to state that there are "no consistently applied rules" of standing, that "[t]he Supreme Court . . . has failed to develop or to apply any lasting standards," and that they are often "'formed' on an ad hoc basis." Edward B. Sears, Note, *Lujan v. National Wildlife Federation: Environmental Plaintiffs Are Tripped Up on Standing*, 24 CONN. L. REV. 293, 294 (1991).

⁴ One contemporary variation of the definition of the word gauntlet is intended here; namely, a test or rite of passage that involves overcoming some adversity and displeasure created by other people. In the context of citizen enforcement suits of environmental laws, it is fair to identify the enhanced standing criteria with one justice, since Antonin Scalia clearly stated his plan for modifying standing criteria well ahead of being nominated to the Supreme Court. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983). As evidenced by the Supreme Court decisions described in Part I of this Article, Scalia subsequently managed to convince a majority of his colleagues to accept his vision in several landmark decisions.

⁵ See *infra* Parts I.B, I.F.

when the government is unwilling or unable to do so.⁶ Finally, because the court opinions establishing the Scalia standing gauntlet leave sufficient room for interpretation, they have resulted in unpredictable and inconsistent outcomes among federal district and appellate courts and between various decisions of the U.S. Supreme Court itself.⁷

It should be stressed at the outset that establishing standing in no way guarantees success on the merits.⁸ However, getting into court and preserving a favorable judgment on appeal necessitates solid proof of standing and therefore is a highly significant threshold to overcome.

Ultra vires statutes⁹ in corporate law may provide a means of circumventing the problem of establishing standing, as explained in Part II. Though assumed to be dead or dormant, there is actually no good reason to believe that the relevant legislation of forty-nine states

⁶ Some litigants have managed to pass these tests to the satisfaction of the Supreme Court. See *infra* Part I.E.2. However, the opinions articulating the difficult and evolving gauntlet of tests have not been overturned. These opinions provide the basis for variations among the circuit courts of appeal in terms of how high they set the hurdle for environmental litigants, depending on the sympathies of judges. The only suggested silver lining of the enhanced and inconsistently applied standing tests for environmental plaintiffs is that they may be motivated to better articulate how environmental degradation is an urgent matter for humans. Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 932 (1998).

⁷ See *infra* Part I.E.

⁸ Since the 1990s, it has become especially difficult to foresee how environmental statutes will be interpreted and applied. For example, the Ninth Circuit Court of Appeals has gone so far as to interpret “shall” to mean “may.” *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001) (holding that the Environmental Protection Agency’s failure to respond to violations of the Clean Water Act was within the zone of discretion of administrators and therefore was not subject to judicial review). For a synopsis of this decision’s logic, highlighting the need for enforcers to prioritize, see Court Reports, 5 U. DENV. WATER L. REV. 573, 588–89 (2002). Justice Scalia’s opinions, to some observers, indicate that he believes that there is “no body of environmental law, warranting the Court’s acknowledgement or respect.” Peter Manus, *Wild Bill Douglas’s Last Stand: A Retrospective on the First Supreme Court Environmentalist*, 72 TEMP. L. REV. 111, 112 (1999).

⁹ Scholars have previously used the term ultra vires doctrine. In an historical context, this is not inappropriate inasmuch as the ultra vires doctrine existed before states passed ultra vires statutes. However, such terminology is misleading in that attorneys, judges, and fellow scholars may be led to believe that contemporary ultra vires lawsuits are based solely on case law. Discussions of contemporary ultra vires lawsuits should reference the relevant statutes. Besides reducing the risk of confusion, it is appropriate to refer to ultra vires statutes—as opposed to the ultra vires doctrine—because recent cases have cited to statutes. These statutes arguably carry more weight than case law, and future litigation will likely continue to cite the relevant state statutes rather than doctrine.

has been repealed or eliminated.¹⁰ Ultra vires statutes allow for the owner of a single share in a company to sue to enjoin that company from performing any acts outside of what is authorized by its corporate charter. In their charters, corporations are required to commit to only lawful conduct and to promise to engage in only lawful activities. Therefore, an individual may sue to enjoin the unlawful activities of a corporation in which he or she owns shares.

As explained herein, plaintiffs may establish standing to sue corporate environmental malfeasors by purchasing shares in those companies. Consequently, the conventional standing hurdles are irrelevant. The court could then take action to stop the illegal activities. Precedent cases indicate that the corporation could be made to pay fines for illegalities already perpetrated and that executives and directors could be made personally liable for the company's actions.¹¹ Equitable remedies, such as court monitoring of the corporation, could also be available.¹² This Article suggests that public interest groups adopt this strategy of purchasing shares to circumvent the Scalia standing gauntlet.

Finally, in Part III, this Article counters foreseeable objections to the thesis that ultra vires statutes can and should be used as tools in contemporary environmental litigation. As mentioned, legislative intent, the historical evolution of doctrines, respect for state statutes, precedent, public policy, concern for the protection of investors, and constitutional law all militate in favor of the conclusion that ultra vires statutes can and ought to be available as a means for citizen plaintiffs to enforce environmental protection statutes.

I

STANDING IN ENVIRONMENTAL LAWSUITS

A. *The Relatively New Concept of Standing Tests*

Standing is a relatively new concept in American jurisprudence.¹³ Until the 1930s, courts simply checked to make sure there was a cognizable legal right at stake, whether based in provisions of

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.A.

¹² See *infra* Part III.A.

¹³ E.g., Alberto B. Lopez, *Laidlaw and the Clean Water Act: Standing in the Bermuda Triangle of Injury in Fact, Environmental Harm, and "Mere" Permit Exceedances*, 69 U. CIN. L. REV. 159, 162–63 (2000); Sunstein, *supra* note 2, at 170, 179.

constitutions, common law, or statutes.¹⁴ The growth in the number, size, and significance of administrative agencies in the United States led to lawsuits challenging the regulatory and enforcement decisions of these agencies.¹⁵ The conceptual origin of standing—the question of justiciability—was articulated chiefly by Justices Frankfurter and Brandeis to restrain the court system’s intrusion into the Roosevelt administration’s initiatives and the corresponding acts of Congress.¹⁶ In 1946, Congress codified judge-made law regarding citizen-initiated judicial review of agency actions with the Administrative Procedures Act (APA), explicitly acknowledging that causes of action could be created by statute and common law.¹⁷ Into the 1970s, the Supreme Court stated that “Congress may enact statutes creating legal rights, the invasion of which creates standing.”¹⁸

B. The Intent, Text, and History of Citizen Suit Provisions in Environmental Law

The origins of citizen suit provisions in environmental legislation date back to 1970 and the realization that governmental entities had been failing at the enforcement of environmental laws during the 1960s.¹⁹ Practically every major piece of environmental legislation includes a citizen suit provision, allowing lawsuits against private parties and the relevant non-enforcing agency for declaratory and injunctive relief and the payment of civil damages.²⁰ Given the

¹⁴ William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988). For an excellent summary of case law indicating that the plain meaning of statutes was applied through the early 1900s, that the direct-injury rule did not achieve widespread use until the 1950s, and that it did not decisively replace the ordinary meaning interpretation of statutes, see John F. Hart, *Standing Doctrine in Antitrust Damage Suits, 1890–1975: Statutory Exegesis, Innovation, and the Influence of Doctrinal History*, 59 TENN. L. REV. 191 (1992).

¹⁵ Sunstein, *supra* note 2, at 179–81.

¹⁶ *Id.*

¹⁷ Pub. L. No. 79-404, § 10, 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702 (2006)). Despite the recent creation of standing tests and the passage of the APA, one scholar has argued that administrative review of agency decisions should be presumptively available and is to some extent a constitutionally protected right. Louis L. Jaffe, *The Right to Judicial Review* (pt. 1), 71 HARV. L. REV. 401, 420 (1958).

¹⁸ *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

¹⁹ JEFFREY G. MILLER, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* 3 (1987) (stating that existing means of enforcement were considered burdensome and awkward).

²⁰ See, e.g., Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (2006); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270 (2006); Clean

failure on the part of the public sector to enforce environmental laws, Congress explicitly granted citizens the right to sue to enforce the law as a supplement to conventional law enforcement.²¹ Even critics of citizen suit provisions acknowledge that Congress believed citizen suits would be “an efficient policy instrument and . . . a participatory, democratic mechanism that allows ‘concerned citizens’ to redress environmental pollution.”²² The legislative intent behind the statutory provisions is unambiguous. As one of the architects of the Clean Water Act said:

[E]very citizen of the United States has a legitimate and established interest in the use and quality of the navigable waters of the United States. Thus, I would presume that a citizen of the United States, regardless of residence, would have an interest as defined in this bill regardless of the location of the waterway and regardless of the issue involved.²³

Some in Congress believed that citizen suits could spur governmental enforcement or provide an alternative method to penalize violators.²⁴ In some statutes, such as the Endangered Species Act, the statutory language does not qualify what kind of citizen may bring the enforcement suit, stating that “any person,” even without particularized injury, was intended to have the ability to function as a private attorney general.²⁵ Based on these express motivations and the text of the legislation, it is clear that Congress intended such

Water Act § 505, 33 U.S.C. § 1365 (2006); Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g) (2006); Deepwater Port Act of 1974 § 16, 33 U.S.C. § 1515 (2006); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (2006); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911 (2006); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (2006); Clean Air Act § 304, 42 U.S.C. § 7604 (2006); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 310, 42 U.S.C. § 9659 (2006); Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349(a) (2006). For example, the Clean Water Act authorizes “a person or persons having an interest which is or may be adversely affected” to compel future compliance by asking for prescriptive injunctive relief and, either in addition or alternatively, for the imposition of civil penalties payable to the United States Treasury. 33 U.S.C. § 1365(g).

²¹ Lopez, *supra* note 13, at 160; Sunstein, *supra* note 2, at 183–84.

²² Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 340 (1990).

²³ 118 CONG. REC. § 33,717 (daily ed. Oct. 4, 1972) (statement of Sen. Muskie).

²⁴ MILLER, *supra* note 19, at 4.

²⁵ 16 U.S.C. § 1540(g) (2006).

statutes to mean what they say: the violation of these laws grants standing to anyone to sue to enforce these statutes.²⁶

C. Reconciling Standing Requirements and Citizen Suit Provisions

Meanwhile, as late as the 1960s, the Supreme Court had yet to develop contemporary standing analysis.²⁷ In the case of *Flast v. Cohen*, the Court even allowed an individual to sue for judicial review of a decision regarding the use of taxes to subsidize a parochial school.²⁸ The Court developed the prudential standing test to decide whether to allow lawsuits where Congress had *not* created a cause of action but where plaintiffs claimed to be the intended beneficiaries of an agency.²⁹ The prudentiality test requires a showing that: (1) a plaintiff's injury is particularized and not shared by many, (2) the legal interests are the plaintiff's own and not someone else's, and (3) the complaint is in the zone of interests served by a relevant statute or part of the Constitution.³⁰ This new inquiry into whether there is an injury-in-fact arising from a regulatory decision was intended to expand and simplify access to the courts for plaintiffs who could not point to a clear injury-at-law.³¹ This test merged with another relatively novel standing test grounded in the Constitution.³² The constitutional test likewise emerged out of cases where Congress had *not* created a cause of action, but rather where a plaintiff sought to

²⁶ Lopez, *supra* note 13, at 160–61. Even detractors of the concept acknowledge that Congress truly intended that any citizen should be empowered to enforce environmental statutes and that the majority of scholars advocate for courts to honor this intent. Greve, *supra* note 22, at 340–41.

²⁷ Sunstein, *supra* note 2, at 180–82.

²⁸ *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

²⁹ Sunstein, *supra* note 2, at 180–81. For example, this test was used in a case where a plaintiff was denied a broadcast license from the FCC. *Office of Comm'n of the United Church of Christ v. FCC*, 359 F.2d 994, 1000–06 (D.C. Cir. 1966).

³⁰ *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153–54 (1970).

