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

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ULTRA VIRES STATUTES: ALIVE, KICKING, AND A MEANS OF CIRCUMVENTING THE
SCALIA\(^1\) STANDING GAUNTLET\(^2\) IN ENVIRONMENTAL LITIGATION

Adam J. Sulkowski\(^3\)

ABSTRACT

The primary purpose of this article is to provide citizen enforcers of environmental laws with an efficient tool for establishing standing. This article also significantly contributes to the literature on ultra vires statutes in corporate law by tracing their historical origins in greater detail, by clarifying terminology and summarizing recent case law that explicitly affirms the power of ultra vires statutes.

Given the scope and severity of environmental problems and 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 specific to the plaintiff that is redressable and within a statutorily-implied zone-of-interests 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. Ultra vires statutes allow a shareholder of a company to sue to enjoin the company from acts outside of what are 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.

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\(^1\) 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 landmark decisions described in section II of this paper, Scalia subsequently managed to convince a majority of his colleagues to accept his vision in several landmark decisions.

\(^2\) 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.

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CONTENTS

I. INTRODUCTION

II. STANDING IN ENVIRONMENTAL LAWSUITS
   A. The relatively new concept of standing tests
   B. The intent, text and history of citizen suit provisions
   C. Reconciling standing requirements and citizen suit provisions
   D. The Scalia standing gauntlet
   E. Plaintiffs may sometimes still survive the gauntlet
   F. Commentary on the Scalia standing gauntlet

III. ULTRA VIRES STATUTES
   A. History of the ultra vires cause of action
   B. Ultra vires statutes and corporate charters
   C. Recent precedent: the ultra vires cause of action is not just alive, but kicking

IV. USING THE ULTRA VIRES DOCTRINE TO CIRCUMVENT THE SCALIA STANDING GAUNTLET
   A. How the ultra vires doctrine would function and the benefits
   B. Rebuttals to foreseeable objections and why the ultra vires doctrine does – and should – guarantee standing

V. CONCLUSION
I. INTRODUCTION

The primary purpose of this article is to provide citizen enforcers of environmental laws with a tool for establishing and retaining standing in lawsuits against businesses. This article also significantly contributes to the literature on ultra vires statutes in corporate law by clarifying terminology and summarizing recent case law that explicitly affirms the power of ultra vires statutes.

Given the scope and severity of environmental problems and limited resources of government to investigate and enforce environmental protection laws, citizen enforcement lawsuits can play an important role in assuring that relevant statutes are obeyed.

However, as explained in Part II, since the early 1990s, this major component of federal environmental protection legislation – the right of citizens to sue to enforce the law – has been eroded. In his opinions on behalf of the U.S. Supreme Court, Justice Scalia narrowed the range of violations amenable to citizen enforcement by applying amorphous standing tests more stringently. These newly enhanced standing tests contradict the letter, spirit and historical intentions of the relevant legislation and these additional procedural hurdles create inefficiencies for all those involved in the litigation. The outcome is clear: it is less certain that citizens and public interest groups will succeed in enforcing environmental laws when the government is unwilling or unable to do so. Finally, the court opinions establishing the Scalia standing gauntlet leave sufficient room for interpretation that 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.

It should be stressed at the outset that establishing standing in no way guarantees success on the merits. 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.

4 While it is not a key point of this article, footnote 205 of this article features a brief review of respected sources asserting that there are worldwide environmental crises.


6 One scholar has gone so far as to state that “there are no consistently applied rules” of standing, that “the 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, Lujan v. National Wildlife Federation: Environmental Plaintiffs Are Tripped Up on Standing, 24 CONN. L. REV. 293, 293-294 (1991).

7 See infra Parts II.B and II.F.

8 Some litigators have managed to pass these tests to the satisfaction of the Supreme Court. See infra Part II.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).

9 See infra Part II.E.

10 Especially since the 1990s, it has become 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.
Ultra vires statutes in corporate law may provide a means of circumventing the problem of establishing standing, as explained in Part III. Though assumed to be dead or dormant, there is actually no good reason to believe that the relevant legislation of 49 states has been repealed or eliminated. Ultra vires statutes allow for the owner of a single share in a company to sue to enjoin a company for any acts outside of what are authorized by its corporate charter. Since corporations are still required to commit to only lawful activities, and do, in fact, promise to only engage in lawful activity in their charters, an individual may sue to enjoin the unlawful activities of a corporation in which the individual owns shares.

Therefore, as explained herein, plaintiffs may establish standing to sue corporate environmental malfeasors by purchasing shares in their adversaries. Consequently, the conventional standing hurdles are irrelevant. The court could then order that the illegality cease. 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. Equitable remedies such as court monitoring of the corporation could also be available. This article suggests that public interest groups adopt this strategy of purchasing shares to circumvent the Scalia standing gauntlet.

Finally, in Part IV, this article counters foreseeable objections to its thesis that ultra vires statutes can and should be used as tools in contemporary environmental litigation. 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.

Whitman, 268 F.3d 898, 904 (9th Cir. 2001) (holding 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 Daniel C. Wennogle, 5 U. DENV. WATER L. REV. 573, 588-889 (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).

