



Winter 1973

Standing to Sue: A Critical Review of the Mineral King Decision

Joseph L. Sax

Recommended Citation

Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RES. J. 76 (1973).
Available at: <https://digitalrepository.unm.edu/nrj/vol13/iss1/4>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

STANDING TO SUE: A CRITICAL REVIEW OF THE MINERAL KING DECISION

JOSEPH L. SAX*

In *Sierra Club v. Morton*¹ (the Mineral King case) the plaintiff conservation organization sought to enjoin the grant of federal permits to allow Walt Disney Enterprises, Inc. to develop a resort on National Forest land.² The essence of the Sierra Club's complaint was that high density recreational development would impair some of the protected uses for which national park and forest lands are required by statute to be held.

The Supreme Court's decision, holding that the Sierra Club did not have standing to sue, is a warning to those federal courts that have been rapidly liberalizing the law of standing since 1965.³ In its narrowest application—to the Mineral King case itself—the Court's decision appears to have little importance. The Court suggested explicitly that if the Sierra Club were to amend its complaint to allege that some of its members were users of Mineral King and would be adversely affected in their aesthetic and recreational use of the area, the Club would have standing not only as a representative of its member-users,⁴ but could then also “argue the public interest.”⁵ The Sierra Club was subsequently permitted to amend its complaint so as to comply with the Supreme Court's rule on standing.⁶

The interest of the Mineral King decision thus turns on two broader questions: Is there any significant class of cases for which the Court's ruling on standing would bar judicial review? And if there is, what real problems of litigation—if any—is the Court attempting to avert by its restrictive decision on standing to sue? In seeking to illuminate the answers to these questions, let us begin by examining the line that the Court drew to distinguish those who have standing from those who do not.

*Professor of Law, University of Michigan; Author of *Defending the Environment* (Knopf, 1971, Vintage, 1972).

1. 405 U.S. 727 (1972). References herein to the Court's opinion are to the majority opinion of Mr. Justice Stewart. Justices Blackmun, Brennan and Douglas dissented. Justices Powell and Rehnquist did not participate. See Comment, *Supreme Court Decides the Mineral King Case: Sierra Club v. Morton*, 2 *Environment Rptr.* 10034 (1972).

2. See 405 U.S. at 730, n. 2.

3. *E.g.*, cases cited 405 U.S. at 739, n. 14.

4. 405 U.S. at 736, n. 8.

5. 405 U.S. at 740, n. 15; 405 U.S. at 737, n. 12.

6. *Sierra Club v. Morton*, 4 ERC 1561 (Sept. 12, 1972). See also Staff Report, *Mineral King: The Battle Goes On*, *Sierra Club Bulletin*, at 26 (May, 1972).

THE COURT'S TEST OF STANDING TO SUE

The Court seems to distinguish two kinds of plaintiffs who would have standing in Mineral King from two who would not. An individual user of Mineral King could sue,⁷ and the Sierra Club could sue as a representative of members who are users.⁸ Conversely the Sierra Club could not sue on its own as an organization interested in and committed to the protection of areas like Mineral King,⁹ nor could a nonusing individual citizen, similarly concerned, sue.¹⁰

The Court's denial of standing to the Sierra Club as an organization, rather than as a representative of user-members, is based both on an interpretation of the relevant statute,¹¹ and upon a judgment about the impact of expanded citizen litigation on judicial administration.

The statutory analysis arises from an interpretation of the Administrative Procedure Act as requiring a plaintiff to sustain "injury in fact" in order to obtain judicial review of administrative action.¹² The Court asserts that injury in fact means an effect on one's *use* of the area in question.¹³ The central premise of the Court's opinion is thus its equation of "injury in fact" with being affected in the use of the area in question. This merger of two quite distinct ideas is significant for the future of environmental cases and other private attorney general¹⁴ litigation.