³¹ Sunstein, *supra* note 2, at 184–86. A similar characterization, but worded slightly differently, is that the Supreme Court developed the zone-of-interests test as a way to delineate the broad grant of standing under the APA. See Kimberly C. Strasser, *Environmental Law: The Scope of the Environmental Standing Act*, 52 MD. L. REV. 673 (1993).

³² The first time that Article III was brought up in the context of an opinion allowing a lawsuit was in 1944. See *Stark v. Wickard*, 321 U.S. 288 (1944); Sunstein, *supra* note 2, at 169. Though courts did previously require particularized harm in the context, for example, of an individual suing to correct a perceived injustice in a tax regime, the Court did not dwell on the concept of standing or engage in a prolonged, multi-pronged exercise in parsing. See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447, 487–88 (1923).

override an executive branch decision through a court decision.³³ Article III of the Constitution grants the judiciary the power to resolve “cases” and “controversies” on behalf of aggrieved parties.³⁴ As articulated concisely in *Allen v. Wright*, the Supreme Court therefore decided that a plaintiff has standing to challenge a decision from the executive branch if the plaintiff can allege facts to show not only (1) an injury-in-fact but (2) a causal connection between the injury and complained of conduct and (3) that the injury can be redressed by a favorable decision.³⁵

With the advent of citizen suit provisions in environmental legislation, the courts began reconciling these standing requirements—articulated in the context of lawsuits where there was *not* a statutorily created cause of action—with the statutorily created rights of citizens to sue to override agency decisions and to enforce laws.³⁶ Scholars tracing the Court’s approach to standing through the 1970s and 1980s frequently cite to the following cases as landmarks.³⁷

In the *Sierra Club v. Morton* decision, the Court held that imminent negative impacts on “[a]esthetic and environmental well-being” could constitute injury-in-fact.³⁸ The Court also allowed the Sierra Club—a third party that was not directly harmed—to sue on behalf of specific members, so long as they were identified.³⁹ The Sierra Club opinion is therefore seen as a very favorable decision to environmental plaintiffs. In *United States v. Students Challenging Regulatory Agency Procedures*, a very tenuous connection was alleged between a decision on transport tariffs for raw materials and harm to the plaintiffs as a result of reduced use of recyclable materials; yet, the Court accepted this case as satisfying all three prongs of both the Article III test and prudentiality test.⁴⁰ This case illustrates how far

³³ Sunstein, *supra* note 2, at 194–95; *see, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (involving citizens attempting to appeal decisions on taxation and spending); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (including an appeal of a decision not to prosecute someone for failure to make child support payments).

³⁴ U.S. CONST. art. III, § 2, cl. 1.

³⁵ *See Allen v. Wright*, 468 U.S. 737, 751 (1984).

³⁶ Sunstein, *supra* note 2, at 195–96.

³⁷ *See, e.g.*, Lopez, *supra* note 13, at 161; Laveta Casdorff, Comment, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY’S L.J. 471 (1999).

³⁸ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

³⁹ *Id.* at 739.

⁴⁰ *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688–90 (1973) (stating that the pleadings contained sufficient allegation to show standing).

the Court was willing to open the door for citizens to access the courts. The Court's holding in *Duke Power Co. v. Carolina Environmental Study Group, Inc.* reaffirmed that aesthetic and environmental harm can satisfy the injury-in-fact requirement and that the violation of an environmental statute is sufficient to meet the zone-of-interest requirement.⁴¹

The opinions in the cases above present a clear inclination to interpret standing requirements broadly and to favor granting citizens access to the courts when suing to enforce environmental protection statutes, insisting only that "pleadings must be something more than an ingenious academic exercise in the conceivable."⁴² The opinions appear consistent with the intent and text of legislation that created citizen rights of action. Some justices even suggested abandoning the requirement that anthropocentric harms must be shown before hearing lawsuits to enforce environmental protection legislation. Justice Douglas penned an opinion suggesting that trees, rivers, and even entire ecosystems have standing.⁴³

D. The Scalia Standing Gauntlet

1. Scalia's Approach

In 1983, then-Judge Antonin Scalia wrote a law review article arguing in favor of stricter standing tests and deriding the "judiciary's long love affair with environmental litigation."⁴⁴ This article, written while Justice Scalia was on the District of Columbia Court of Appeals, presaged what Justice Blackmun called Scalia's "slash-and-burn expedition through the law of environmental standing."⁴⁵

⁴¹ *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 73–74 (1978). The Court's holding in *Sierra Club* did not go as far as the Second Circuit Court of Appeals in 1966, which held that Article III and a citizen suit provision in the Federal Power Act allowed individuals to function as purely citizen attorneys general without any allegation of specified harm. *Scenic Hudson Pres. Conference v. Fed. Power Comm'n.*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

⁴² *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 688.

⁴³ *Sierra Club*, 405 U.S. at 742–49 (Douglas, J., dissenting) (condoning such an approach in cases where a reputable organization like the Sierra Club professed to be litigating on behalf of the environment).

⁴⁴ Scalia, *supra* note 4, at 884–85.

⁴⁵ *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 606 (1992) (Blackmun, J., dissenting).

“What’s it to you?” was the question Scalia wanted courts to ask of all plaintiffs in citizen suits to enforce environmental law.⁴⁶

2. *Lujan v. National Wildlife Federation or Lujan I*

In *Lujan I*, the plaintiffs sought review of the Department of Interior decision to grant extractive industries access to public lands.⁴⁷ Scalia’s majority found that while the plaintiff citizens may have satisfied the zone-of-interests test, they did not claim any facts that suggested an actual harm to those interests.⁴⁸ Some environmentalists apparently saw a silver lining to the decision, however, because the majority still held that aesthetic and environmental concerns are sufficient to claim an injury-in-fact and thus qualify as an aggrieved party under the APA and standing tests.⁴⁹ The inadequacy in the plaintiffs’ pleadings, in the opinion of the majority, was that their aesthetic and environmental concerns lacked an adequate connection to specific decisions on specific parcels of land.⁵⁰

3. *Lujan v. Defenders of Wildlife or Lujan II*

In *Lujan II*, the plaintiffs challenged a Reagan administration decision to reverse a Carter era regulation that required U.S. foreign aid projects to follow the Endangered Species Act’s requirement of formal interagency consultations when endangered species’ habitats are placed at risk.⁵¹ Scalia’s opinion again reiterated acceptance of aesthetic interests as valid but focused on the lack of any imminent, specific plans of the plaintiffs to travel to see the endangered species at issue.⁵² Scalia’s majority opinion in *Lujan II* refined the concept of injury-in-fact to require (1) a concrete and particularized injury that is (2) actual or imminent and (3) not hypothetical nor based on conjecture. Some authors have defended this conclusion, saying it just clarified the requirement that there be a particularized and at least

⁴⁶ Scalia, *supra* note 4, at 882.

⁴⁷ *Lujan v. Nat’l Wildlife Fed’n (Lujan I)*, 497 U.S. 871, 875–80 (1990).

⁴⁸ *Id.* at 883.

⁴⁹ Bill J. Hays, Comment, *Standing and Environmental Law: Judicial Policy and the Impact of Lujan v. National Wildlife Federation*, 39 U. KAN. L. REV. 997 (1991).

⁵⁰ *Lujan I*, 497 U.S. at 899.

⁵¹ *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 557–59 (1992).

⁵² *Id.* at 563–64.

imminent harm.⁵³ Others focused on Scalia's eagerness to limit the power of Congress to grant standing: "[m]ost significantly, . . . the Court rejected the premise that Congress could confer standing by enacting an expansive citizen suit provision which could regulate actions of the federal government overseas. For Justice Scalia, such a Congressional action violates the separation of powers doctrine."⁵⁴ While the entire majority only signed onto the section of the opinion finding a lack of particularized and imminent harm, Scalia's assertion in a separate section of his opinion of the importance of Article II, Section 3 of the Constitution—giving enforcement powers solely to the executive branch—was a signal of what was yet to come.⁵⁵

4. *Steel Co. v. Citizens for a Better Environment*

Scalia's majority opinion in *Steel Co. v. Citizens for a Better Environment* further developed the redressability criterion of the standing gauntlet.⁵⁶ In this case, the citizen plaintiffs alleged violations of the Emergency Planning and Community Right-to-Know Act of 1986.⁵⁷ Scalia's opinion again focused on the powers of the judiciary, under Article III, Section 2 of the Constitution, to decide "cases" and "controversies."⁵⁸ Standing in this case turned largely on the issue of redressability.⁵⁹ While the citizens argued that there were past and future threats to their "safety, health, recreational, economic, aesthetic, and environmental interests" created by a company failing to lawfully disclose its use of toxic chemicals, Scalia's opinion explains that none of the requested remedies would redress the alleged harms.⁶⁰ Since violations had ceased, any

⁵³ Marshall J. Breger, Comment, *Defending Defenders: Remarks on Nichol and Pierce*, 42 DUKE L.J. 1202, 1202–03 (1993).

⁵⁴ Michael J. Wray, *Still Standing? Citizen Suits, Justice Scalia's New Theory of Standing and the Decision in Steel Company v. Citizens for a Better Environment*, 8 S.C. ENVTL. L.J. 207, 216–17 (2000).

⁵⁵ *Lujan II*, 504 U.S. at 557–78; see Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 95–96 (2001) (critiquing this application of Article II of the Constitution).

⁵⁶ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105–09 (1998).

⁵⁷ *Id.* at 86.

⁵⁸ *Id.* at 102.

⁵⁹ *Id.* at 105–09.

⁶⁰ *Id.*

injunctive relief was considered useless as a means of redressing harm.⁶¹

E. Inconsistencies and Unpredictability: Plaintiffs May Sometimes Still Pass the Gauntlet.

I. Bennett v. Spear

When the plaintiffs included ranchers challenging a U.S. Fish and Wildlife Service decision on the maintenance of minimum water levels to protect an endangered species, the standing tests were applied slightly differently.⁶² The Court concluded that the Endangered Species Act eliminates the zone-of-interests test, justifying this outcome as follows:

Our readiness to take the term “any person” at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called “private attorneys general”
.....⁶³

This language would appear to starkly contradict earlier edicts that generalized harms to the environment do not grant individuals standing.⁶⁴ The majority opinion attempts to justify this approach by asserting that the zone-of-interests test is prudential rather than constitutional, and it can therefore be expanded or abrogated.⁶⁵ The logic above however and the looser application of the prudential standing test that follows are starkly different from Scalia’s earlier strict approach to standing tests and, together with the next case, hardly provide clear guidance to lower courts.

⁶¹ *Id.* Scalia did not see how forcing a government agency to collect a fine would redress any possible harm the citizens may have perceived. Not even the costs of investigation or litigation could be recovered because the relevant law only allows for recovery of litigation costs, and recovery of the costs of litigation could not logically be the basis for standing. *Id.* at 107–08.

⁶² *Bennett v. Spear*, 520 U.S. 154 (1997).

⁶³ *Id.* at 165.

⁶⁴ *See supra* Parts I.D.2–3.

⁶⁵ *Bennett*, 520 U.S. at 162.

2. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.

The *Laidlaw* decision demonstrated that plaintiffs seeking environmental protection may also sometimes still pass the standing gauntlet.⁶⁶ It is important to stress, first and foremost, that the *Laidlaw* decision did not claim to overturn the strict series of tests that Scalia articulated in the cases above in Part I.D. *Laidlaw* was a somewhat surprising landmark, however, as all the justices that had been in the majority in the cases above, with the exception of Scalia and Thomas, concluded that the plaintiffs could qualify as having standing despite a fact pattern that appeared to present similar problems to those in the *Steel Co.* decision. Ginsburg's opinion on behalf of the seven-justice majority explained their application of standing criteria.