11 [Text deleted intentionally to protect anonymity of author(s)] Scholars have previously used the term ultra vires doctrine. In a 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. This article and other 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, because these statutes arguably carry more weight than case law and future litigation will likely continue to cite the relevant state statutes rather than doctrine.

12 See infra Part III.
II. STANDING IN ENVIRONMENTAL LAWSUITS

A. The relatively new concept of standing tests

Standing is a relatively new concept in American jurisprudence. Until the 1930s, courts simply checked to make sure there was a cognizable legal right at stake, whether based in provisions of constitutions, common law or statutes. 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. 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. In 1948, 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. Into the 1970s, the Supreme Court stated that “Congress may enact statutes creating legal rights, the invasion of which creates standing.”

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. 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 to the U.S. Treasury. Given the failure on the part of the public sector to enforce environmental laws, Congress decided to explicitly grant citizens the right to sue to enforce the law as a supplement to conventional law enforcement. 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

14 William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 225 (1985). 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).
16 Id. Sunstein, supra note 5, at 179-180.
19 Lopez, supra note 13, 160-161. Existing means of enforcement were considered burdensome and awkward. GEORGE MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 3 (1987).
21 Lopez, supra note 13, at 160; Sunstein, supra note 5, at 183-184.
environmental pollution.” The legislative intent behind the statutory provisions is unambiguous; as one of the architects of the Clean Water Act said:

>Every 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 citizen”, 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 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, through the 1960s, the Supreme Court was yet to develop contemporary standing analysis.\(^{27}\) In the case of *Flast v. Cohen*, the Court even allowed an individual to sue for a judicial review of a decision regarding the use of taxes to subsidize a parochial school.\(^{28}\) The court developed the prudential standing test for deciding 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 override an executive branch decision through a court decision.\(^{33}\) Article III of the


\(^{24}\) MILLER, supra note 19, at 4.


\(^{26}\) Lopez, supra note 13, at 160-161. 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 340-341.

\(^{27}\) Sunstein, supra note 5, at 170 and 180-182.

\(^{28}\) 392 U.S. 83, 106 (1968).

\(^{29}\) Sunstein, supra note 5, at 170. In such cases, for example, a plaintiff was denied a broadcast license from the FCC. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1967).


\(^{31}\) Sunstein, supra note 5, at 183-192. 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 Kimberley C. Strasser, *Developments in Maryland Law: Environmental Law*, 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. Id. 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., Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 487-488 (1923).

Constitution grants the judiciary the power to resolve “cases” and “controversies” on behalf of aggrieved parties. 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.

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. Scholars tracing the Court’s approach to standing through the 1970s and 1980s frequently cite to the following cases as landmarks.

In the *Sierra Club v. Morton* decision, the court held that imminent negative impacts on “aesthetic and environmental well-being” could constitute injury-in-fact. 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. The *Sierra Club* opinion is therefore seen as a very favorable decision to environmental plaintiffs.

In *U.S. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 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. This case illustrates how far 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.

The opinions in the cases above presented 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.” 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 that suggested that trees, rivers and even entire ecosystems have standing.

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34 U.S. CONST. art. III, § 2.
36 Sunstein, *supra*, note 5 at 194.
39 The Club seemed to have been testing if the Court would find standing for generalized harms; the plaintiffs were able to subsequently amend their complaints to show standing. ZYGMENT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY*, 2d ed. 401, n.29 (1998).
40 *Strasser, supra*, note 31 at 677-678.
43 Justice Stewart, *SCRAP, supra* note 41, at 688.
44 *Sierra Club*, 405 U.S. at 742-749. Justice Blackmun filed a separate opinion in which he condoned such an approach in cases where a reputable organization like the Sierra Club professed to be litigating on behalf of the environment. *Id.* at 755-760.
D. The Scalia standing gauntlet

1. Scalia’s approach
“The long love affair between judiciary and environmental litigation is over.”45
These words, written in a law review article by then-Judge Antonin Scalia in 1983 while on the District of Columbia Court of Appeals, presaged what Brennan called Scalia’s “slash-and-burn expedition through the law of environmental standing.”46 “What’s it to you?” Scalia went on to write in his scholarly article, was the question courts should ask all plaintiffs in citizen suits to enforce environmental law.47

2. Lujan v. National Wildlife Federation48 or Lujan I

In Lujan I, the plaintiffs sought review of Interior Department decisions to grant extractive industries access to public lands.49 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.50 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 to satisfy standing tests.51 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.52

3. Lujan v. Defenders of Wildlife53 or Lujan II

In Lujan II, the plaintiffs challenged a Reagan Administration decision to reverse a Carter era regulation that had required U.S. foreign aid projects to follow the Endangered Species Act’s requirement of formal inter-agency consultations when endangered species’ habitats are placed at risk.54 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.55 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 imminent harm.56 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.”57 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

45 Scalia, supra note 1, at 884. In this article, Scalia argued in favor of stricter standing tests to defend his conception of the separation of powers.
47 Scalia, supra note 1, at 882.
49 Id. at 875.
50 Id. at 883.
52 497 U.S. 871 at 889.
54 Id. at 559.
55 Id. at 564.
57 Hays, supra note 51, at 564-565.
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.\(^{58}\)

4. *Steel Co. v. Citizens for a Better Environment*\(^ {59}\)