Before turning to an exploration of the significance of the Court's analysis of standing as a statutory issue, let us note the policy reasons that the Court gives in support of its interpretation of the Administrative Procedure Act. First, the Court says, while the Sierra Club is large, long established and historically committed to the protection of natural resources, if its interest in the subject matter (as opposed to interest as a user or a representative of users) were enough to confer standing upon it:

[t]here would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to

7. 405 U.S. at 736; text at n. 8.

8. 405 U.S. at 739; text following n. 14.

9. *Id.*

10. *Id.*

11. The Administrative Procedure Act §10, 5 U.S.C. §702 (1971); 405 U.S. at 732.

12. 405 U.S. at 733, text following n. 4. The Court seems to assume that the Sierra Club meets the constitutional test of standing, 405 U.S. at 732, n. 3; see 405 U.S. at 741, n. 1 (dissenting opinion).

13. 405 U.S. at 735, n. 8.

14. 405 U.S. at 737. The Mineral King opinion thus suggests that the "injury in fact" test is not as easy for the courts as has sometimes been suggested. See Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 468, 473 (1970).

perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.¹⁵

Having raised this spectre, the Court concludes that its rule requiring interest as a user as a prerequisite to standing serves:

[a]s at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to . . . authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.¹⁶

THE SIGNIFICANCE OF THE COURT'S DENIAL OF STANDING TO SPECIAL INTEREST, AS OPPOSED TO USER, PLAINTIFFS

The Mineral King opinion assumes that plaintiffs who do not have a user or property-type interest in a case are suing only to "vindicate their own value preferences";¹⁷ that to allow such suits would improperly politicize the courts;¹⁸ and that the restriction of standing will not "prevent any public interests from being protected through the judicial process."¹⁹

Each of these assumptions is insupportable. It is plain that the Court's rule could prevent the litigation of important legal issues. Consider the case of an organization composed of prominent citizens concerned with prison reform or mental health. Were such an organization to challenge in court the legality of the conduct of those who administer such institutions, it would be clear that no member of the plaintiff organization would be "injured in fact" in the sense that the Court uses that phrase; that is, in the way that a prisoner or inmate would be injured. Moreover, no inmate who is allegedly so injured may be a member of the plaintiff organization, so the problem cannot be avoided simply by joining inmates—the "users." Furthermore, inmates in such a situation may be unwilling to become plaintiffs for fear of retribution, or lack of resources.²⁰ Similarly, an organization concerned with respiratory diseases might wish to sue to enforce air pollution control laws in a company town, where all the

15. 405 U.S. at 739.

16. 405 U.S. at 740.

17. *Id.*

18. This is apparently the significance of the quotation from deTocqueville, 405 U.S. at 740, n. 16.

19. 405 U.S. at 740, n. 15.

20. To be sure, no such practical problem was presented in the *Sierra Club* case, see Staff Report *supra* note 6. The Court met this sort of problem only two months later. See *Laird v. Tatum*, 408 U.S. 1, 14, at n. 7 (1972). The recent proliferation of countersuits for damages against environmental plaintiffs makes fearfulness of participation a serious concern. *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Calif. 1972) is thus far the leading case dismissing such a suit.

directly affected citizens are reluctant, for economic reasons, to become plaintiffs.²¹ Thus, there may well be important legal claims that would be effectively barred from the courts for lack of any willing plaintiff with standing under the Supreme Court's test.

Since the denial of organizational standing may well have important practical consequences, it becomes pertinent to ask if there is any good reason why such organizational standing should be denied.

The Court says that such suits would allow the judiciary to be used by those "who seek to do no more than vindicate their own value preferences."²² The Court is speaking pejoratively rather than analytically. For plainly the Sierra Club was asking the Court to interpret the value preferences of Congress, as expressed in federal statutes. The laws in question may not be easy to apply, any more than the law of due process is easy to apply.²³ And such laws may well draw the Court into consideration of important social conflicts. But if there is law to apply—which is quite a different question than that of standing-to-sue—it is hardly for the Supreme Court to tell the Congress that it may not (short of constitutional limitations)²⁴ engage the judiciary in litigation that requires resolution of difficult competing public issues. A court may prefer construing mortgages to interpreting the scope of the right of privacy; but if the legislature has created legal rights, there is no excuse for the courts to back away from the challenge by creating procedural barriers like lack of standing-to-sue.