The majority decided that subjective fear of harm that arises from an illegality and that causes a plaintiff to cease or avoid specific activities in a specific geographic location qualifies as an injury-in-fact.⁶⁷ Ginsburg's opinion clarifies that the specificity of the geographic location in *Laidlaw* is contrasted with the lack of geographic specificity in *Lujan I.*⁶⁸ Also, the actual avoidance of a recreational activity in *Laidlaw* contrasted with the "some day" loss of a recreational opportunity—the possibility of not being able to view endangered animals—that constituted the potential harm in *Lujan II.*⁶⁹ The majority opinion explicitly rebuts Scalia's assertion that actual damage to the environment stemming from illegal amounts of pollution is a sine qua non to have standing; in other words, fear of harm amounts to harm.⁷⁰

The majority also decided that the controversy was redressable, even though the company had shut down and dismantled the relevant facility and pollution had ceased during the time that the case was under appeal.⁷¹ Without explicitly overturning *Steel Co.*, the Court came to the opposite conclusion with regard to the question of whether civil damages are a form of redress in such a context and

⁶⁶ Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181–85 (2000).

⁶⁷ *Id.*

⁶⁸ *Id.* at 183–84.

⁶⁹ *Id.* at 184.

⁷⁰ *Id.* at 181.

⁷¹ *Id.* at 179.

therefore whether the plaintiffs had standing.⁷² The difference in the procedural histories amounted to this: the *Laidlaw* plaintiffs alleged harms at the time of the filing of their suit and alleged that the illegalities might begin again.⁷³ In contrast, the *Steel Co.* plaintiffs did not allege that the illegalities might resume.⁷⁴ Consistent with the tradition of anthropocentrism, the majority confirmed that the test to establish standing is whether there has been injury to human plaintiffs, which is separable and distinct from their surrounding environment.⁷⁵

Some have faulted the logic of *Laidlaw*.⁷⁶ One critique is that if subjective fear of unproven facts can qualify as a type of harm, then potentially the harm can be utterly fictional.⁷⁷ This critique prompted at least one observer to speculate that an avalanche of lawsuits will commence, with trial lawyers being the most significant beneficiaries.⁷⁸ The author making this allegation failed to provide data that would support this alarmist rhetoric.⁷⁹ Having to cover one's own costs in the event of losing such a lawsuit and the lack of damage awards deter frivolous lawsuits of this variety.⁸⁰

Though it did not eliminate the Scalia gauntlet, should the *Laidlaw* decision be seen as somehow abrogating a strict standard of standing scrutiny? Some have argued that this is the case, calling *Laidlaw* a

⁷² The nature of the pollution may have influenced the Court's standing analysis. The Court noted that it was "of particular relevance to this case [that] mercury, an extremely toxic pollutant," was repeatedly discharged along with other hazardous pollutants. *Id.* at 176. Perhaps the fact that property values may have been affected also played a role in militating in favor of the citizen plaintiffs. The opinion takes note of the belief of a landowner that the price of her lot may have been to some extent influenced by the discharges. *Id.* at 182-83.

⁷³ *Id.* at 187-88.

⁷⁴ *Id.*

⁷⁵ *Id.* at 181 (stating that having to prove an injury to the environment would be too high a hurdle).

⁷⁶ See, e.g., John D. Echeverria, *Critiquing Laidlaw: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 DUKE ENVTL. L. & POL'Y F. 287 (2001).

⁷⁷ See *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. at 198-201 (Scalia, J., dissenting).

⁷⁸ Kimberly M. Large, Comment, *The Mischaracterization of Justice Scalia as Environmental Foe: What Harm to Standing Following the Court's Stance in Laidlaw Environmental v. Friends of the Earth?* 10 WIDENER L. REV. 561, 576-77 (2004).

⁷⁹ See *id.*

⁸⁰ Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 685-86 (1983).

counterrevolution that loosened standing criteria.⁸¹ The Court appears to have thought that it was providing helpful clarifications rather than a major revision.⁸² Regardless, one of the counterproductive outcomes of this opinion and the preceding sequence of opinions involving standing is the lack of certainty that comes with novel exercises in splitting hairs.⁸³ Circuit courts are still free to interpret and apply the series of standing tests with just as much vim and vigor—or laxity—as they desire, resulting in inconsistencies and ambiguity.⁸⁴

A review of circuit court of appeals cases citing to *Laidlaw* supports the general observations averred to above and in the next section: the landmark cases defining tests to decide if environmental plaintiffs have standing do not provide clear and consistent standards, but rather have yielded an inefficient gauntlet of unpredictable severity.⁸⁵

F. Commentary on the Scalia Standing Gauntlet

An immediate problem with the ambiguous and inconsistently applied standing rules is the irregularity it has bred among federal district and appellate courts in deciding this issue.⁸⁶ It has also been noted that the uncertainty of how standing tests will be applied and quibbling over whether a plaintiff has been harmed the right way has created inefficiencies.⁸⁷ Further, the will of Congress at the time of

⁸¹ Echeverria, *supra* note 76, at 294–96.

⁸² See *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. at 186–87.

⁸³ See Echeverria, *supra* note 76, at 287.

⁸⁴ See Amanda J. Masucci, Comment, *Stand By Me: The Fourth Circuit Raises Standing Requirements in Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 12 VILL. ENVTL. L.J. 171, 171–72 (2001).

⁸⁵ Zachary D. Sakas, *Footnotes, Forests, and Fallacy: An Examination of the Circuit Split Regarding Standing in Procedural Injury-Based Programmatic Challenges*, 13 U. BALT. J. ENVTL. L. 175, 192–207 (2006). Thirty-two of thirty-seven opinions citing to *Laidlaw* as of May 7, 2009, distinguished their cases from the fact pattern in *Laidlaw*. Of the remaining cases, two recognized disagreement with its holding, one called it into question, and another two declined to extend its holding. The *Laidlaw* opinion itself acknowledged the problematic differences among circuits in their application of the Court's standing tests. See *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. at 179–80.

⁸⁶ See May, *supra* note 2, at 10–11; Sakas, *supra* note 85, at 207.

⁸⁷ Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1139–40 (1994).

the passage of environmental statutes has effectively been blocked.⁸⁸ Setting aside inconsistencies in the application of recently created standing criteria, even by their authors on the Supreme Court, Scalia's typical combative approach against law enforcement by citizens can be somewhat understood as motivated by the pursuit of limits on a perceived counter-democratic role of the judiciary.⁸⁹ This ignores the obvious fact that it requires bold acts of judicial activism to severely abrogate the citizen suit provisions of multiple pieces of major legislation passed by Congress, the most representative branch of government.⁹⁰ This is hardly a democratic approach. Scalia's opinion that the executive branch should lead a revival of constitutional separation of powers seems even more inconsistent with his professed desire to protect democracy.⁹¹

⁸⁸ One commentary has attempted to argue that Scalia is not an opponent to the cause of environmental protection. The author makes many statements that lack supporting argumentation or citations to facts or decisions, for example: "Giving citizen-suit plaintiffs unfettered access to the courts has done little to further encourage environmental progress." Large, *supra* note 78, at 583.

⁸⁹ Scalia, *supra* note 4, at 894.

⁹⁰ For a compilation of articles illustrating the shock and outrage of the environmentalist community in the wake of *Lujan II*, see Donald Strong Higley, II, *A Slash-and-Burn Expedition Through the Law of Environmental Standing—Lujan v. Defenders of Wildlife*, 15 CAMPBELL L. REV. 347, 364 n.122–23 (1993).

⁹¹ Scalia's purported motivations in protecting democracy seem all the more dubious when considered in the context of his role in granting certiorari and deciding the case of *Bush v. Gore*, 531 U.S. 98 (2000), arguably the most anti-democratic decision of the Supreme Court in U.S. history. There is no shortage of critiques of the decision in *Bush v. Gore*. E.g., Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert Bush v. Gore into a Vehicle for Reform?* 9 GEO. J. ON POVERTY L. & POL'Y 357, 364 n.47 (2002) (citing ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001) and Jonathan Schell, *Vesuvius*, NATION, Dec. 18, 2001). Even supporters of the outcome have authored critiques of the decision. See RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001). For one of the most comprehensive and excoriating denunciations, see Kim Lane Scheppelle, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001). Scheppelle begins her article with a vignette from the film *Monty Python and the Holy Grail* that she suggests is analogous to the quandary experienced by Gore in his litigation over the disputed 2000 election. *Id.* at 1361–65. The vignette parodies the classic fairytale motif of a hero having to pass a test in order to proceed with a quest; however, the administrators of the test in the parodied version (the Knights Who Say Ni) change the rules of the test (bringing a shrubbery) without advance notice to the hero (King Arthur). *Id.* The quandary in this film reference is also analogous to the situation experienced by citizen plaintiffs in environmental lawsuits inasmuch as standing rules, as described above, have been changed without advance notice during the appeals process.

Scalia's restrictive approach to standing could be somewhat comprehensible if there was a flood of frivolous citizen enforcement of environmental laws. However, pre-*Lujan* citizen enforcement actions were not frivolous in nature.⁹² Statutes such as the Clean Water Act allow violators the benefit of a sixty-day period to come into compliance with the law after the finding of a violation and therefore avoid penalties.⁹³ As mentioned above, plaintiffs having to cover their own costs in the event of losing and the lack of damage awards both serve as deterrents to frivolous lawsuits in the arena of citizen enforcement litigation. Ultimately, EPA administrators, a Senate report, and scholars have all concluded that citizen lawsuits based on environmental statutes were remarkably successful at promoting regulatory compliance.⁹⁴

Finally, these standing games in the environmental context are farcical from a global perspective. No one can separate themselves from a web of living systems that provide water, air, and food. It follows that everyone could be defined as a potential plaintiff when environmental protection standards are violated. Members of Congress expressed this perspective when passing key environmental legislation.⁹⁵ This legislative intent was initially recognized and honored by the courts.⁹⁶ While this may now seem like a radical approach, everyone—possibly even animals, trees, mountains, and the environment as a whole—should be granted standing. The only questions left, as it would have been until the 1970s, are whether an illegality has been committed and whether Congress has created a cause of action.⁹⁷ Regardless, the Scalia standing gauntlet, for better

⁹² Steven D. Shermer, *The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement*, 14 J. ENVTL. L. & LITIG. 461, 482–83 (1999); Stephen Fotis, Comment, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U. L. REV. 127, 154–55 (1985).

⁹³ Fotis, *supra* note 92, at 147–48.

⁹⁴ Steven M. Dunne, *Attorney's Fees for Citizen Enforcement of Environmental Statutes: The Obstacles for Public Interest Law Firms*, 9 STAN. ENVTL. L.J. 1, 2 n.7 (1990).

⁹⁵ 118 CONG. REC. 33,717 (daily ed. Oct. 4, 1972) (statement of Sen. Bayh).

⁹⁶ *Metro. Wash. Coal. for Clean Air v. District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981) (“The purpose of the citizen-suit provision [of the Clean Air Act] was to aid enforcement of the Act while ‘motiv[at]ing governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.’” (quoting S. Rep. No. 91-1196, at 36 (1970))).

⁹⁷ Sunstein, *supra* note 2, at 181–82. For a more current discussion of the challenges of applying present standing rules to lawsuits concerning global climate change, see Bradford

or for worse, currently exists as an unpredictable hurdle for environmental plaintiffs and defendants. The remainder of this Article will describe a more efficient means for environmental plaintiffs to establish standing.

II

ULTRA VIRES STATUTES

A. History of the Ultra Vires Cause of Action

The concept of a corporation—a group of people authorized by a sovereign to engage in a collective activity—originated in the ancient Roman Empire⁹⁸ and functioned through European history,⁹⁹ American colonial times,¹⁰⁰ and into our present era.¹⁰¹ The first corporations chartered specifically to engage in trade were formed in the 1500s in England and the Netherlands.¹⁰² Throughout most of this history, it was self evident that corporations had none of the natural rights that humans would eventually claim but that all of their abilities to act were granted and delineated by government through a charter; the document without which a corporate entity could not exist.¹⁰³

C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?* 35 ENVTL. L. 1 (2005).

⁹⁸ In Roman times, the corporate form was used for towns, guilds, and colonies. COLOSSUS 6 (Jack Beatty ed., 2001).