Scalia’s majority opinion in *Steel Co. v. Citizens for a Better Environment* further developed the redressability criterion of the standing gauntlet.\(^ {60}\) In this case, the citizen plaintiffs alleged violations of the Emergency Planning and Community Right-to-Know Act of 1986.\(^ {61}\) Scalia’s opinion again focused on the powers of the judiciary, under Article III, Section 2 of the Constitution, to decide “cases” and “controversies.”\(^ {62}\) Standing in this case turned largely on the issue of redressability.\(^ {63}\) 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.\(^ {64}\) Since violations had ceased, any injunctive relief was considered useless as a means of redressing harm.\(^ {65}\)

E. Inconsistencies and unpredictability: plaintiffs may sometimes still pass the gauntlet.

1. *Bennett v. Spear*.\(^ {66}\)

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.\(^ {67}\) The Court concluded that the Endangered Species Act obviates 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’…\(^ {68}\)

This language would appear to starkly contradict earlier edicts that generalized harms to the environment do not grant individuals standing.\(^ {69}\) The majority opinion attempts to justify this approach by asserting that the zone-of-interests test is prudential rather than Constitutional, and can therefore be expanded or abrogated.\(^ {70}\) The logic above, however, and the looser application of the 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.


\(^{60}\) Id. at 105-109.

\(^{61}\) Id. at 86.

\(^{62}\) Id. at 105-106.

\(^{63}\) Id. at 105-109.

\(^{64}\) Id.

\(^{65}\) Id. at 106-107. Scalia did not see how forcing a government agency to collect a fine would redress any possible harm the citizens may have perceived. Id. at 106-107. 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 107-108.

\(^{66}\) 520 U.S. 154 (1997).

\(^{67}\) Id. at 159.

\(^{68}\) Id. at 165.

\(^{69}\) See supra, Parts II.D.2 and II.D.3.

\(^{70}\) 520 U.S. 154, 162 (1997).
2. _Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc_.

The _Laidlaw_ decision demonstrated that plaintiffs seeking environmental protection may also sometimes still pass the standing gauntlet. 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 D. _Laidlaw_ was a somewhat surprising landmark, however, inasmuch 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. Ginsburg’s opinion clarifies that the specificity of the geographic location in _Laidlaw_ contrasted with the lack of geographic specificity in _Lujan I_. 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_. 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.

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. 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 therefore whether the plaintiffs had standing. 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. In contrast, the _Steel Co._ plaintiffs did not allege that the illegalities might resume. Consistent with the tradition of anthropocentrism, the majority confirmed that the test to establish standing is whether there has been injury to human plaintiffs, separable and distinct from their surrounding environment.

Some have faulted the logic of _Laidlaw_. 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. This critique prompted at least one observer to speculate that an avalanche of lawsuits will commence, with trial lawyers being the most significant beneficiaries. The author making this allegation failed to provide

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71 528 U.S. 167 (2000).
72 Id. at 181-185.
73 Id. at 183-184.
74 Id. at 184.
75 Id. at 181.
76 Id. at 179.
77 The nature of the pollution may have influenced the Court’s standing analysis; the Court noted that it is “of particular relevance to this case, 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 182-183.
78 Id. at 187-188.
79 Id.
80 Id. at 181. Interestingly, Ginsburg’s opinion states that having to prove an injury to the environment would be too high a hurdle.
82 Laidlaw, 528 U.S. at 198-201 (Scalia, J. dissenting).
data that would support this alarmist rhetoric.\footnote{Id.} 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.\footnote{Note, Award of Attorney’s Fees to Unsuccessful Environmental Litigants, 96 Harv. L. Rev. 677, 685-686 (1983).}

Though it did not eliminate the Scalia gauntlet, should the \textit{Laidlaw} decision be seen as somehow abrogating a strict standard of standing scrutiny? Some have argued that this is the case, calling Laidlaw a counter-revolution that loosened standing criteria.\footnote{Echeverria, supra note 81, at 294-296.} The Court appears to have thought, rather, that it was providing helpful clarifications rather than a major revision.\footnote{Laidlaw, 528 U.S. at 186.} 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.\footnote{See Echeverria, supra note 81, at 287.} 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.\footnote{See Amanda J. Masucci, \textit{Stand By Me: the Fourth Circuit Raises Standing Requirements in Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. Just as Long as You Stand, Stand By Me}, 12 Vill. Envtl. L. J. 171 (2001).}

A review of lower court cases citing to \textit{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.\footnote{Zachary D. Sakas, \textit{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, 180 (2006); twenty-seven of thirty-six opinions citing to \textit{Laidlaw} as of December 31, 2007 distinguished their cases from the fact pattern \textit{Laidlaw}. Of the remaining cases, two recognize disagreement with its holding, one called it into question and another declined to extend its holding. The \textit{Laidlaw} opinion itself acknowledged the problematic differences among circuits in their application of the Court’s standing tests. Laidlaw, 528 U.S. at 179-180. See May, supra note 5; Sakas, supra note 90.}