Even if one sympathized with the Court's reluctance to be drawn into value-laden controversies, it should be clear that the Mineral King opinion is poorly calculated to keep the Court out of this arena.²⁵ For the Court's opinion explicitly states that a plaintiff who is an actual user of an area such as Mineral King (such as a hiker or fisherman) may not only challenge alleged violation of statutes insofar as they affect his aesthetic and recreational enjoyment of the area, but "may assert the interests of the general public."²⁶

21. Cf. J. Fallows, *The Water Lords* 109-112 (1971). See *Reservists Committee to Stop the War v. Laird*, 323 F. Supp. 833, 841 (D.D.C. 1971): "It is not irrelevant to note that if these plaintiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can." See also Jaffe, note 45, *infra*.

22. 405 U.S. at 740.

23. Cf. *Atlee v. Laird*, 399 F. Supp. 1347, 1357 (E.D. Pa. 1972): "The complaint in this action presents not an airing of a 'generalized grievance' about the government, but an attack against a particular war, alleging that the prosecution of this war has not and does not conform to the requirements of law."

24. See note 12, *supra*.

25. 405 U.S. at 738.

26. 405 U.S. at 740, n. 15. The Court seems also to have crossed this barrier in the taxpayer standing case, *Flast v. Cohen*, 392 U.S. 83 (1968). But see *Laird v. Tatum*, 408 U.S. 1 (1972); *United States v. Richardson*, cert. granted 41 U.S. L.W. 3458 (U.S. Feb. 26, 1973). See also cases cited in note 37, *infra*, and Jaffe, note 38 *infra*, at 1043.

Thus, the Court agrees that it would entertain precisely the same sort of litigation the Sierra Club wanted to initiate, if only a "direct user" of Mineral King had been joined as a plaintiff, or if the Sierra Club had alleged that some of its members were direct users. Thus, it is difficult to perceive what potential misuse of the judicial process the Court is avoiding by its decision in the Mineral King case.

Nothing in the Mineral King decision will insulate the courts from cases high in political content or "party spirit."²⁷ Distinctions will in practice turn on considerations that are by no means clearly germane to the question whether litigation is appropriate. The prison and air pollution hypothetical cases will turn out to be litigable or not depending on the intensity of fear of retribution of the victims, on the persuasiveness of the organization in obtaining individual users-victims as plaintiffs, or on the structure of the organization as a membership organization of users or not.

As to this latter point, it is illustrative to recall that one of the environmental organizations that has been most engaged in litigation, the Environmental Defense Fund, began as a very small group of scientists and lawyers concerned about the environment. It was only after it had achieved considerable success in litigation that it "went public," soliciting memberships from a broad range of citizens who would, in the Court's terms, qualify as users. The change in organizational structure has had no perceivable impact on EDF's litigation program.²⁸

Moreover, there is a powerful, though surely not deliberate, disingenuity in the distinction that the Court makes. The opinion indicates that there is an important protection for the judicial process in putting the decision whether to go to court "in the hands of those who have a direct stake in the outcome," such as an actual user of the area in controversy. In many instances, organization plaintiffs who could not obtain standing on their own will have no trouble in finding a user to join as a named plaintiff—a local property owner, fisherman or guide. One need not be very sophisticated to know that such a named plaintiff, who would clearly have standing under the Court's test, will often be simply a front man whose participation in the decision making and financing of the lawsuit will be nil.²⁹

27. 405 U.S. at 741, n. 16.

