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A Critical Look at Michigan Citizens for Water Conservation v. Nestle Waters North

America & the Michigan Supreme Court's Recent Jurisprudence

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*"It is a tragic day for Michigan."*²

INTRODUCTION

From timber to iron ore, and from copper to freshwater, Michigan is well known for its abundant natural resources.³ As a result being endowed with these good fortunes, Michigan was one of the early pioneers of environmental reform.⁴ Reflective of this environmental stewardship, the Michigan State Constitution succinctly states that "[t]he conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people."⁵ The state constitution then goes on to textually demand that "[t]he legislature *shall* provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."⁶ To help reach this end, as required by the Michigan State Constitution, the Michigan legislature enacted the Michigan Environmental Protection Act ("the MEPA" or "MEPA"). As an integral component of the MEPA, which had been uniformly upheld for over thirty years by Michigan's courts,⁷ the legislature expressly allowed "*any person*" to enjoin

² Justice Weaver concluded her opinion in Nestle with this observation. See Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280 (2007).

³ <http://www.legislature.mi.gov/documents/Publications/NaturalResources.pdf>

⁴ Joseph F. Castrilli, Environmental Rights Statutes in the United States and Canada, 9 Vill. Envtl. L.J. 349, 354-55 (1998).

⁵ MICH. CONST. of 1963, art. IV, § 52.

⁶ *Id.*

⁷ Mich. Comp. Laws § 324.1701(1) (stating that "The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction"); Mich.

polluters in state court.⁸ Regardless of the constitutional mandate, the Michigan Supreme Court—in its characteristic indifference to past precedent⁹—has recently invalidated the citizen suit provision in MEPA that it had previously accepted for nearly thirty years.¹⁰

The Michigan Supreme Court—through its “majority of four”¹¹—was able to reach this result by drastically and systematically changing Michigan’s standing jurisprudence. Until 2001, there was no question that the test for standing in Michigan was merely prudential, and the test could be changed by legislative or judicial prerogative.¹² In 2001, however, the Michigan Supreme Court adopted the federal test for standing and agreed with the United States Supreme Court that standing is a constitutional requirement. As such, the Michigan Supreme Court warned that “citizen suit” provisions—like the one in the MEPA—will likely not pass constitutional muster.¹³ In Michigan Citizens for Water Conservation v. Nestle, a 2007 Michigan Supreme Court case, the same four Justices took the opportunity to confirm what it had earlier hinted:

Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280, 317 n. 19 (2007) (Weaver, J. dissenting) (stating that MEPA’s citizen suit provision has been unquestioned for thirty years).

⁸ See *Id.*

⁹ See Part Four (discussing the Michigan Supreme Courts habit of ignoring stare decisis).

¹⁰ See Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280 (2007) (discussed at length *infra*).

¹¹ See Dissent to Election of Chief Justice Clifford Taylor as Chief Justice (Jan. 5, 2007) (Weaver, J., dissenting), available at http://www.justiceweaver.com/pdfs/1-5-07_DissenttoCJ.pdf (Justice Weaver coined the phrase “majority of four.” She was referring to Chief Justice Taylor, and Justices Corrigan, Young and Markman); see also Biography of the Justices, <http://www.courts.michigan.gov/supremecourt/AboutCourt/biography.htm> (last visited Feb. 2, 2007) (providing biographies for the current Michigan Supreme Court justices).

¹² See *supra* note 5.

¹³ See generally Lee v. Macomb Co. Bd. of Comm'rs, 464 Mich. 726 (2001)

the MEPA's citizen suit provision cannot confer standing unless the plaintiff meets Michigan's *new* constitutionally required test for standing, regardless of the constitution's unequivocal demand that the legislature protect the environment.

This holding is problematic in many ways. First, the Michigan Supreme Court abandoned *stare decisis* by invalidating a provision that had been upheld for over thirty years and by abandoning Michigan's historic standing requirements.¹⁴ Second, the Michigan Supreme Court imported *federal* constitutional standing requirements into the *state* constitution even though there are many differences between the two documents.¹⁵ Third, the Michigan Supreme Court unequivocally declared that standing is a constitutional requirement for any tripartite government; however, the Court failed to acknowledge that *a majority* of states hold that the requirement is merely *prudential*.¹⁶

¹⁴ See *supra* note 5.

¹⁵ See *House Speaker v. State Administrative Bd.*, 441 Mich. 547, 559 n. 20 (1993) (stating that “[o]ne notable distinction between federal and state standing analysis is the power of this Court to issue advisory opinions.”)