F. Commentary on the Scalia standing gauntlet

An immediate problem with the ambiguous and inconsistently applied standing rules is the inconsistency it has bred among federal district and appellate courts in deciding this issue.\footnote{Craig R. Gottlieb, \textit{How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns}, 142 U. Pa. L. Rev. 1063, 1139 (1994).} 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.\footnote{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 83, at 583.} Further, the will of Congress at the time of the passage of environmental statutes has effectively been blocked.\footnote{Scalia, supra note 1, at 894.} Setting aside inconsistencies in the application of recently-created standing criteria – even by their authors on the Supreme Court – provided immediately above, 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.\footnote{For a compilation of articles illustrating the shock and outrage of the environmentalist community in the wake of \textit{Lujan II}, see Donald Strong Higley, II, \textit{A Slash-and-Burn Expedition Through the Law of Environmental Standing – \textit{Lujan} v. Defenders of Wildlife}, 15 Campbell L. Rev. 347 (1993) at 364 n.122-123.} But 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.\footnote{For a compilation of articles illustrating the shock and outrage of the environmentalist community in the wake of \textit{Lujan II}, see Donald Strong Higley, II, \textit{A Slash-and-Burn Expedition Through the Law of Environmental Standing – \textit{Lujan} v. Defenders of Wildlife}, 15 Campbell L. Rev. 347 (1993) at 364 n.122-123.} 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. 96

Scalia’s restrictive approach to standing could be somewhat comprehensible if there was a flood of frivolous citizen enforcement of environmental laws, but pre-Lujan citizen enforcement actions were not frivolous in nature. 97 Statutes such as the CWA allow violators the benefit of a 60-day period to come into compliance after the finding of a violation and can therefore avoid penalties by coming into compliance with the law. 98 As mentioned above, having to cover their own costs in the event of losing and the lack of damage awards also serves as a deterrent to frivolous lawsuits in the arena of citizen enforcement litigation. 99 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.100

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.101 This legislative intent was initially recognized and honored by the courts.102 While this may now seem like a radical approach, everyone – possibly even animals, trees, mountains and the environment-as-whole – should be granted standing, with the sole question being – as it would have been until the 1970s – whether an illegality has been committed and whether Congress has created a cause of action.103 Regardless, the Scalia standing gauntlet, for better or for worse, currently exists as an unpredictable hurdle for environmental plaintiffs and defendants; the remainder of this paper will describe a more efficient means for environmental plaintiffs to establish standing.

96 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. 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, 377 n47 (2002) (citing to ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); Jonathan Schell, Vesuvius, THE NATION (Dec. 18, 2001)). Even supporters of the outcome have authored critiques of the outcome. See RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001). One of the most comprehensive and excoriating denunciations is Kim Lane Scheppel’s When the Law Doesn’t Count: The 2000 Election and the Failure of the Rule of Law, 149 U. PA. L. REV. 1361 (2001). Scheppel 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; the administrators of the test in the parodied version, however (the Knights Who Say NI) change the rules of the test (bringing a shrubbery) without advance notice to the hero (King Arthur). MONTY PYTHON AND THE HOLY GRAIL (Python Pictures 1974). 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.


98 Fotis, supra note 97, at 147-148.


100 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 n7 (1990).


103 Sunstein, supra note 5, at 182. For a more current discussion of the challenges of applying present standing rules to lawsuits concerning global climate change, see Bradford C. Mank, Standing and Global Warming: Is Injury to All Injury to None? 35 ENVTL. L. 1 (2005).
III. 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 Empire and functioned through European history, colonial American times and into our present era. The first corporations chartered specifically to engage in trade were formed in the 1500s in England and the Netherlands. 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.

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. 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.

The seminal case with regard to ultra vires cases against business corporations in England was decided by the House of Lords in 1875. In Ashbury Railway Carriage & Iron Co. Ltd. v. Riche, the House of Lords held that a company’s legal power to do business depended upon the objects clause in its charter of the city of London has been called the “most important case in English history.”

104 In Roman times, the corporate form was used for towns, guilds and colonies. COLOSSUS 6 (Jack Beatty, ed., 2001).
105 In the Middle Ages, the corporate form was used for universities, religious orders, and other so-called benevolent organizations providing civil services. Id.
106 Massachusetts and Virginia both began as trading corporations chartered by England. Id. at 18-19.
107 Corporations have come to be seen as the predominant institution of the present era. See Joel Bakan, THE CORPORATION (2004). Widely-cited statistics indicate that out of the largest 100 economies on the planet, a majority were corporations as of the early 2000s rather than countries. 70 percent of the U.S. economy was run by the Fortune 1,000 companies and 200 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. Thomas Hartmann, Unequal Protection (2002) at 37.
108 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 104, at 6. According to another, the trading companies of the Netherlands in the 1500s were among the first business associations. Hartmann, supra note 107, at 30. The East India Company founded the first colony in Jamestown by deeding property to the Virginia Company in 1606. Id. at 49.
109 Hartmann, supra note 107, at 30.
110 For example, in 1846 an English court ruled 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. Colman v. E. Counties Ry. Co., 50 Eng. Rep. 481, 487 (M.R. 1846).
111 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 so-called 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, 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 (1969) at 80. 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 has been at times used to revoke corporate charters. See Valeria Hendricks, Which Writ Is Which? A Trial Attorney’s Guide to Florida’s Extraordinary Writs, FLORIDA B. J. 46 (April, 2007); 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). 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 Dodd, American Business Corporations Until 1860 (1954) at 57-61, 181-83. 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, 239-240 (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 n17. For more on the history of quo warranto, see George Lee Haskins, Law and Authority in Early Massachusetts, A Study in Tradition and Design, 64-65 and 112-115 (1968), and Forrest G. Ferris and Forrest G. Ferris, Jr., THE LAW OF EXTRAORDINARY LEGAL REMEDIES, HABEAS CORPUS, QUO WARRANTO, CERTIORARI, MANDAMUS, AND PROHIBITION 160-176 (1926).
Primary justification for the doctrine was the dual protection of investment interests of the company's shareholders and security interests of its creditors. 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.