⁹⁹ In the Middle Ages, the corporate form was used for universities, religious orders, and other so-called benevolent organizations providing civil services. *Id.*

¹⁰⁰ Massachusetts and Virginia both began as trading corporations chartered by England. *Id.* at 18–19.

¹⁰¹ Corporations have come to be seen as the predominant institution of the present era. See JOEL BAKAN, *THE CORPORATION* (Constable 2005) (2004). Widely cited statistics indicate that out of the largest one-hundred economies on the planet, a majority were corporations as of the early 2000s rather than countries; seventy percent of the U.S. economy was run by the Fortune 1000 companies and two-hundred corporations conducted almost one-third of the planet's economic activity, yet employed less than one-quarter of one percent of the world's workforce. THOM HARTMANN, *UNEQUAL PROTECTION* 37 (2002).

¹⁰² According to one source, the first recorded business charters of incorporation were granted by Queen Elizabeth to the Muscovy Company in 1555, the Spanish Company in 1577, and the East India Company in 1601. COLOSSUS, *supra* note 98, at 6. According to another, the trading companies of the Netherlands in the 1500s were among the first business associations. HARTMANN, *supra* note 101, at 30. The East India Company founded the first colony in Jamestown by deeding property to the Virginia Company in 1606. *Id.* at 49.

¹⁰³ HARTMANN, *supra* note 101, at 30.

The ultra vires doctrine in the corporate setting originated as an English common law tradition allowing shareholders or parties dealing with corporations to sue to enjoin or invalidate corporate acts that were outside of the activities specifically authorized in a corporate charter.¹⁰⁴ The ultra vires doctrine is rooted in the more ancient doctrine of quo warranto, through which the authority of an entity or individual to act may be challenged.¹⁰⁵

The seminal ultra vires case against business corporations in England was decided by the House of Lords in 1875. In *Ashbury Railway Carriage & Iron Co. v. Riche*, the House of Lords held that a company's legal power to do business depended upon the objects clause in its memorandum of association.¹⁰⁶ The primary justification for the doctrine was the dual protection of investment interests of the

¹⁰⁴ *Colman v. E. Counties Ry. Co.*, (1846) 50 Eng. Rep. 481, 487 (M.R.) (Ch.) (ruling that the charter of a railroad company could not confer the power to directors to invest in a steam boat company, even though this would have likely benefited the railroad company).

¹⁰⁵ In response, a defendant may then produce evidence of having received authority from the sovereign; recorded inquiries into the legitimacy of someone's public office date back at least to 1274 and culminated in the Quo Warranto statute of 1290. See Helen Cam, *Quo Warranto Proceedings in the Reign of King Edward I, 1278–1294*, 77 HARV. L. REV. 985, 985–86 (1964). The quo warranto action brought in 1682 by Charles II in which he challenged the legitimacy of the corporate charter of the city of London has been called the "most important case in English history." JENNIFER LEVIN, *THE CHARTER CONTROVERSY IN THE CITY OF LONDON 1660–1688, AND ITS CONSEQUENCES* 80 (1969). Since then, quo warranto actions—literally asking "by what warrant?"—have remained, for the most part, a means of challenging an individual's claim to public office but have been at times used to revoke corporate charters. See Logan Scott Stafford, *Judicial Coup d'Etat: Mandamus, Quo Warranto and the Original Jurisdiction of the Supreme Court of Arkansas*, 20 U. ARK. LITTLE ROCK L.J. 891 (1998); Comment, *The Use of the Quo Warranto*, 18 YALE L.J. 58, 58 (1908) [hereinafter Comment, *The Use of the Quo Warranto*]; Valeria Hendricks, *Which Writ Is Which? A Trial Attorney's Guide to Florida's Extraordinary Writs*, FLA. B.J., Apr. 2007, at 46. To add to the potential confusion, some have asserted that a writ of mandamus was a proper vehicle for compelling a corporation to live up to its charter. EDWIN MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860*, at 57–61, 181–83 (1954). One authority attempted to clarify the issue by stating that a corporation's legitimacy could be challenged with a quo warranto action in the absence of statutes. Comment, *Quo Warranto and Private Corporations*, 37 YALE L.J. 237, 239–40 (1927). A writ of scire facias was used in England and during the 1800s in the United States to forfeit the franchise of a corporation for abuse, but this was rare and is deemed to have been an incorrect method. *Id.* at 239 n.17. For more on the history of quo warranto, see GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS*, 64–65, 112–15 (1960) and FORREST G. FERRIS & FORREST G. FERRIS, JR., *THE LAW OF EXTRAORDINARY LEGAL REMEDIES: HABEAS CORPUS, QUO WARRANTO, CERTIORARI, MANDAMUS, AND PROHIBITION* 160–76 (1926).

¹⁰⁶ *Ashbury Ry. Carriage & Iron Co. v. Riche* (1875) L.R. 7 H.L. 653, 693.

company's shareholders and security interests of its creditors.¹⁰⁷ Protection of the investment interests of shareholders from misappropriation was an especially important motivation in an era before mandatory disclosures; investors could evaluate the risk of a company based largely on its charter and sue to make sure their assets were used in a manner consistent with what had been promised.¹⁰⁸

A brief overview of the role of corporations in colonial America helps one to appreciate the impetus behind U.S. corporate law as conceptualized and practiced for the majority of its existence. The story of corporations in colonial America has two sides: On the one hand, Massachusetts and Virginia were born as corporations. On the other, revolutionaries came to dislike trading corporations for their exploitive nature.¹⁰⁹ In the embryonic colonies of Massachusetts and Virginia, shareholder meetings were arguably incubators for representative government,¹¹⁰ with members voting their shares, choosing officers, and deciding policy.¹¹¹ However, in subsequent years, the colonialists' experience with corporations, such as the East India Company, schooled subsequent generations of political leaders in the new republic to be suspicious of concentrated economic

¹⁰⁷ Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in the United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law*, 5 DEPAUL BUS. & COM. L.J. 67, 77 (2006).

¹⁰⁸ Jonathan Fielding, *Enforcing International Labor Standards Through the Use of the Alien Tort Claims Act and Traditional Corporate Law*, 17 N.Y. INT'L L. REV. 77, 92–93 (2004).

¹⁰⁹ The charters creating the East India Company, the Hudson Bay Company, and some of the American colonies were based on the model of the English kings' grants of authority to municipalities. 8 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 192–222 (1925).

¹¹⁰ King James complained that “the Virginia Company was a seminary for a seditious Parliament.” EDWARD D. NEILL, *HISTORY OF THE VIRGINIA COMPANY OF LONDON WITH LETTERS TO AND FROM THE FIRST COLONY NEVER BEFORE PRINTED* 185 n.1 (1869).

¹¹¹ COLOSSUS, *supra* note 98, at 18–19. In the context of this Article, it is ironic to note that the transformation of Massachusetts from trading company into commonwealth on October 19, 1630, was arguably the first ultra vires act by a corporation in the English colonies of the Americas—it was not authorized by the grant of authority from the sovereign to the trading company. *Id.* at 19. The two earliest English colonies were also witness to other firsts in the history of the legal framework of business in America; Jamestown colony allowed the formation of what was arguably the first trade union in the Americas, the first strike, and the first access to voting privileges as a result of that work stoppage by a group of Polish glassmakers. J.C. HARRINGTON, *GLASSMAKING AT JAMESTOWN: AMERICA'S FIRST INDUSTRY* 3 (1952); *THE POLES IN AMERICA 1608–1972*, at 41–42 (Frank Renkiewicz ed., 1973).

power.¹¹² The first battles of the American Revolution stemmed from colonists' refusal to obey laws for which the East India Company had lobbied in its zeal to eliminate competition.¹¹³ The Tea Act, exempting the East India Company from having to pay taxes to Britain and providing a tax refund to the company to compensate for losses due to unsold inventory, was detrimental to small colonial merchants.¹¹⁴ It was seen as an abuse of corporate lobbying power that enriched shareholders at the expense of colonialists.¹¹⁵ Thus, the corporate form arguably played a role in shaping the form of the nascent governments of the United States, providing the cause for rebellion, and breeding mistrust of concentrated economic power.

It is therefore not surprising that state laws of incorporation through the 1800s required corporations to apply for charters from state legislatures, to renew these charters periodically, and to specify in these charters the corporation's authorized range of activities and the length of its legal existence.¹¹⁶ Specific language was included to allow state attorneys general and shareholders to sue either to dissolve the corporation for violating these terms or to enjoin the corporation from engaging in activities outside of those specifically authorized by its charter.¹¹⁷

During the 1800s, it was uncontroversial that a shareholder could sue to have an activity of a corporation enjoined if it was not explicitly authorized in the corporation's charter; for the same reason,

¹¹² Thomas Jefferson was famously suspicious of the corporate form, fretting about the rise of "moneyed corporations" as a threat to American democracy after leaving the presidency in 1816. HARTMANN, *supra* note 101, at 30. Suspicions that concentrated economic power in the corporate form ruins the functioning of markets and leads to corruption were shared by none other than Adam Smith and David Hume. COLOSSUS, *supra* note 98, at 54. Edmund Burke exposed corruption leading to the trial of Warren Hastings of the East India Company. *Id.* In short, Elizabethan trading companies illustrated not only the economic but the moral evils of monopoly. Corporations came to be seen by these leading British thinkers as medieval holdovers—antique, inefficient, and corrupt. *Id.* Thomas Hobbes vividly analogized corporations to "wormes in the entrayles of a naturall man." THOMAS HOBBS, *LEVIATHAN* 256–57 (Oxford ed. 1909) (1651).

¹¹³ HARTMANN, *supra* note 101, 51–63.

¹¹⁴ *Id.* at 51–52.

¹¹⁵ *Id.* at 52.

¹¹⁶ See Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1686 (1988).

¹¹⁷ Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality*, 87 VA. L. REV. 1279, 1319 (2001).

an act of a corporation could be declared void.¹¹⁸ A milestone Supreme Court opinion captures the zeitgeist of the era with regard to this issue.

A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.¹¹⁹

Lawsuits based on *ultra vires* statutes continued to be used into the 1900s to restrain corporate activities.¹²⁰ Beyond just granting injunctions, courts agreed to dissolve corporations for illegalities into the 1890s.¹²¹ From the late 1800s and early 1900s, restrictions on corporations were gradually loosened by judicial decisions and changes to incorporation statutes.¹²²

¹¹⁸ The U.S. Supreme Court recognized the doctrine of *ultra vires* by stating that “the powers of corporations organized under legislative statutes are such and such only as those statutes confer.” *Thomas v. R.R. Co.*, 101 U.S. 71, 82 (1879). The Court held that a lease agreement was *ultra vires* because it was “not within the scope of the powers conferred on the corporation.” *Id.* at 83. Another court stated simply: “As artificial creations they have no powers or faculties, except those with which they were endowed when created.” *Leslie v. Lorillard*, 18 N.E. 363, 365–67 (N.Y. 1888).

¹¹⁹ *Cent. Transp. Co. v. Pullman’s Palace Car Co.*, 139 U.S. 24, 59 (1891).

¹²⁰ A comment in the *Yale Law Journal* from 1908 illustrates how widely and staunchly held was the belief that corporations and their agents continued to be constrained by their corporate charters: “In *T. & T. Road Co. v. Campbell*, the court said: ‘It is a sovereign prerogative, and vests in an individual only by virtue of a legislative grant!’ So general is this conception of a franchise that it is needless to multiply citations.” Comment, *The Use of the Quo Warranto*, *supra* note 105, at 59 (citation omitted).

¹²¹ New York’s highest court revoked the charter of a company for allowing management to enter under the control of the competition-stifling Sugar Trust. *People v. N. River Sugar Refining Co.*, 24 N.E. 834, 841 (Ct. App. N.Y. 1890). The court referred to this action as “corporate death.” *Id.* at 834. New York, Ohio, Michigan, and Nebraska revoked the charters of oil, match, sugar, and whiskey trusts in the 1800s. Russell Mokhiber, *The Death Penalty for Corporations Comes of Age*, *BUS. ETHICS*, Nov. 1, 1998, available at <http://www.corpwatch.org/article.php?id=1810>.