28. The May, 1972 Environmental Defense Fund (EDF) Letter, distributed to members, contains the following comment: "As a result of the Mineral King decision, EDF may be required to explain to the courts specific ways EDF members will be harmed by the degradation EDF is opposing. Consequently, EDF attorneys may contact members with specific questions about their use of particular rivers, mountains, valleys, consumer products and other environmental assets or liabilities." 3 EDF Letter, No. 2, at 4.

29. The conceptual frailty of the Court's position is also revealed by cases like *Securities and Exchange Comm'n v. Medical Comm. for Human Rights*, 404 U.S. 403 (1972), where "a direct

Thus, the Court creates an untenable set of alternatives. The barriers it imposes on standing to sue will at times be hurdled by the search for a local front man; if that search is capable of success, the litigation will go forward unchanged from what it would have been if the organization had been permitted to sue on its own.

If the organization is unable to find such a plaintiff, it proves nothing about the merits or nature of the suit sought to be instituted. It may only suggest that no local person is willing or interested in suing. The absence of a local user willing to sue hardly suggests that litigation is inappropriate. Beyond the problem of the fearful local resident, mentioned earlier, there is the potential problem of an area sought to be preserved as a game sanctuary or scientific study area, in which the only present users are hunters whose interests are at odds with the preservationist claim an organizational plaintiff wishes to assert. Is the user interest in such a case the only legitimate litigable interest?

THE COURT'S PRESENT USER—LITIGABLE INTEREST TEST

This brings us to the proposition that underlies the whole of the Court's decision, the notion that a litigable interest is limited to a direct user interest,³⁰ which alone is capable of sustaining an injury in fact.

Certainly the Court was not compelled to adopt its present user test by the Administrative Procedure Act. Indeed the Court freely interprets the A.P.A. to suit its own purposes. It takes the statutory language of "adversely affected or aggrieved," says that language means "injured in fact," and then interprets injury to mean harm to a present user.

Neither is the Court's interpretation the obvious result of examining the interests that Congress sought to protect in the governing substantive laws. One of the central statutes underlying cases like *Mineral King* is the law creating the National Park Service. That Law provides that the Park Service shall:³¹

[p]romote and regulate the use of the . . . national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such

stake in the outcome," and thus standing, may apparently be purchased at the price of a single share of stock.

30. While the Court does not expressly speak of "present" use, this seems to be the only sort of interest the Court views as involving a "direct stake in the outcome."

31. Act of Aug. 25, 1916, 39 Stat. 535, 48 Stat. 389. The National Parks, Military Parks, Monuments and Seashore Act, 16 U.S.C. §1 (1970).

manner and by such means as will leave them unimpaired for the enjoyment of future generations.

It could hardly be clearer that Congress did not order the parks to be managed simply for the benefit of present users. Thus, the question arises, who is an appropriate plaintiff to assure that the parks are protected "for the enjoyment of future generations"? It would be difficult to conceive of a more appropriate plaintiff to fulfill that function than the Sierra Club.³² As indicated earlier, a present user of the parks may well have interests that are inconsistent with the mandate of future preservation.

THE INADEQUACY OF THE USER TEST

Even if one were to accept the Court's "user equals standing" test, any attempt to apply that test intelligibly is doomed to failure.

Consider, for example, a suit brought to enforce the laws relating to management of a bird sanctuary. Who, in the Court's terms, has "a direct stake in the outcome" of such litigation? Only those who go birdwatching in the physical boundaries of the sanctuary? Those who are birdwatchers and enjoy the birds that nest in the sanctuary during their migratory flights elsewhere? Is a plaintiff birdwatcher in a worse position if he is unable to demonstrate that the birds he watches have nested in this very sanctuary during some particular period of time? And what of the citizen who does not watch birds directly, but enjoys nature films and books based on the work of those who come into the sanctuary for source material? Is his interest necessarily or significantly less a use than that of one who hikes occasionally in the sanctuary?