A brief overview of the role of corporations in colonial America helps 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 exploiting them. In the embryonic colonies of Massachusetts and Virginia, shareholder meetings were arguably incubators for representative government, with members voting their shares, choosing officers and deciding policy. 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 power. 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. 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. It was seen as an abuse of corporate lobbying power that enriched shareholders at the expense of colonialists. 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

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112 L.R. 7 H.L. 653 (1875).
115 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. WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 192-222 (1925).
116 King James complained that “the Virginia Company was a seminary for a seditious Parliament.” EDWARD NEILL, HISTORY OF THE VIRGINIA COMPANY, 185 n1 (1869).
117 COLOSSUS, supra note 104, 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. JEAN CARL HARRINGTON, GLASSMAKING AT JAMESTOWN: AMERICA’S FIRST INDUSTRY, 3 (Dietz Press, 1952); THE POLES IN AMERICA, 1608-1972: A CHRONOLOGY AND FACT BOOK 41-42 (Frank Renkiewicz, ed., 1973).
118 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 107, 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. COLLOSUS, supra note 104, 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 HOBBES, LEVIATHAN 256-57 (Oxford ed. 1909).
119 HARTMANN, supra note 107, 51-63.
120 Id. at 51-52.
121 Id. at 52.
specify in their charters their authorized range of activities and how long the corporation would exist. Specific language was included to allow state attorneys general and shareholders to sue to either dissolve the corporation for violating these terms or else to enjoin the corporation from engaging in activities outside of those specifically authorized by its charter.

During 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 and, for the same reason, an act of a corporation could be declared void. 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.

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

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124 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 powers conferred on the corporation.” Id. at 83. Another court stated simply: “[a]s 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).
126 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, 44 Cal. 89, 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.” The Use of the Quo Warranto, supra, note 111, at 58.
128 The most famous single judicial decision of this era expanding the rights of corporation was Santa Clara County v. Southern Pacific Railroad Co., which includes a headnote suggesting that the Court accepted that corporations are persons for the purpose of the 14th Amendment during oral arguments. 118 U.S. 394, 396 (1886). 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 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 107, at 95-119. Douglas Litowitz builds upon this discussion in his article Are Corporations Evil? 58 U. MIAMI L. REV. 811 (2004) at 822. 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, 210-211 (2005).
The most important explanation why ultra vires lawsuits fell out of favor was their abuse by corporations seeking to avoid contractual obligations. 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. 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. 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. Criticisms of the ultra vires doctrine have focused on this historical abuse of the doctrine as a defense in the context of contractual enforcement.

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. 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. 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. Managers now had a clear fiduciary duty to shareholders, with their discretion, choices and behavior guided by the business judgment rule. Finally, shareholder derivate suits became a substitute to ultra vires suits as a means for shareholders to enforce the obligations of managers. With all of these changes in place, corporations had vastly expanded their freedoms, allowing them to exploit opportunities to serve their shareholders. At the same time, as a result of the foregoing factors, ultra vires lawsuits became increasingly rare.

129 Greenfield, supra note 123, at 1310.
130 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 affect the viability of using the ultra vires doctrine to enjoin a company from ongoing illegaliies. Charles E. Carpenter, Should the Doctrine of Ultra Vires Be Discarded? 33 YALE L. J. 49, 52-53 (1923).
131 See, e.g., Middlesex Turnpike Corp. v. Locke, 8 Mass. 268, 271-72 (1811), (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; the rerouting was ultra vires at the time and hence the obligation to pay money was void).
132 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: “Authority of corporation s. A corporation shall have authority to do any act which is necessary or proper to accomplish its purposes, and which is not repugnant to 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.
134 Greenfield, supra note 123, at 1313.
135 David Millon, Theories of the Corporation, DUKE L. J. 201, 212 (1990). Since corporations now came to be imagined theoretically 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 104, at 45. The re-conceptualization 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 157-158.
136 Greenfield, supra note 123, at 1313.
137 Id.
139 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.140

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.141 The laws of 46 states and the District of Columbia require corporations to limit themselves to lawful activities.142 Delaware is among these 46 states; the first 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.”143 The laws of 49 states allow shareholders and state attorneys general to sue to enjoin illegal activities or to dissolve corporations in these instances.144 Interestingly, while most state laws state that state attorneys general may revoke corporate charters, Delaware law states that the Delaware attorney general shall revoke a corporate charter for illegal acts.145 The Model Business Corporation Act retains language allowing for an ultra vires cause of action.146 However much corporations may have been set free of narrow

140 COLOSSUS, supra note 104, at 134-135. 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. 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 3.15 (1st ed. 1995).