¹²² The most famous single judicial decision of this era expanding the rights of corporations was *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886), which includes a headnote suggesting that the Court accepted that corporations are persons for the purpose of the 14th Amendment during oral arguments. Thom Hartmann presents evidence that the choice of the word “person” in the 14th Amendment and the wording of the comment in the headnote applying the 14th Amendment to corporations

The most important explanation why ultra vires lawsuits fell out of favor was their abuse by corporations seeking to avoid contractual obligations.¹²³ Through the 1800s and into the beginning of the 1900s, courts had accepted that if a corporation was not authorized to engage in an activity by its charter, then any contract related to that activity must be void or voidable.¹²⁴ The ultra vires doctrine was at one point so sacrosanct that contractual obligations could be escaped even when contracts had been partially performed to the disadvantage of a creditor or supplier and the enrichment of the company.¹²⁵ As a result, state incorporation laws were specifically altered to eliminate the ability of third parties to bring ultra vires lawsuits to invalidate contracts and hence avoid obligations.¹²⁶ Criticisms of the ultra vires

was part of a larger—and somewhat plainly visible—plan by corporate lawyers and lobbyists to assume greater power and privileges for their clients. HARTMANN, *supra* note 101, at 95–119. Douglas Litowitz builds upon this discussion in his article *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 822 (2004). The court reporter who wrote the headnote into the official record of the *Santa Clara* decision was an adept lawyer who had ties to the railroad industry. *Id.* at 823. Since only the text of judicial opinions is binding precedent, this case should not have been cited since then as the bedrock case supporting corporate personhood. Nonetheless, as Litowitz points out, the Supreme Court and lower courts have since recognized corporate personhood, so independent of the *Santa Clara* decision, corporate personhood has a foundation in precedent. *Id.* at 823. The status of corporations as persons under the law allowed them to challenge state laws and fees as unconstitutional denials of property and freedom. For a brief cataloging of freedoms in the Bill of Rights that were applied to corporations, see Katie J. Thoennes, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 203, 210–11 (2005).

¹²³ Greenfield, *supra* note 117, at 1310.

¹²⁴ Charles E. Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?* 33 YALE L.J. 49, 50–52 (1923). By the early 1900s, a scholarly debate and disagreement between courts emerged over the question of whether unauthorized contracts were void or voidable; the answer to that question does not effect the viability of using the ultra vires doctrine to enjoin a company from ongoing illegalities. *Id.*

¹²⁵ See, e.g., *Middlesex Turnpike Corp. v. Locke*, 8 Mass. 268, 271–72 (1811). In *Middlesex Turnpike Corp.*, the defendant subscriber to stock avoided paying money that he owed for shares because the legislature only subsequently permitted a rerouting of the turnpike by charter amendment. *Id.* The court ruled that the rerouting was ultra vires at the time and hence the obligation to pay money was void. *Id.*

¹²⁶ For example, the change to Vermont's relevant statute in 1915 contains language to assure that it can only be read as a broad grant of authority to engage in any act—so long as the act is legal. “A corporation shall have authority to do any act which is necessary or proper to accomplish its purposes, and which is not repugnant to the law. Without limiting or enlarging the effect of this general grant of authority, it is hereby specifically provided that it may have a corporate seal.” Vt. Laws 1915, No. 141, § 15.

doctrine have focused on this historical abuse of the doctrine as a defense in the context of contractual enforcement.¹²⁷

At the same time that statutes were reformed to eliminate abuse, ultra vires lawsuits became less important as a means to protect shareholder interests because of the concept of shareholder primacy and the business judgment rule.¹²⁸ During the 1800s and early 1900s, judicial opinions reflected a shift from regarding a corporation primarily as an artificial public creation of the government to the notion that a corporation exists as a naturally arising nexus of contracts to serve private shareholders' financial interest as their primary, some would say sole, purpose of existence.¹²⁹

Once the concept of shareholder primacy became part of the enforceable duties of managers, the function of ultra vires suits to restrain management discretion and protect shareholders' financial interests became significantly less important.¹³⁰ Managers now had a clear fiduciary duty to shareholders, with their discretion, choices, and behavior guided by the business judgment rule.¹³¹

Finally, shareholder derivative suits became a substitute to ultra vires suits as a means for shareholders to enforce the obligations of managers.¹³² With all of these changes in place, corporations had vastly expanded their freedoms, allowing them to exploit opportunities to serve their shareholders.¹³³ At the same time, as a result of the foregoing factors, ultra vires lawsuits became increasingly rare.

¹²⁷ See, e.g., Carpenter, *supra* note 124, at 49; Michael Schaeftler, *Ultra Vires—Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP. L. 81 (1983).

¹²⁸ Greenfield, *supra* note 117, at 1313.

¹²⁹ David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 212 (1990). Since corporations came to be imagined as natural entities owing their existence to private acts of individuals, the shareholders could now ratify acts, which weakened the ultra vires concept. *Id.* The change in conceptualization of the corporation from an artificial and public creation of the state to that of an essentially natural nexus of contracts among private individuals dates back to the 1820s. COLOSSUS, *supra* note 98, at 45. The reconceptualization of the corporate form from public entity to natural nexus of contracts did not, however, erode the corporation's claim to personhood under the law. *Id.* at 157–58.

¹³⁰ Greenfield, *supra* note 117, at 1313.

¹³¹ *Id.*

¹³² Leacock, *supra* note 107, at 56–59.

¹³³ *Id.*

From another perspective, not inconsistent with the others, the decline of the ultra vires doctrine was symptomatic of a race to the bottom, in terms of restrictions on corporate freedom, as states sought to create the friendliest and most inviting climates for corporations.¹³⁴

B. Ultra Vires Statutes and Corporate Charters

The only promise that all large publicly traded corporations must, and do, make in their articles of incorporation and charters is to not break laws.¹³⁵ The laws of forty-seven states and the District of Columbia require corporations to limit themselves to lawful activities.¹³⁶ Delaware is among these forty-seven states; the first

¹³⁴ COLOSSUS, *supra* note 98, at 134–35. The fear that “millions in capital were fleeing the state” precipitated the elimination of restraints in Massachusetts corporate charters. *Id.* at 46. Delaware only became the incorporation state of choice after Woodrow Wilson, then governor of New Jersey, grew so alarmed at the conduct of corporations that he slowed the further erosion of controls on corporations. *Id.* at 134.

¹³⁵ This requirement remains, even as all other restrictions to corporate longevity or activities have been removed from the incorporation laws of every state. JAMES D. COX ET AL., CORPORATIONS § 3.6, at 50–51 (1997).

¹³⁶ See ALA. CODE § 10-2B-3.01 (1999); ALASKA STAT. § 10.06.005 (2008); ARIZ. REV. STAT. ANN. § 10-301 (2004); ARK. CODE ANN. § 4-26-103(a) (West 2004); CAL. CORP. CODE § 206 (West 1990); COLO. REV. STAT. § 7-103-101 (2006); CONN. GEN. STAT. ANN. § 33-645 (West 2005); DEL. CODE ANN. tit. 8, § 101(b) (2001); D.C. CODE § 29-301.04 (2001); FLA. STAT. ANN. § 607.0301 (West 2007); GA. CODE ANN. § 14-2-301 (2003); HAW. REV. STAT. § 414-41(a) (2004); IDAHO CODE ANN. § 30-1-301(1) (2005); 805 ILL. COMP. STAT. ANN. 5/3.05 (West 2004); IND. CODE ANN. § 23-1-22-1(a) (West 2005); IOWA CODE ANN. § 491.1 (West 1999); KAN. STAT. ANN. § 17-6001(b) (2007); KY. REV. STAT. ANN. § 271B.3-010 (West 2006); LA. REV. STAT. ANN. § 12:22 (1994); ME. REV. STAT. ANN. tit. 13-B, § 201(1) (2005 & Supp. 2007); MD. CODE ANN., CORPS. & ASS'NS § 2-101 (West 2002); MASS. ANN. LAWS ch. 156, § 6 (LexisNexis 2005); MICH. COMP. LAWS ANN. § 450.1251 (West 2002); MISS. CODE ANN. § 79-4-3.01 (West 1999); MO. ANN. STAT. § 351.386(1) (West 2001); MONT. CODE ANN. § 35-1-114(1) (2007); NEB. REV. STAT. ANN. § 21-2024 (LexisNexis 1999); NEV. REV. STAT. ANN. § 78.030 (LexisNexis 2004); N.H. REV. STAT. ANN. § 293-A:3.01 (1999); N.J. STAT. ANN. § 14A:2-1 (West 2000); N.M. STAT. ANN. § 53-11-3 (West 2003); N.Y. BUS. CORP. LAW § 201 (McKinney 2003 & Supp. 2009); N.C. GEN. STAT. ANN. § 55-3-01 (West 2003); N.D. CENT. CODE § 10-19.1-08 (2005); OHIO REV. CODE ANN. § 1701.03 (West 1994); OKLA. STAT. ANN. tit. 18, § 1005 (West 1999); OR. REV. STAT. § 60.074 (2008); 15 PA. CONS. STAT. ANN. § 1301 (West 1995); R.I. GEN. LAWS § 7-1.1-3 (1999); S.C. CODE ANN. § 33-3-101 (2006); S.D. CODIFIED LAWS § 47-2-3 (2007); TENN. CODE ANN. § 48-13-101 (West 2002); TEX. BUS. ORGS. CODE ANN. § 2.001 (2008); UTAH CODE ANN. § 16-10a-301 (2005); VA. CODE ANN. § 13.1-626 (West 2007); WASH. REV. CODE ANN. § 23B.03.010 (West 1994); WIS. STAT. ANN. § 180.0301 (West 2002); WYO. STAT. ANN. § 17-16-301 (2007). The only two states that do not have such language are Minnesota and Vermont. See MINN. STAT. ANN. § 302A.101 (West 2004) (“A corporation may be incorporated under this chapter for any business purpose or purposes”). Vermont

section of the Delaware statute establishes that “[a] corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes.”¹³⁷ The laws of forty-nine states allow shareholders and state attorneys general to sue to enjoin illegal activities or to dissolve corporations in these instances.¹³⁸ Interestingly, while most state laws provide that state attorneys general *may* revoke corporate charters, Delaware law states that the Delaware Attorney General *shall* revoke a corporate charter for illegal acts.¹³⁹ The Model Business Corporation Act retains language allowing for an ultra vires cause of action.¹⁴⁰ While corporations may have been set free of narrow constraints on their power, the language that allows for ultra vires lawsuits has not been scrubbed from state statutes.¹⁴¹

The other text plainly committing corporations to only lawful activities can be found in the corporate articles of incorporation and charters themselves. Unocal’s articles of incorporation state that the “purpose of the Corporation is to engage in any lawful act or activity

does not have such statutory language. It has specific purposes listed, but the general purposes section was repealed in 1971. VT. STAT. ANN. tit. 11, § 41 (repealed 1971).

¹³⁷ DEL. CODE ANN. tit. 8, § 101(b).

¹³⁸ Only North Dakota does not provide its attorney general with the power to revoke charters. See N.D. CENT. CODE § 10-19.1-08; Schaeftler, *supra* note 127, at 85 n.9.

¹³⁹ DEL. CODE ANN. tit. 8, § 284.

¹⁴⁰ MODEL BUS. CORP. ACT § 3.04 (1969).

(a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation’s power to act may be challenged:

- (1) in a proceeding by a shareholder against the corporation to enjoin the act;
- (2) in a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or
- (3) in a proceeding by the attorney general under section 14.30.

(c) In a shareholder’s proceeding under subsection (b)(1) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act.

Id.