Would it be enough that one had contributed money to preserve the area, though he had not visited it personally, and did not intend to visit it? Such a person certainly has an interest in enforcement of the law on the land acquired with his financial support. The example is by no means fanciful, for it may be recalled that the Sierra Club attained national prominence following highly publicized campaigns to preserve the Grand Canyon and the California Redwoods. Surely a great many people contributed to those campaigns who had never seen either site. Perhaps their only interest was an uncertain future desire to visit them; or perhaps they felt no more "direct stake" in these resources than many Americans feel in the Liberty Bell or the original copy of the Constitution. They consider these things to be a part of their American heritage that ought to be preserved, whether or not they have personally visited them or even intend to do so.

32. The Court seems to assume that there is no constitutional barrier to such litigation. See note 12, *supra*.

These examples only begin to suggest how much more complicated the question of genuine interest and injury in fact is than the crude direct stake, present user test the Court seems to be adopting. A citizen's concern about the long term protection of ocean resources from radioactive or chemical contamination, or about the maintenance of wildlife habitat, surely need not be contemptuously dismissed as the indulgence of a mere "value preference."³³ If one's concern relates to the long range food supply of the earth, the maintenance of adequate scientific study areas, or even the preservation of a stock of "aesthetic" resources for the enjoyment of his own and future generations, it is far from obvious that these are not real and important interests susceptible of being "injured in fact."³⁴

What is more, to limit standing to what the Court calls user interests is in an important sense to predetermine the merits of the controversy without ever reaching them. One who seeks to restrain offshore oil drilling, or the dumping of toxic substances in the ocean, may not have any present user interest that is demonstrably threatened. He may only be concerned for the protection of the long-range maintenance of the oceans for food supply. It may well be in a given case that such concern is not within the zone of interest meant to be protected by the Congress, or that the evidence of harm the plaintiff could produce is too speculative to be of much evidentiary weight. But surely these issues go to the merits of the controversy and should not be finessed by rules on standing to sue. Nor, it would seem clear, should the courts determine by standing to sue rules that a present interest in fishing is *ipso facto* more important than a present interest in maintenance of long term food supplies, the latter being an issue

33. The Court's view about such situations is ambiguous. This is a suggestion in the opinion that if the injury will "fall indiscriminately upon every citizen," 405 U.S. at 735, then every citizen may have standing. See also cases cited at 405 U.S. at 739, n. 14. If that is the Court's view, the Mineral King case may be understood as imposing a sort of "best plaintiff" rule, see 85, *infra*.

34. Likewise in the jail example given earlier, in the text at 78-79, *supra*, the organizational interest in rehabilitation and reduced recidivism, assuming those are the interests protected by statutes governing jails, are real and capable of being injured—even though they may not be perfectly consistent with the interests of the inmates. Notably, to be able to assert those interests, the plaintiff organization need not be correct about the relationship between enforcement of laws governing jails and rehabilitation of criminals. There need merely be a rational nexus between the claim they make and the interest they seek to protect, and it must be a connection that has a basis in the law sought to be enforced (the zone of interest test).

At least one commentator must have been very surprised by the Mineral King decision, for he wrote in 1971 that the Court had already adopted a position on standing in which "the principal harm in irrational or ultra vires governmental action or inaction is seen as the impairment of the functioning of the social system in its pursuit of chosen values, rather than as the disappointment of individual expectations. And the broader and more systemic the recognized impact of the agency position, the more imperative is an opportunity for resolution of doubts about its legality." Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 Mich. L. Rev. 1443, 1475 (1971).

which present commercial fishermen "users" may have no desire to litigate.

THE INDIVIDUAL NON-USER PLAINTIFF—INJURY IN FACT TO ONE AS A MEMBER OF THE PUBLIC

Having thus noted the scope and significance of non-user interests, one might well ask why their protection ought to be limited even to such well-established organizations as the Sierra Club. To the extent that the interests sought to be protected are those that inure to every member of the public—and that is certainly the implication of many of the statutes protecting natural resources³⁵—why should any individual concerned with the protection of *those* interests be less appropriate as a plaintiff than the individual who seeks to protect his (and others') interest as present users of the resource.