141 See ALA. CODE § 10-2B-3.01 (LexisNexis 1999); ALASKA STAT. § 10.06.005 (2004); ARIZ. REV. STAT. ANN. § 10-301 (2004); ARK. CODE ANN. § 4-26-103 (2001); CAL. CORP. CODE § 206 (Deering 2003); COLO. REV. STAT. § 7-103-101 (2004); CONN. GEN. STAT. ANN. § 33-645 (West 1997); D.C. CODE ANN. § 29-301.04 (LexisNexis 2001); DEL. CODE ANN. Tit. 8, §101(b) (2001); FLA. STAT. ANN. § 607.0301 (West 2001); GA. CODE ANN. § 14-2-301 (2003); HAW. REV. STAT. ANN. § 414-41 (LexisNexis 2004); IDAHO CODE ANN. § 30-1-301 (1999); 805 ILL. COMP. STAT. ANN. 5/3.05 (West 2004); IND. CODE ANN. § 23-1-22-1 (West 2005); IOWA CODE ANN. § 491.1 (West 1999); KAN. STAT. ANN. § 17-6001 (1995); KY. REV. STAT. ANN. § 271B.3-010 (LexisNexis 2003); LA. REV. STAT. ANN. § 12:22 (1994); ME. REV. STAT. ANN. tit. 13-B, § 201 (2005); MD. CODE ANN., CORPS. & ASS’NS § 2-101 (LexisNexis 1999); MASS. ANN. LAWS ch. 156, § 6 (LexisNexis 1996); MICH. COMP. LAWS SERV. § 450.1251 (LexisNexis 2001); MISS. CODE ANN. § 79-4-3.01 (2001); MO. ANN. STAT. § 351.386 (West 2001); MONT. CODE ANN. § 35-1-114 (2003); NEB. REV. STAT. § 21-2024 (1997); NEV. REV. STAT. ANN. § 78.030 (LexisNexis 2004); N.H. REV. STAT. ANN. § 293-A:3.01 (LexisNexis 1999); N.J. STAT. ANN. § 14A:2-1 (West 2003); N.M. STAT. § 53-11-3 (2003); N.C. GEN. STAT. § 55-3-01 (2003); N.Y. BUS. CORP. LAW § 201 (McKinney 2003); OHIO REV. CODE ANN. § 1701.03 (LexisNexis 2004); OKLA. STAT. ANN. tit. 18, § 1005 (West 1999); OR. REV. STAT. § 60.074 (2003); 15 PA. CONS. STAT. ANN. § 1301 (West 1995); R.I. GEN. LAWS § 7-1-1.3 (1999); S.C. CODE ANN. § 33-3-101 (1990); S.D. CODIFIED LAWS §§ 47-2-3 (2000); TENN. CODE ANN. § 48-13-101 (2002); TEX. BUS. ORGS. CODE ANN. § 2.001 (Vernon 2001); UTAH CODE ANN. § 16-10a-301 (2001); VA. CODE ANN. § 13.1-626 (1999); WASH. REV. CODE ANN. § 23B.03.010 (West 1994); WIS. STAT. ANN. § 180.0301 (West 2002); WYO. STAT. ANN. § 17-16-301 (2005). The only three states that do not have such language are Minnesota, North Dakota, and Vermont. See MINN. STAT. ANN. § 302A.101 (West 2004) (“A corporation may be incorporated under this chapter for any business purpose or purposes . . . .”); N.D. CENT. CODE § 10-19.1-08 (2001) (“A corporation may be incorporated under this chapter for any business purpose or purposes . . . .”). Vermont does not have such statutory language. It has specific purposes listed, but the general purposes section—Title 11, §41—was repealed in 1971. VT. STAT. ANN. tit. 11, § 41 (repealed 1971).


143 Only North Dakota does not provide its attorney general with the power to revoke charters. See N.D. CENT. CODE § 10-19.1-08 (2001). See Schaeflter, supra note 133, 85 n9.


(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 ....

(c) In shareholder's proceeding under subsection (b)(1) to enjoin an unauthorized corporate act, the court may enjoin or set
constraints on their power, the language that allows for ultra vires lawsuits has not been scrubbed from state statutes.147

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 for which a corporation may be organized” under California law.148 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.149 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.”150 The foregoing examples of the promise to only engage in lawful behavior in statutes and charters do not have teeth if courts do not enforce them. The next section of this article therefore 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

As far as precedent cases are concerned, since the heyday of the ultra vires doctrine, as exemplified in Bank of Augusta v. Earle,151 there have been no cases holding that ultra vires provisions in state incorporation laws are somehow not valid and enforceable. 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.152 The poison pill provision resulted in some shareholders being treated differently than other holders of the same class of shares.153 New Jersey law prohibited discriminatory treatment of individuals within the same class of shareholders.154 Shareholders therefore argued that the adoption of the poison pill provision was ultra vires.155 The United States District Court for the Southern District of New York accepted this logic and granted the requested injunction.156 This case indicates that the ultra vires doctrine is alive and functioning.157

In similar cases, courts in other jurisdictions have decided that, as a matter of their state law, poison pill provisions are not illegal.158 However, the opinions in these cases do not deny the existence

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147 See MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS, 129 (8th ed. 2000), at 129 (stating that § 3.04 “almost (but not quite) abolish[es] the doctrine.”).
148 Union Oil Co. of Cal., Restated Articles of Incorporation, art. II (June 29, 1994).
149 Nike, Inc., Restated Articles of Incorporation, art. III (Sept. 23, 2005).
151 38 U.S. 519, 587 (1839).
153 Id. at 1234.
154 Id. at 1234.
155 Id. at 1230.
156 Id. at 1240.
157 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 Industries, 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: “‘an unlawful device,’ and was ‘Ultra vires as a matter of New Jersey business corporation law.’” Id. at 89.
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. Popular belief notwithstanding, courts continued to acknowledge the limits of corporate powers through the 1900s.