¹⁴¹ See MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 129 (8th ed. 2001) (stating that § 3.04 “almost (but not quite) abolish[es] the doctrine”).

for which a corporation may be organized” under California law.¹⁴² Nike, Inc. states in its charter that its purpose is “to engage in any lawful activity for which corporations may be organized” under Oregon law.¹⁴³ General Electric’s charter states that the corporation’s purposes include “any activity which may promote the interests of the corporation, or enhance the value of its property, to the fullest extent permitted by law, and in furtherance of the foregoing purposes to exercise all powers now or hereafter granted or permitted by law.”¹⁴⁴ The foregoing examples of the promise to engage only in lawful behavior in statutes and charters do not have teeth if courts do not enforce them. Part II.C of this Article turns to court opinions to demonstrate that these requirements of statutes and promises in charters are enforced.

C. Recent Precedent: The Ultra Vires Cause of Action Is Not Just Alive but Kicking

Since the heyday of the ultra vires doctrine, as exemplified in *Bank of Augusta v. Earle*,¹⁴⁵ there have been no cases holding that ultra vires provisions in state incorporation laws are somehow invalid or unenforceable. On the contrary, a key contribution of this Article to the existing literature is to point out that court opinions across the United States continue to consistently affirm the existence and vitality of the ultra vires statutes.

Shareholders used an ultra vires cause of action in the 1986 case of *Amalgamated Sugar Co. v. NL Industries, Inc.* to prevent a company from adopting a poison pill provision.¹⁴⁶ The poison pill provision resulted in some shareholders being treated differently than other holders of the same class of shares.¹⁴⁷ New Jersey law prohibited discriminatory treatment of individuals within the same class of

¹⁴² Union Oil Co. of California, Restated Articles of Incorporation, art. II (Mar. 31, 1998), available at <http://sec.edgar-online.com/unocal-corp/10-ky05-annual-report-regulation-s-k-item-405/1998/03/31/Section60.aspx>.

¹⁴³ Nike, Inc., Restated Articles of Incorporation, art. III (Aug. 31, 1995), available at <http://www.secinfo.com/d9xWk.au.d.htm#1stPage>.

¹⁴⁴ General Electric Co., Certificate of Incorporation, § 2D (Apr. 27, 2007), available at <http://sec.edgar-online.com/general-electric-co/8-k-current-report-filing/2007/04/27/Section7.aspx>.

¹⁴⁵ *Bank of Augusta v. Earle*, 38 U.S. 519, 587 (1839).

¹⁴⁶ *Amalgamated Sugar Co. v. NL Indus., Inc.*, 644 F. Supp. 1229, 1229–30 (S.D.N.Y. 1986).

¹⁴⁷ *Id.* at 1233.

shareholders.¹⁴⁸ Shareholders therefore argued that the adoption of the poison pill provision was ultra vires.¹⁴⁹ The U.S. District Court for the Southern District of New York accepted this logic and granted the requested injunction.¹⁵⁰ This case indicates that the ultra vires doctrine is alive and functioning.¹⁵¹

In similar cases, courts in other jurisdictions have decided that, as a matter of their state law, poison pill provisions are not illegal.¹⁵² However, the opinions in these cases do not deny the existence of the ultra vires doctrine, they do not extensively question the standing of shareholders to bring such actions, nor do the courts state that it is outside of their ability to restrain corporations from engaging in activities that are illegal.¹⁵³ Popular belief notwithstanding, courts continued to acknowledge the limits of corporate powers through the 1900s.¹⁵⁴

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1230.

¹⁵⁰ *Id.* at 1234.

¹⁵¹ David A. Kulwicki, *Amalgamated Sugar: The Auspicious Return of the Ultra Vires Doctrine*, 49 OHIO ST. L.J. 841 (1988). Subsequently, after the Second Circuit Court of Appeals denied a stay of the injunction, the federal district court made the injunction permanent, characterizing its original opinion to have been a final disposition on the issue of whether the poison pill provision was ultra vires. *Amalgamated Sugar Co. v. NL Indus., Inc.*, 667 F. Supp. 87, 94 (S.D.N.Y. 1987). Judge Vincent Broderick added that "I have rarely, in 10 years on the bench, seen a matter as vigorously and effectively contested as that of the validity of the preferred share purchase rights plan." *Id.* at 92. Judge Broderick reiterated that the holding in his original decision was that the poison pill provision in question was: "'[a]n unlawful device,' and was 'Ultra vires as a matter of New Jersey business corporation law.'" *Id.* at 89 (quoting *Amalgamated Sugar Co.*, 644 F. Supp. at 1240).

¹⁵² *See, e.g., Ga.-Pac. Corp. v. Great N. Nekoosa Corp.*, 728 F. Supp. 807 (D. Me. 1990).

¹⁵³ *Id.* at 808-09.

¹⁵⁴ *See, e.g., Trico Elec. Coop., Inc. v. Corp. Comm'n*, 339 P.2d 1046 (Ariz. 1959). The Arizona Supreme Court decided that the inclusion of the word "primarily" into the clause empowering the defendant corporation's charter did nothing to expand its range of legitimate activities, holding that "[a]ny attempt to go beyond the service of electric energy to [the defendant corporation's] members would be ultra vires and void." *Id.* at 1053. A year earlier, the Arizona Supreme Court similarly held that a corporation could not lawfully contract outside the object of its creation as defined in the law of its organization.

A corporation has only such powers as are expressly or impliedly conferred by its charter. Unlike a natural person, if [sic] may not do all things not expressly or impliedly prohibited, but must draw from its charter the power to act in any given respect, and can do only that which is expressly or impliedly authorized therein.

Trico Elec. Coop., Inc. v. Ralston, 196 P.2d 470, 475 (Ariz. 1958).

A review of case law from 1997 to 2008 yields more specific examples of courts recognizing the standing of a shareholder to sue to enjoin an illegal act of a company by means of ultra vires statutes. In 2000, the Supreme Judicial Court of Maine expressly stated that the Maine ultra vires statute allows the injunction of ongoing illegalities and the dissolution of corporations.¹⁵⁵ Also in 2000, the Court of Civil Appeals of Oklahoma affirmed that

the lack of capacity or power of a corporation to act may be asserted (1) by a shareholder in an action to enjoin the corporation from performing acts or transferring property, (2) by the corporation in an action against an officer or director for loss or damage due to unauthorized acts, and (3) by the Attorney General in an action to dissolve the corporation or enjoin it from transacting unauthorized business.¹⁵⁶

In 2006, the Supreme Court of Nevada reviewed Delaware law, Delaware Chancery Court decisions, and secondary sources, concluding that it had the power to enjoin ultra vires acts.¹⁵⁷ Another affirmation that some acts—including illegal acts—are ultra vires and may be subject to an injunction is found in *Multimedia Patent Trust v. Microsoft Corp.*, decided by the U.S. District Court for the Southern District of California using Delaware law in 2007.¹⁵⁸ In 2008, the U.S. District Court for the Northern District of California similarly affirmed that it had the power, based on well-settled precedent, to declare a decision of the board of directors of Hewlett Packard to be ultra vires, or outside of the board's power to have authorized.¹⁵⁹ While the court did not have to act upon that power, the court did go out of its way to assert that it could enjoin ultra vires acts and

¹⁵⁵ *Tomhegan Camp Owners Ass'n v. Murphy*, 754 A.2d 334, 335–36 (Me. 2000) (citing ME. REV. STAT. ANN. tit. 13-B, § 203 (2005 & Supp. 2007)). The court rejected the argument that a nonprofit corporation lacked standing to sue where the dispute concerned unauthorized transactions.

¹⁵⁶ *Total Access, Inc. v. Caddo Elec. Coop.*, 9 P.3d 95, 96–97 (Okla. Civ. App. 2000) (finding that a third party Internet service provider could not sue a cooperative for acting outside of its corporate charter and providing competing services).

¹⁵⁷ *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1186 n.70 (Nev. 2006).

¹⁵⁸ *Multimedia Patent Trust v. Microsoft Corp.*, 525 F. Supp. 2d 1200, 1216 (S.D. Cal. 2007) (citing *Solomon v. Armstrong*, 747 A.2d 1098, 1114 n.45 (Del. Ch. 1999)).

¹⁵⁹ *Ind. Elec. Workers Pension Trust Fund v. Dunn*, No. C-06-01711, 2008 WL 878424, at *11 (N.D. Cal. Mar. 28, 2008).

provided support for this conclusion with a review of Delaware law, to which this Article now turns.¹⁶⁰

The Delaware Chancery Court's 1999 opinion in *Harbor Finance Partners v. Huizenga* is particularly important because of the number of major corporations incorporated under Delaware law,¹⁶¹ and the fact that the court clarified the business judgment rule vis-à-vis Delaware's ultra vires statute. The chancery court plainly stated that the business judgment rule does not protect board actions deemed ultra vires and that ultra vires acts cannot lawfully be accomplished in any case.¹⁶² Also in 1999, the Delaware Chancery Court observed that "[i]n the context of defining void acts, *ultra vires* acts . . . include[] acts specifically prohibited by the corporation's charter, for which no implicit authority may be rationally surmised, or those acts contrary to basic principles of fiduciary law."¹⁶³

In a 2002 decision, the Delaware Chancery Court concluded that a board's repricing of options without shareholder approval was ultra vires because the stock option plan provided that any change in exercise price of options required shareholder approval.¹⁶⁴ In a 2005 decision, the Delaware Chancery Court held that ultra vires acts are "illegal acts or acts beyond the authority of the corporation."¹⁶⁵

Related events outside the context of litigation also substantiate the notion that corporations have not acquired the freedom to violate laws. In 1999, public interest groups and individuals petitioned the California Attorney General to revoke the charter of Unocal for a long history and continued pattern of illegal conduct, including violations

¹⁶⁰ The court found that the compensation received by Hewlett Packard CEO Carleton Fiorina was not ultra vires in that it was not outside the authority of the board to exercise discretion in deciding upon it. *Id.*

¹⁶¹ Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003). Delaware earns more corporate tax revenue than any other state and most large U.S. companies are incorporated in Delaware. *Id.* In part, Delaware's dominance in corporate law stems from its small size, which gives corporate interest groups greater influence, as well as its specialized judiciary. *Id.* at 594.

¹⁶² *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 896 (Del. Ch. 1999). This opinion also clarified a minor point of ambiguity in the law derived from the Delaware Supreme Court's earlier opinion in *Michelson v. Duncan*, 407 A.2d 211, 218-19 (Del. 1979), which could be interpreted as distinguishing between voidable acts—acts that could be ratified by subsequent shareholder approval—and ultra vires acts.

¹⁶³ *Solomon*, 747 A.2d at 1114 n.45.

¹⁶⁴ *Cal. Pub. Employees' Ret. Sys. v. Coulter*, No. 19191, 2002 WL 31888343, at *11 (Del. Ch. 2002).

¹⁶⁵ *Nevins v. Bryan*, 885 A.2d 233, 245 (Del. Ch. 2005) (quoting *Harbor Fin. Partners*, 751 A.2d at 896).

of international legal norms in its involvement with oil extraction in Burma and the attendant use of forced labor.¹⁶⁶ While Attorney General Bill Lockyer declined the request, he did affirm the power of the attorney general to revoke corporate charters.¹⁶⁷ This is obviously not precisely the same variety of action as a shareholder attempting to enjoin a corporation from an act. However, it is persuasive evidence that state governments and courts retain the power to restrain corporations from engaging in unlawful activities.¹⁶⁸

III

THE ULTRA VIRES DOCTRINE AS AN END-RUN AROUND THE SCALIA STANDING GAUNTLET

A. How the Ultra Vires Doctrine Would Function and Its Benefits

Purchasing a share of a corporation is essentially purchasing a ticket to have standing in cases where the potential plaintiff might otherwise have problems proving standing against a corporation violating an environmental law. An ultra vires suit would allege a violation of an environmental law as the illegality that the plaintiffs would be asking the court to enjoin. This end-run around the Scalia standing gauntlet has not been previously discussed in scholarly literature.¹⁶⁹ This cause of action would be a sufficient basis to request an injunction to cease ongoing illegalities, to ask that an appropriate fine be paid, and to ask for the equitable relief of court monitoring to assure that the defendant company complies with the court's rulings.¹⁷⁰

¹⁶⁶ Press Release, Nat'l Lawyers Guild, Coalition Petitions the New California Governor and Attorney General to Revoke Unocal's Corporate Charter (Apr. 15, 1999), available at <http://www.ibiblio.org/obl/reg.burma/archives/199904/msg00212.html>.