The Court implies that it would be improper to allow an individual citizen of Florida, for example, to sue to enforce laws protecting the Alaskan wilderness. Such a plaintiff would claim no status other than that of an interested citizen for whose benefit the Congress has enacted protective legislation.³⁶ The plaintiff would allege that the injury to him is a reduction in the national heritage of resources that Congress seeks to protect for a variety of reasons, only one of which is immediate physical use and occupation—a national natural resource bank account of which he, along with every other citizen, is a legitimate account holder.³⁷

35. For an explicit example, see The National Environmental Policy Act, §101(b)(1)-(6), 42 U.S.C. § 4331(b)(1)-(6) (1970).

36. If that were not the congressional purpose, the plaintiff would properly be denied standing as not meeting the "zone of interest" test. See, e.g., *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686 (2nd Cir., 1971), cert. denied 404 U.S. 1004 (1971).

37. The seemingly more far-reaching approach in Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972), does not seem to me to illuminate the real issues in these cases. If Stone is saying only that we should take account of diffuse citizen interests not routinely represented—including the citizen interest in species preservation—I quite agree, and suggest that his elaborate "rights for objects" theory is a form of verbal overkill, despite his disclaimer. Stone, *supra* at 488. For I do not see how it advances our understanding to contemplate the rights of a river itself, as distinguished from a more spacious view of rights of citizens in the river. See Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1036, 1046 (1968).

On the standing question, Stone's guardianship theory does not appear to solve the multiple suit and adequacy of representation problems (see text at note 42, *infra*). For if the interests are wide-ranging enough, no single guardian is likely to defend all of them—distinct and at times conflicting—in a fully satisfactory way. Sports fishing or deer hunting guardians may have rather different views from those of wilderness guardians, about the needs of the natural resources they seek to protect.

See also Reservoirs Committee to Stop the War v. Laird, 323 F. Supp. 833, 840-41 (D.D.C. 1971); *Atlee v. Laird*, 339 F. Supp. 1347, 1353-57 (E.D. Pa. 1972); compare with *Meyers v. Nixon*, 339 F. Supp. 1389 (S.D.N.Y. 1972).

THE BEST PLAINTIFF PROBLEM

If the interests that have just been noted are accepted as real interests amenable to being injured in fact, no individual plaintiff, though he is merely a concerned member of the protected public, can properly be viewed as an interloper. He is, indeed, the very person (though only one of many) for whose benefit the rights he asserts were created. Though they are different in a sense from the right of the present user, they are certainly not necessarily less important than the interest of a present user; nor are they necessarily sufficiently overlapping with present user interests that such users can be counted upon to vindicate them.

If, then, the Court's concern is with somehow identifying a best plaintiff, there is surely no reason to think that a hunter, hiker or a fisherman would be better plaintiffs in the Alaska wilderness, Mineral King or offshore oil situations than the Sierra Club or a concerned citizen from the other end of the country.³⁸ The Court's notion that the present user somehow is to be preferred because he has a "direct stake in the outcome" only suggests that the Court did not adequately consider the extent and variety of the stakes in such controversies.³⁹

FEAR OF THE HARASSING PLAINTIFF

While the Court does not say so explicitly, perhaps there is a fear of harassment underlying its decision narrowing standing. If so, the Court in future cases ought to inquire into the self-regulating aspect of litigation in situations like the Mineral King case where only declaratory and equitable relief is sought.⁴⁰ The high cost and