A review of case law from 1997-2008 only 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. Also in 2000, the Court of Civil Appeals of Oklahoma in 2000 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.”

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. One more affirmation some acts – including illegal acts – are ultra vires and may be subject to an injunction is in Multimedia Patent Trust v. Microsoft Corp., decided by the Federal District Court for the Southern District of California using Delaware law in 2007. In 2008, the Federal Court for the North 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. 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 provided support for this conclusion with a review of Delaware law, to which this article next turns.

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 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; ultra vires acts cannot lawfully be accomplished in any case. Also in 1999, the

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159 Id. at 808-809.
160 See, e.g., Trico Elec. Co-op., Inc. v. Corporation Commission of Ariz.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 its [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. Co-op., Inc. v. Ralston, 196 P.2d 470, 475 (Ariz. 1958).
161 Tomhegan Camp Owners Ass’n v. Robert Murphy et. al., 754 A.2d 334, 335-336 (Me. 2000) (citing to 13-B M.R.S.A. § 203 (1981)). The court rejected the argument that a non-profit corporation lacked standing to sue where the dispute concerned unauthorized transactions.
163 Shoen v. SAC Holding Corp., 137 P.3d 1171, 1186 n70 (Nev. 2006).
164 525 F.Supp.2d 1200, 1216 (S.D. Cal. 2007) (citing to Solomon v. Armstrong, 747 A.2d 1098, 1114 (Del. Ch. 1999)).
166 The court found that the compensation received by Hewlett Packard CEO Carleton (“Carly”) Fiorina was not ultra vires, in that it was not outside the authority of the board to exercise discretion in deciding upon it. Id.
167 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 United States 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.
168 Harbor Finance 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 Chancery court’s earlier opinion in Michelson v. Duncan, which could be interpreted
Delaware Chancery Court observed that “[i]n the context of 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.”

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. In a 2005 decision, the Delaware Chancery Court held that ultra vires acts are “illegal acts or acts beyond the authority of the corporation.”

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 of international legal norms in its involvement with oil extraction in Burma and the attendant use of forced labor. While Attorney General Bill Lockyer declined the request, he did affirm the power of the attorney general to revoke corporate charters. 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.

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173 Id.
IV. THE ULTRA VIRES DOCTRINE AS AN END-RUN AROUND THE SCALIA STANDING GAUNTLET

A. How the ultra vires doctrine would function and the 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. 175 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. 176

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. 177 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. 178 Moreover, the damages were not adjusted to take into account that the violation of law had been a profitable decision. 179 Courts in other jurisdictions have similarly found that executives can be held personally liable for ultra vires acts. 180 Therefore, there is precedent to suggest that a shareholder could ask that the appropriate fines be assessed and that they be paid by the executives or directors who authorized the illegal acts.

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 sentinels can protect the corporation from the negative consequences of ultra vires activities. They do. 181

175 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 174.
176 See Greenfield, supra note 123, at 1351-1360.
177 118 N.Y.S. 351 (Sup. Ct. Erie County 1909).
178 Id. at 353.
179 Id.
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 plaintiff’s 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 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.182

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, 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 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 be 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 two-fold mandate to (1) encourage socially or environmental responsibility and (2) preserve the long-term value of its investments. The New York City Employees’ Retirement System (NYCERS), Walden Asset Management, ISIS Asset Management and Trillium Asset Management Corporation, for example, precisely fits 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.183

182 See supra Part IV.A.
183 Adam J. Sulkowski and 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-
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 willing to invest money to stop corporate misconduct. Therefore, communication and coordination with existing concerned investors is another approach that environmental plaintiffs should consider. Because no money damages are sought from the corporation, and given the willingness of concerned investors to expend resources to rein-in 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 illegalsities 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, the burden of proof ought to be on the company managers to prove that a pattern of ongoing illegalsities will not eventually result in lower share value. In other words, it seems more likely that ongoing illegalsities, 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. 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 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 46 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 49 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.

6. The U.S. Constitution requires that ultra vires lawsuits be available to all shareholder plaintiffs


184 Press Release, Social Investment Forum, Report: Socially Responsible Investing Assets in U.S. Surged 18 Percent From 2005 To 2007, Outpacing Broader Managed Assets (March 5, 2008). http://www.socialinvest.org/news/releases/pressrelease.cfm?id=108 (last visited October 1, 2008). From 2005 to 2007, Socially Responsible Investment (SRI) assets grew more than 18 percent while all investment assets under management edged up by less than 3 percent. Id. $2.71 trillion in total assets are under management using one or more of three SRI strategies - screening, shareholder advocacy, and community investing. Id. In the past two years, social investing grew from $2.29 trillion documented in 2005. Id. In 2008, nearly one out of every nine dollars under professional management in the United States today is involved in SRI. Id.