¹⁶⁷ *Id.*

¹⁶⁸ For a discussion of charter revocation as a tool for encouraging compliance with environmental laws, see Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations?*, 63 LA. L. REV. 175 (2003) and Thomas Linzey, *Killing Goliath: Defending Our Sovereignty and Environmental Sustainability Through Corporate Charter Revocation in Pennsylvania and Delaware*, 6 DICK. J. ENVTL. L. & POL'Y 31 (1997).

¹⁶⁹ One author came close to making this connection when considering the question of whether corporations guilty of breaking environmental laws should be dissolved. The author, however, did not consider using an ultra vires lawsuit to enjoin the corporation. See Crusto, *supra* note 168.

¹⁷⁰ See Greenfield, *supra* note 117, at 1351–60.

In precedent cases, where a shareholder has sued to enjoin an illegality of a corporation, courts have also agreed to make officers and directors personally liable. In *Roth v. Robertson*, the New York Supreme Court held corporate directors of an amusement park personally liable for bribing public officials to not enforce laws prohibiting the operation of their business on Sundays.¹⁷¹ The court stated that corporate directors would be required to refund the damages to the corporation—the amount of fines that were levied—arising from the illegality, even if the shareholder plaintiff had acquiesced in the act, and even if the act could be shown to be in the shareholders' interest.¹⁷² Moreover, the damages were not adjusted to take into account that the violation of law had been a profitable decision.¹⁷³ Courts in other jurisdictions have similarly found that executives can be held personally liable for ultra vires acts.¹⁷⁴ Therefore, there is precedent to suggest that a shareholder could ask that the appropriate fines be assessed and that the executives or directors who authorized the illegal acts pay them.

Even staunch critics of ultra vires statutes admit that officers and directors can be made to pay fines for ultra vires acts. First, the attorney general may seek judicial dissolution of a corporation that engages in ultra vires acts. Secondly, shareholders may seek an injunction to restrain the corporation in which they own shares from engaging in an ultra vires act or acts. In addition, quite sensibly, liability of a corporation's directors, officers, or other agents responsible for an ultra vires act or acts is statutorily retained. The corporation is statutorily empowered to seek recovery from them by suing them for involving it in the ultra vires business activity in the first place. The American solution therefore empowers those whose financial motivation would tend to promote vigilance. They are motivated to act as guardians of the corporation and its assets. These

¹⁷¹ *Roth v. Robertson*, 118 N.Y.S. 351 (Sup. Ct. 1909).

¹⁷² *Id.* at 353.

¹⁷³ *Id.*

¹⁷⁴ *See, e.g.,* *Lurie v. Ariz. Fertilizer & Chem. Co.*, 421 P.2d 330 (Ariz. 1966); *Mid-Am. Elevator Co. v. Norcon, Inc.*, 679 N.E.2d 387, 391 (Ill. App. Ct. 1997) (officers and directors can be held personally liable for activities continued after the dissolution of the corporate form); *Moore v. Keystone Macaroni Mfg. Co.*, 87 A.2d 295 (Pa. 1952) (making officers pay back money to the company given ultra vires to the wife of a deceased executive).

sentinels can and do protect the corporation from the negative consequences of ultra vires activities.¹⁷⁵

Using an ultra vires cause of action would therefore result in six benefits. First, the plaintiffs' standing would be secure, given their status as shareholders. Second, the court could grant the plaintiffs' request for declaratory relief, clarifying that an illegality had in fact occurred, despite an agency's failure, for whatever reason, to fulfill its mandate. Third, the court could directly enjoin the corporation from the relevant illegal activity. An ultra vires lawsuit is more useful than existing tools because, unlike a shareholder derivative suit, even if a violation of a law is profitable it can still be enjoined. Fourth, if ultra vires acts had ceased by the time of the final judgment, the court could direct the corporation to pay the appropriate fine. Fifth, a court could use its powers in equity to order court monitoring of the defendant corporation to assure that the illegalities do not recur. Finally, as explained above, there is historical precedent for company managers paying the fines owed by a corporation for illegal acts that they had ordered; the fact that the illegal acts were profitable to the company would make no difference in the amount of fine that managers had to pay.

B. Rebuttals to Foreseeable Objections and Why Ultra Vires Statutes Do—and Should—Guarantee Standing

1. The Statutory Grant of Standing for Shareholders Is Unqualified

One foreseeable objection to the thesis of this Article—that plaintiffs seeking to enforce environmental laws can assure themselves standing by buying shares in their adversaries—is that the relevant statutes surely do not allow for such an application. Yet, as reviewed above, the statutory language granting an ultra vires cause of action is so clear and utterly unqualified that it is safe to conclude that it is a grant of standing per se. So long as there is an ongoing illegality, a shareholder plaintiff may sue to enjoin a company from continuing this conduct. The language of the statutes does not leave much room for interpretation or confusion.

2. Precedent Cases Have Never Discriminated Among Shareholders

¹⁷⁵ Leacock, *supra* note 107, at 96–97; see also Robert S. Stevens, *A Proposal as to the Codification and Restatement of the Ultra Vires Doctrine*, 36 *YALE L.J.* 297, 307–08 (1927).

Bringing Ultra Vires Lawsuits

Turning to the reasoning in precedent cases for guidance, one sees a clear and consistent history of judges accepting the standing of ultra vires plaintiffs who seek to enjoin a corporation from activities not authorized in its corporate charter without question or discussion. This includes enjoining companies from illegalities. This trend continues into recent decades, as described above. Therefore, it would be a novel development to question the legitimacy of a shareholder bringing an ultra vires lawsuit to enforce an environmental law.

3. *If the Cause of Action Is Restricted to Self-Interested Shareholders, Such Potential Plaintiffs Exist*

Another predictable critique is that an environmental plaintiff purchasing a single share or small volume of shares for the purpose of assuring standing may not be deemed to be the “right” kind of plaintiff with the “right” interest at stake. Perhaps a judge could imagine that the ultra vires cause of action should be restricted to investors who are motivated by financial self-interest. Even though, as indicated by the statutes and precedent cited above, the ultra vires statutory provisions grant standing to shareholders per se, it may present an even less ambiguous scenario to a skeptical judge if one of the named plaintiffs was a large institutional investor with a twofold mandate to (1) encourage social or environmental responsibility and (2) preserve the long-term value of its investments. The New York City Employees’ Retirement System, Walden Asset Management, ISIS Asset Management, and Trillium Asset Management Corporation, for example, precisely fit this profile. They have invested years of time and millions of dollars in actions to promote corporate responsibility and ought to consider the ultra vires doctrine as a more efficient device, in some cases, to fulfill their goals.¹⁷⁶ Therefore, even if a court reinterprets ultra vires causes of action to only be available to investors with some arbitrarily defined minimum financial interest at stake, such plaintiffs exist and are likely willing to invest money to stop corporate misconduct. Communication and coordination with existing concerned investors is another approach that environmental plaintiffs should consider. Because no money

¹⁷⁶ Adam J. Sulkowski & Kent Greenfield, *A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN’S L. REV. 929, 937–41 (2005).

damages are sought from the corporation and given the willingness of concerned investors to expend resources to expose corporate misbehavior, there is reason to believe that some existing investors would cooperate in bringing an ultra vires lawsuit to enjoin violations of environmental laws.

4. *The Historical Concerns Motivating the Emergence of the Ultra Vires Cause of Action Are Still Valid*

The concerns that motivated the emergence of the ultra vires doctrine—the progenitor of the ultra vires cause of action in state statutes—should be recognized as still being valid. If a shareholder alleges that ongoing illegalities threaten the value of shares, a court cannot, as a threshold question, presume in good faith and with absolute certainty that there will not be adverse effects on share value. On the contrary, in an era where private investors and institutional investors have deliberately allocated \$2.71 trillion to ethically screened investment funds and even large investment banks have committed to better screening of investments for social or environmental performance,¹⁷⁷ the burden of proof ought to be on the company managers to prove that a pattern of ongoing illegalities will not eventually result in lower share value.

In other words, it seems more likely that ongoing illegalities, however profitable in the short term, will at some point result in negative repercussions, be they deteriorated shareholder trust and relationships; government fines; negative reputational impacts among consumers; or negative impacts on employee recruitment, motivation, and retention.¹⁷⁸ The historical motivation for the doctrine and statutes has been to protect shareholders from a loss of value in their investments and courts must recognize this motivation to protect invested wealth is still a valid concern. Obviously, as acknowledged

¹⁷⁷ Press Release, Soc. Invest. Forum, Report: Socially Responsible Investing Assets in U.S. Surged 18 Percent from 2005 to 2007, Outpacing Broader Managed Assets (Mar. 5, 2008), <http://www.socialinvest.org/news/releases/pressrelease.cfm?id=108>. From 2005 to 2007, Socially Responsible Investment (SRI) assets grew more than eighteen percent while all investment assets under management edged up by less than three percent. *Id.* There were \$2.71 trillion in total assets under management in 2007 using one or more of three SRI strategies—screening, shareholder advocacy, and community investing—up from \$2.29 trillion in 2005. *Id.* In 2008, nearly one out of every nine dollars under professional management in the United States was involved in SRI. *Id.*

¹⁷⁸ See KPMG, INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2008 (2008), http://www.kpmg.com/SiteCollectionDocuments/International-corporate-responsibility-survey-2008_v2.pdf.

above, a large institutional investor with both a significant financial interest and a mandate to invest in socially and environmentally responsible businesses would be a plaintiff best positioned to make these arguments.

5. *The Intent of State Legislatures Should Be Respected*

Why, despite the elimination of all other prerequisite promises for incorporation, have the legislatures of forty-six states decided to retain language in their incorporation statutes that requires a corporation to promise to behave lawfully? More significantly, why would the mechanism that allows shareholders and state attorneys general to enjoin or dissolve corporations be retained in corporation laws of forty-nine states? Authors who ask this question conclude that this many legislatures did not happen to leave these provisions in their state incorporation laws by accident. The intent of legislatures must have been to provide a clear minimum standard for corporate actions and a means to enforce such a minimum standard.¹⁷⁹

6. *The U.S. Constitution Requires that Ultra Vires Lawsuits Be Available to All Shareholder Plaintiffs*

The U.S. Constitution requires that a plaintiff desiring to enforce environmental laws through an ultra vires cause of action be recognized as having standing. It would be highly discriminatory—a clear denial of due process and equal protection—for any court to recognize the standing of investors alleging possibly illegal poison pill provisions but to then fail to recognize the standing of investors alleging violations of environmental law.¹⁸⁰ As discussed above, investors using the ultra vires cause of action have been consistently granted standing by the U.S. Supreme Court, the lower federal courts, and state courts. Therefore, to carve out a category of investors and exempt them from having standing because of the nature of the illegalities that they allege would be an exercise in unconstitutional discrimination.

¹⁷⁹ See Greenfield, *supra* note 117.

¹⁸⁰ U.S. CONST. amend. XIV, § 1.

7. *The Lack of Money Damages Means Frivolous Litigation Is Unlikely*

A foreseeable critique is that allowing an “end-run” around standing jurisprudence would flood the courts with plaintiffs chasing every minor possibility of an illegality, thereby burdening both corporations and courts. This objection is easily overcome. First, the ultra vires cause of action exists, and based on the foregoing summary of recent court decisions across the country, there is no evidence that the ultra vires cause of action has been used frivolously. Second, the fact that injunctive relief and not monetary damages are the goal of environmental enforcement litigation helps explain why there has been a dearth of frivolous suits.¹⁸¹ Similarly, because the primary goal of an ultra vires lawsuit is to enjoin a corporation, there likewise is very little reason to believe that this cause of action will suddenly trigger an avalanche of frivolous litigation. Environmental advocates are highly unlikely to risk millions of dollars litigating over trivial violations of the law when no money damages are at stake and when the facts are anything less than certain and compelling.