38. See Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1037-38 (1968).

39. The Court is not always so insensitive to broader rights, at least where the plaintiff is a state suing as sovereign or *parens patriae*. E.g., *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972) (suggesting that the State would be entitled to seek injunctive relief for damage to the State's economy and prosperity); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 446 (1945) (Georgia allowed to seek injunctive relief to protect "matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected"); *Illinois v. Milwaukee*, 406 U.S. 91, 104 (1972) (the right of a state to sue to protect its sovereign interest in "the air over its territory . . . the forests on its mountains . . . the crops and orchards on its hills"); *State v. Dexter*, 32 Wash. 2d 551, 556-57, 202 P.2d 906, 908 (1949), *aff'd per curiam*, 338 U.S. 863 (1949) (the right of the state to "use reasonable means to safeguard the economic structure upon which the good of all depends"). See generally 7A Wright & Miller, *Federal Practice & Procedure* § 1782. In such cases, the interest being asserted is recognized as more than an effort to effectuate a value preference.

Surely it is no longer obvious that the effectuation of such interests is uniquely one for the state itself as a plaintiff; the old rule that only the state may sue to enjoin a public nuisance is on the way out. *Restatement of Torts* 2d, § 821 (c) (Tent Draft No. 17, 1971).

40. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972), where the Court explicitly distinguished between a claim for injunctive relief and for damages in a suit broadly complaining of damage to the State's economy and prosperity. As to the special problems of

difficulty of initiating litigation without hope of reward is not a burden lightly undertaken.⁴¹ The plaintiff without a direct economic stake, the Court's greatest fear, is likely to exercise more self-restraint than an economically interested private plaintiff, or a well-established and well-financed organization.

ADEQUACY OF REPRESENTATION

If the Court perceives a problem of inadequate representation by some self-appointed protector of the public interest, that problem can be attacked directly by reference to the rules governing adequacy of representation in class actions,⁴² as well as by the rules governing joinder of parties.⁴³

Should the Court fear that the legitimate concerns of present users

class actions for damages, *see* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 Mich. L. Rev. 338 (1972); *see also* 7A Wright & Miller, *Federal Practice & Procedure*, § 1782, at 113-14.

41. "By process of elimination those 'consumers' willing to shoulder the burdensome and costly processes . . . are likely to be the only ones 'having a sufficient interest' to challenge. . . . Always a restraining factor is the expense of participation . . . an economic reality which will operate to limit the number of those who will seek participation." *Office of Communication, United Church of Christ v. F.C.C.*, 359 F.2d 994, 1005, 1006 (D.C. Cir., 1966).

42. Fed. R. Civ. P. 23. It should be noted, however, that not every such case will be brought as a class action. While in many situations it is desirable for the plaintiff to institute a class action to assure that all members of the class will benefit from a decision against the defendant (as where termination of welfare benefits to many recipients is challenged, *e.g.*, *Serritella v. Engelman*, 339 F. Supp. 738, [D.N.J. 1972]), a case like *Mineral King* does not require a class action; for all interested persons allied with the plaintiff will automatically benefit if the injunction sought is issued.

In such situations, it may be the defendant or the court itself that desires the case to be deemed a class action, either to assure a binding effect if the defendant wins or to set the stage for promoting adequate representation. *E.g.*, *Sierra Club v. Hardin*, 325 F. Supp. 99, 104 (D. Alas., 1971) where the judge designated the case a class action on motion of a defendant. *See also* 7 Wright & Miller, *Federal Practice and Procedure*, § 1754, at 544-45. The Supreme Court appears never to have decided whether a case can be made a class action at the instance of the defendant, or by the court *sua sponte*.

If the case is not brought as a class action or cannot be made into one, the question arises whether the court is in a position to promote adequate representation. Note that in such a situation the issue is not adequate representation of the plaintiff class, but adequate representation of the broader interest that the plaintiff is litigating. While good representation of important issues is obviously desirable, there is no legal basis for requiring it, and it is, of course, quite common for very important precedents to be made in cases where one of the parties is just an ordinary "man in the street" who may or may not be skillfully represented by counsel. *E.g.*, *A. Lewis, Gideon's Trumpet*; and *Davis, The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 470 (1970). *See also* Jaffe, *supra* note 38, at 1041. In any event, the Court's user test of standing certainly does not assure quality representation of the "public interest."