186 See Greenfield, supra note 123.
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 a 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. 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.

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. The 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. 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 or business law or ethics courses in business schools to point out executives do occasionally look at a cost-benefit analysis to determine if following the law makes sense. Some scholars support this theoretical framing of law-as-price, placing the duty to maximize price ahead of the duty to obey the law. If this is the case, the profits to be gained from a violation of law exceed the cost of the fine or other liabilities, then a manager would have the duty to break a 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. The basis for this theoretical approach – placing the duty to maximize 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.

9. Other arguments grounded in policy, ethical reasoning and respect for state legislatures

187 U.S. CONST. amend. XIV, § 1.
188 See Dunne, supra note 100, at 43-45.
189 See, e.g., TONY MCDAMDS ET AL., LAW, BUSINESS AND SOCIETY, 40 (2006).
192 See Greenfield, supra note 123 at 1298-1299.
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. These works have already presented theoretical foundations for the conclusion that the 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. 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, revoke the 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 nor 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. Surely no one – without knowing ahead of time who they would be in a society, or ex ante – would want other people or entities to be empowered to break laws. If one then adds factors 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 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. Illegalities of all sorts are commonly acknowledged, ongoing, yet are not remedied or corrected by any government authority. This fact adds weight to the argument that courts should recognize this clearly available mechanism for citizen law enforcement efforts through corporate law statutes.

[194] This perspective is described in greater detail by Kent Greenfield, supra note 123, at 1291-1293.
[197] Stephen Fotis documents the historical decline in political will and resources to enforce environmental laws in his comment, Private Enforcement of the Clean Air Act and the Clean Water Act, 35 AM. U. L. REV. 127, 149-150 (1985). In 1982 and 1983, the EPA's budget was reduced by one-third and enforcement attorneys were cut 85% from 200 to 30; “crippling” organizational changes and attitudes of appointees further limited the EPA’s enforcement activities. Id. at 130-131 n15. 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 EPA against polluters dropped from 2,139 to 1,129. Id. at 130 n14.
[198] 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 62 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—SECOND SURVEY OF CORPORATE AMERICA'S ACCOUNTING FOR ENVIRONMENTAL COSTS, 10-11 (1992). A 1996 academic study found a 54 percent non-reporting rate for known CERCLA potentially responsible parties (PRPs) in initial public offering registration statements and there is a 61 percent non-reporting 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 n.187 (citing to Memorandum from Mary Kay Lynch, Director, EPA Office of Planning and Policy Analysis, and Eric V. Schaeffer, Director, EPA Office of Regulatory Enforcement, to Office of Enforcement and Compliance Assurance Directors, et al. (Jan. 19 2001)). A governmental study found that 74% of corporations in its sample fail to comply with disclosure requirements. Id. at 410 n.188
V. CONCLUSION

This article has highlighted a tool that citizen plaintiffs in environmental litigation may use to establish and retain standing. In doing so, this article has contributed to recent scholarly literature of ultra vires lawsuits by tracing their historical origins in greater detail, clarifying terminology and by reviewing recent court opinions 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 briefly highlight 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. 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. 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 are an important piece of the puzzle. The worldwide and observable scope of environmental problems shows-up recently revised and stricter standing tests to be somewhat silly academic exercises which are dangerously out-of-touch with the realities of an urgent global crisis.

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 may be possible

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199 A consensus indicator statistic on the state of 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 65 million years. TERRY GLAVIN, SIXTH EXTINCTION 1 (2006). See PAUL R. EHRLICH AND ANNE H. EHRLICH, EXTINCTION (1981); RICHARD LEAKEY AND ROGER LEWIN, THE SIXTH EXTINCTION (1996); DAVID TAKACS, THE IDEA OF BIODIVERSITY (1996); DUGALD STERMER, VANISHING FLORA (1995); E.O. WILSON, THE CREATION, AN APPEAL TO SAVE LIFE ON EARTH (2006); E.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. IPCC FOURTH ASSESSMENT REPORT, 48-54 (2007). Rising sea level, an observable effect of global climate change, has already permanently displaced 500,000 people in Bangladesh, among the low-lying countries that are beginning to feel these impacts. Emily Wax, In Flood-Prone Bangladesh, a Future That Floats, WASHINGTON POST, September 27, 2007, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/09/26/AR2007092602582.html (last visited October 8, 2008).

200 For example, by 2015, the number of people in water-stressed countries (having less than 1,700 cubic meters of water per capita per year) will increase to 3 billion; this trend is attributable to extremely water-intensive agricultural practices. CENTRAL INTELLIGENCE AGENCY, GLOBAL TRENDS 2015, 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 word. Id. at 31.

201 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 II.C, has been suggested before. Gary L. Francione, Animal Rights and Animal Welfare, 48 RUTGERS L. REV. 397, 461-62 (1996). See Manus, supra note 10; 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 II.C, Justice William Douglas’ dissent in Sierra Club v. Morton 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. 405 U.S. 717, 742-749.
to also 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 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 strict-yet-unpredictably-applied Scalia standing gauntlet should be over 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 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 that this be so.