8. *Ultra Vires Lawsuits Overcome a Critical Limitation of Shareholder Derivative Suits*

It is a cliché of business and society, business law, or ethics courses in business schools to point out that executives do occasionally look at a cost-benefit analysis to determine if following the law makes sense.¹⁸² Some scholars support this theoretical framing of law-as-price, placing the duty to maximize price ahead of the duty to obey the law.¹⁸³ If this is the case and if the profits to be gained from a violation of law exceed the cost of the fine or other liabilities, then a manager would have a duty to break the law. Some argue this is consistent with their fiduciary duty and adequate to immunize them from shareholder derivative suits, so long as breaking the law presents the company with a net financial gain.¹⁸⁴ The basis for this theoretical approach—placing the duty to maximize

¹⁸¹ See Dunne, *supra* note 94, at 43–45.

¹⁸² See, e.g., TONY MCADAMS ET AL., *LAW, BUSINESS AND SOCIETY* 40 (9th ed. 2009).

¹⁸³ See Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1537–52 (1984) (describing the difference between viewing law as sanction versus viewing law as price).

¹⁸⁴ See, e.g., Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of the American Law Institute’s Principles of Corporate Governance*, 66 WASH. L. REV. 413 (1991).

shareholder value ahead of the duty to obey the law—contradicts the plain language of state incorporation statutes. The ultra vires provisions in state incorporation laws can correct for this shortcoming of derivative suits and allow the injunction of illegalities, even if they are profitable in the short term.¹⁸⁵

9. *Other Arguments Grounded in Policy, Ethical Reasoning, and Respect for State Legislatures*

Other scholarly works and secondary sources concur that courts have the power to enjoin ultra vires activities and that this is desirable from a public policy perspective.¹⁸⁶ These works have already presented theoretical foundations for the conclusion that ultra vires statutes have real meaning and ought to continue to play a role as a tool to protect the interests of both investors and the public. A brief synopsis of these arguments is, however, appropriate.

From a contractarian perspective—that is, if we consider a corporation to be a nexus of contracts—the parties to a contract would all logically want the existing ultra vires provisions to persist.¹⁸⁷ The entity granting the corporation its existence—a state government—would want to have the means to assure that the corporation obeys laws, and in cases of continued abuse, the means to revoke its charter. Those contracting to be owners of the corporation—the shareholders—surely should similarly have the means to restrain their entity when it deviates from the law in violation of the promise of the charter.

There is one more argument why ultra vires lawsuits should assure the standing of plaintiffs; this one grounded in ethical reasoning. One can apply Rawls' theory of justice; that is, without knowing ahead of time who we would be or where we would be positioned in terms of power and privilege, one can imagine what kind of rules we would logically want to live under.¹⁸⁸ Surely no one—without knowing ahead of time who they would be in a society or ex ante—would want

¹⁸⁵ See Greenfield, *supra* note 117, at 1298–99.

¹⁸⁶ 7A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 3400, at 10–12 (perm. ed., rev. vol. 1997); Kulwicki, *supra* note 151, at 851.

¹⁸⁷ This perspective is described in greater detail by Kent Greenfield. Greenfield, *supra* note 117, at 1291–93.

¹⁸⁸ JOHN RAWLS, A THEORY OF JUSTICE (1971).

other people or entities to be empowered to break laws.¹⁸⁹ There are other factors to add to the abstract scenario, such as constraints on resources for law enforcement, lobbying pressure on political institutions, the superior economic resources of corporations, and the impediments to citizen enforcement suits. It then becomes readily apparent that good public policy practically begs for a vigorous means for, at the very least, shareholders to rein in corporations when they are otherwise tempted in the short term to violate the law, irrespective of long-term consequences for all stakeholders.¹⁹⁰ Illegalities of all sorts are commonly acknowledged and ongoing, yet they are not remedied or corrected by any government authority.¹⁹¹ This fact adds weight to the argument that courts should recognize this clearly available mechanism for citizen law enforcement efforts through corporate law statutes.

IV CONCLUSION

This Article highlights a tool that citizen plaintiffs in environmental litigation may use to establish and retain standing. In doing so, this Article contributes to recent scholarly literature of ultra vires lawsuits by tracing their historical origins in greater detail, by

¹⁸⁹ Greenfield, *supra* note 117, at 1323–42.

¹⁹⁰ Stephen Fotis documents the historical decline in political will and resources to enforce environmental laws in his comment in the *American University Law Review*. Fotis, *supra* note 92, at 149–50. In 1982 and 1983, the EPA’s budget was reduced by one-third and enforcement attorneys were cut eighty-five percent from two hundred to thirty; “crippling” organizational changes and attitudes of appointees further limited the EPA’s enforcement activities. *Id.* at 130–31 n.15. The number of civil cases that the EPA has referred to the Department of Justice decreased from 242 in 1979 to 110 in 1982, and administrative actions by the EPA against polluters dropped from 2139 to 1129. *Id.* at 130 n.14.

¹⁹¹ SEC disclosure laws, for example, are among those that are openly and widely disregarded. A 1992 Price Waterhouse survey found that the financial statements of sixty-two percent of respondents failed to follow SEC rules and did not disclose fines for environmental illegalities in excess of \$100,000. PRICE WATERHOUSE, ACCOUNTING FOR ENVIRONMENTAL COMPLIANCE: CROSSROADS OF GAAP, ENGINEERING AND GOVERNMENT 10–11 (1992). A 1996 academic study found a fifty-four percent nonreporting rate for known CERCLA potentially responsible parties (PRPs) in initial public offering registration statements and a sixty-one percent nonreporting rate among currently registered companies also known to be CERCLA PRPs. David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 410 (2005). A governmental study found that seventy-four percent of corporations in its sample fail to comply with disclosure requirements. *Id.* at 410 n.188.

clarifying terminology, by reviewing recent court opinions, and by explicitly stating that ultra vires statutes are grounds for shareholders to sue to enforce statutes.

While not central to the thesis of this Article, it is appropriate to highlight briefly why citizen enforcement of environmental statutes is an important issue in the bigger scheme of things. Unchecked anthropogenic environmental degradation is literally a matter of life and death for, conservatively stated, hundreds of thousands of species and potentially tens of millions of humans at risk of becoming environmental refugees or worse, casualties.¹⁹² Whether it is exacerbated drought in developing nations or cancer rates in the developed world, all of humanity is in a crisis precipitated by a combination of industrialization, growth in demand for goods and services, and lack of restraint or adjustment of damaging activities stemming from a lack of awareness and will.¹⁹³ Given that citizen enforcement suits supplement governmental enforcement of relevant statutes and regulations, the facilitation of citizen enforcement efforts is a topic worthy of attention. Citizen enforcement suits are clearly not a “silver bullet” solution to all environmental problems, but they

¹⁹² A consensus indicator statistic on the state of the world’s natural environment is that a distinct species is lost every ten minutes. This sixth mass extinction of life in the history of the planet—explainable largely by massive habitat destruction by humans—is without precedent in the last sixty-five million years. TERRY GLAVIN, *THE SIXTH EXTINCTION: JOURNEYS AMONG THE LOST AND LEFT BEHIND I* (2006); see also PAUL R. EHRLICH & ANNE H. EHRLICH, *EXTINCTION* (1981); RICHARD LEAKEY & ROGER LEWIN, *THE SIXTH EXTINCTION: PATTERNS OF LIFE AND THE FUTURE OF HUMANKIND* (1996); DUGALD STERMER, *VANISHING FLORA* (1995); DAVID TAKACS, *THE IDEA OF BIODIVERSITY* (1996); EDWARD O. WILSON, *THE CREATION: AN APPEAL TO SAVE LIFE ON EARTH* (2006); EDWARD O. WILSON, *THE FUTURE OF LIFE* (2002). The Intergovernmental Panel on Climate Change (IPCC)—which, because of its consensus-building process, may have arrived at conservative forecasts—projects that climate changes will drastically exacerbate storm severity, clean water shortages, food scarcity, and the very viability of coastal cities that are homes to hundreds of millions of people. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, U.N., *CLIMATE CHANGE 2007: SYNTHESIS REPORT* 52–54 (2007). Rising sea level, an observable effect of global climate change, has already permanently displaced five hundred thousand people in Bangladesh, which is among the low-lying countries that are beginning to feel these impacts. Emily Wax, *In Flood-Prone Bangladesh, a Future that Floats*, WASH. POST, Sept. 27, 2007, at A01.

¹⁹³ For example, by 2015, the number of people in water-stressed countries (having less than 1700 cubic meters of water per capita per year) will increase to three billion; this trend is attributable to extremely water-intensive agricultural practices. CIA, *GLOBAL TRENDS 2015*, at 27 (2000). Exacerbated human health problems are anticipated, both locally and globally, as a result of both past and present industrial activity in the developed economies of the world as well as the ongoing industrialization and urbanization of the developing world. *Id.* at 31.

are an important piece of the puzzle. The observable, worldwide scope of environmental problems shows recently revised and stricter standing tests to be somewhat silly academic exercises that are dangerously out of touch with the realities of an urgent global crisis.¹⁹⁴

On a less global scale, the ambiguity and inconsistency in recent decisions on standing has led to inefficiencies and inconsistencies in the application of these rules among federal district and appellate courts and arguably between various decisions of the U.S. Supreme Court.

As explained above, ultra vires statutes, which are still functioning in other contexts, provide an elegant end-run around the maddening exercise of showing that a citizen plaintiff is sufficiently harmed by a violation of a law. Ultra vires statutes may be used by shareholders to either dissolve a corporation or to enjoin ongoing or planned illegalities. Precedent cases indicate that it also may be possible to force a corporation, or even executives and directors, to pay relevant fines as a cost of law breaking.

From a certain idealistic perspective, ultra vires statutes may seem somewhat unfair as they currently function in this context, inasmuch as they place shareholders in a category superior to other citizens vis-à-vis violators of the law. That is, shareholders—or those with the resources to purchase shares—are in the privileged position of having access to the courts to assert a right that Congress intentionally gave to all citizens in landmark pieces of legislation. In an ideal world, the cases establishing the strict yet unpredictably applied Scalia standing gauntlet should be overturned if congressional intent and statutory text are to be respected by the judiciary.

Regardless of such a potential critique from those who strongly believe that standing tests should be relaxed or eliminated, until such changes come about, environmental plaintiffs have a means to

¹⁹⁴ The exercise of proving standing in court is silly enough without pointing to its being exclusively anthropocentric. The concept of other life forms or even mountains or rivers or ecosystems having standing, as mentioned above in Part I.C, has been suggested before. See Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 461–62 (1996); Manus, *supra* note 8; Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Also as mentioned above in Part I.C, Justice William Douglas's dissent in *Sierra Club v. Morton*, 405 U.S. 727, 742–49 (1972) (Douglas, J., dissenting), explicitly suggested that inanimate objects such as trees and rivers be granted standing, noting that standing is granted to completely fictional persons in the case of business corporations.

circumvent a subjective and confusing set of standing tests that only create inefficiencies and uncertainties for the courts and all the parties involved in litigation.

The practical application of the foregoing analysis is as follows. Plaintiffs seeking to enforce environmental laws against a corporation are well advised to buy shares in their adversaries. In other words, plaintiffs may acquire and defend their standing in court by buying shares in the very corporations that they may be seeking to enjoin. The purchase of a share, besides being the practical equivalent of purchasing a ticket to assure standing, allows plaintiffs to seek injunctions against corporations and other equitable remedies such as court monitoring. Forcing the payment of fines by the corporation or its officers and directors is also supported by precedent cases. Legislative intent, clear statutory language, the historical motivations for the relevant doctrine and statutes, consistently and universally applied precedent, good public policy, the protection of investors' interests, logic, and even an appeal to the constitutional rights to equal protection and due process all dictate this result.