As to multiple litigation of environmental controversies, the fear greatly exceeds the reality. The reason is clear: The Wilderness Society, even if not bound by *res judicata*, is not very likely to expend its limited funds to relitigate hopelessly a case the Sierra Club has just lost. *See* Comment, *Michigan Environmental Protection Act: Multiplicity of Suits*, 4 J. Law Reform 370 (1970). When the problem of duplicative litigation does arise, as happens occasionally in various formats, courts seem quite able to handle it; *see, e.g.*, *Township of Hopewell v. Volpe*, 446 F.2d 167 (3rd Cir., 1971).

43. Fed. R. Civ. P. 19 (a).

might be forgotten if standing is allowed to special interest plaintiffs, the easy solution is to allow any such users free opportunity for intervention, either as plaintiffs or defendants.

If the Court worried about the possibility of collusive suits that might bind bonafide plaintiffs, there are also well established means for dealing with that problem.⁴⁴

NO GENERAL RIGHT TO ENFORCE ALL LAWS

Nothing in what has just been said suggests that every citizen ought to be allowed to enforce every law, from initiating criminal prosecutions to enforcing private contracts. Workable distinctions can be drawn.⁴⁵ In the criminal area, where loss of personal freedom is at stake, we should maintain the practice of tempering rigorous law enforcement with compassionate restraint. This is only possible practically by retaining a broad—though not absolute—discretion not to prosecute.⁴⁶

Likewise a very liberal law of standing need not be pushed to its ultimate extreme in civil cases, where there *are* important instances of the 'best plaintiff' problem. In an ordinary contract dispute, the interests of the contracting parties are ordinarily much greater than that of any third party's⁴⁷ interest in seeing that agreements in the society are enforced. To permit wide-open citizen standing in such cases could be a serious infringement of the need to allow individuals to build flexibility into contract arrangements. Courts should experience no difficulty in distinguishing such matters from the problem of standing to sue in cases like *Sierra Club v. Morton*,⁴⁸

CONCLUSION

Perhaps the central significance of the Mineral King decision is the sense it gives that the Court sees the citizen plaintiff in such a case as essentially like the unrelated third-party who seeks to enforce a private contract between two other persons. If he is not wholly an intermeddler, the Court implies, he certainly has an interest that is inconsiderably small compared to that of the user.

44. *Hansberry v. Lee*, 311 U.S. 32 (1940).

45. Professor Jaffe suggests an approach designed to avoid empty sloganeering about standing, and to make the rules on standing responsive to the need for litigation in the matter before the court. Comment, *Standing Again*, 84 Harv. L. Rev. 633, 637-38 (1971).

46. See generally Hall, Kamisar, LaFave & Israel, *Modern Criminal Procedure*, ch. 14 (1969).

47. This does not refer to the technical third party beneficiary to a contract, but to an unrelated outsider who evinces concern about other people keeping their promises. Cf. *Nat'l Licorice Corp. v. N.L.R.B.*, 309 U.S. 350 (1940); *Natural Resources Defense Council v. TVA*, 340 F. Supp. 400, 407-08 (S.D.N.Y., 1971).

48. The distinction is made easy by the ability of the *Sierra Club* type plaintiff to point to a statute creating an explicit legal interest in members of the general public. One seeking to enforce others' private contracts would be within no such statutory zone of interest.

Thus, the Mineral King decision suggests that environmental controversies are really nothing more than struggles between developers and birdwatchers. The Court majority seems oblivious to the central message of the current environmental literature—that the issues to engage our serious attention are risks of long-term, large scale, practically irreversible disruptions of ecosystems. By denying to persons who wish to assert those issues the right to come into court, and granting standing *only* to one who has a stake in his own present use and enjoyment, the Court reveals how little it appreciated the real meaning of the test case it had before it.