¹⁶ Currently 26 states have rejected standing as a constitutional doctrine. For cases that support this general proposition, see generally *Gilbert M. v. State*, 139 P.3d 581, 586 (Alaska 2006); *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 (Ariz. 2005); *County Market v. Thornton*, 27 Ark. App. 235, 240 (Ark. Ct. App. 1989); *Morascini v. Commission of Public Safety*, 1991 Conn. Super. LEXIS 3071 (Conn. Super. Ct. 1991); *Stuart Kingston v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991); *Sierra Club v. DOT*, 115 Haw. 299, 319 (Haw. 2007); *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus*, 127 Idaho 239, 241 (Idaho 1995); *Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 869 (Iowa 2005); *Nichols v. Kansas Governmental Ethics Comm'n*, 28 Kan. App. 2d 524, 532 (Kan. Ct. App. 2001); *Roop v. City of Belfast*, 2007 ME 32 (Me. 2007); *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007); *City of Picayune v. Southern Reg'l Corp.*, 916 So. 2d 510, 525-526 (Miss. 2005); *State ex rel. Williams v. Mauer*, 722 S.W.2d 296, 298 (Mo. 1986); *Neb. Coalition for Educ. Equity & Adequacy v. Heineman*, 273 Neb. 531, 546 (Neb. 2007); *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 135 P.3d 220 (Nev. 2006); *Baca v. N.M. Dep't of Pub. Safety*, 132 N.M. 282, 284 (N.M. 2002); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 812 (N.Y. 2003); *Goldston v. State*, 361 N.C. 26 (N.C. 2006); *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, P65 (N.D. 2001); *Kuhar v. Medina County Bd. of Elections*, 2006 Ohio 5427, P7 (Ohio Ct. App. 2006); *Keating v. Johnson*, 1996 Ok. 61 (Okla. 1996); *In re Hickson*, 573 Pa.

Fourth, the adopted Lujan test is not any easier to apply than the prior prudential test, which was one of the motivations for its adoption by the Michigan Supreme Court. Lastly, the Nestle holding erodes a powerful enforcement tool – citizen suits – and makes it very difficult for many polluters to be enjoined.

The purpose of this Paper is to illustrate that the Michigan Supreme Court reached the wrong conclusion in Nestle. It will further be suggested that something other than sound judicial reasoning is driving the Michigan Supreme Court's decisions—namely, judicial politics and questionable judicial activism. Part One of this Paper will summarize federal and Michigan standing requirements. Part Two of the paper will pithily summarize MEPA and its history. Part Three of this Paper will summarize and analyze the Court's decision in Nestle. Part Four will explore the idea that the Michigan Supreme Court has not been deciding cases based on sound judicial reasoning. More specifically, it appears that the court used standing to make it harder for plaintiffs to get to court. Part Four will also illustrate that the Michigan Supreme Court has moved Michigan in to the minority of states that hold that standing is a constitutional requirement. Lastly, Part Four will illustrate that the Lujan test is not easy to apply, and should not have replaced the discretionary prudential standard. Part

127 (Pa. 2003); *In re Northern States Power Co.*, 328 N.W.2d 852, 855 (S.D. 1983); *Provo City Corp. v. Willden*, 768 P.2d 455, 457 (Utah 1989); *State ex rel. First Nat'l Bank v. M & I Peoples Bank*, 95 Wis. 2d 303, 309 (Wis. 1980); *see also* Part Four for a discussion of the significance of this jurisprudence.

Five will propose a constitutional amendment that will remedy the Court's holding in Nestle.

I. CITIZENS SUITS AND STANDING

Standing is the justiciability¹⁷ doctrine that helps determine whether a person is the appropriate party to bring a matter before a particular tribunal.¹⁸ Who, however, should be allowed to make this determination—the legislature, the courts, or both? As a matter of sound policy, someone has to limit who can bring a complaint; otherwise, there could be a flood of litigation caused by persons bringing causes of action that they have no real stake in.¹⁹ Confusion often arises, however, when legislatures create new causes of action, create new rights, or confer standing on large classes of persons because courts are uncertain whether this creates a justiciable injury in fact. More specifically, this confusion appears because many courts require that there be “an actual”²⁰ or “imminent injury,”²¹ and the courts inconsistently determine whether legislatures can dispense with this requirement. In addressing this problem, Professor

¹⁷ Blacks Law Dictionary defines justiciability as “[t]he quality or state of being appropriate or suitable for adjudication by a court.” See also 13 Charles Alan Wright et al., *Federal Practice and Procedure* § 3529, at 278-79 (2d ed. 1984) (stating that “[c]oncepts of justiciability have been developed to identify appropriate occasions for judicial action.... The central concepts often are elaborated into more specific categories of justiciability -- advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions.”).

¹⁸ Erwin Chemerinsky, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 60 (2nd ed. 2002).

¹⁹ However, it seems debatable that this would be the actual case. Lawsuits are time consuming and expensive, and it is quite possible that only persons with a genuine interest will bring cause of action.

²⁰ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

²¹ *Id.*

Chemerinsky noted that the standing jurisprudence surrounding citizen suit provisions is one of the most confused areas in all of the law.²²

A. CONSTITUTIONAL & PRUDENTIAL STANDING IN THE FEDERAL COURTS ADDRESSING CITIZEN SUIT PROVISIONS: A QUAGMIRE OF CONTRADICTIONS

In the federal courts, if a plaintiff cannot show that she has standing, her case will be dismissed. As the United States Supreme Court has stated, this requirement stems from both the “cases” and “controversy”²³ clause of article III and the constitution’s overall structure that emphasizes separation of powers.²⁴ The United States Supreme Court has articulated several reasons why plaintiffs must have standing to bring suit under the federal constitutional architecture. First, by limiting what cases federal courts can hear, the doctrine of standing promotes separation of powers.²⁵ Second, federal standing jurisprudence promotes judicial efficiency because only persons that meet the test can sue in federal court.²⁶ Third, standing helps ensure

²² Chemerinsky, *supra* note 16, at 60.

²³ See U.S. CONST. art. III, § 2 (stating that:

The judicial power shall extend to all *cases*, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all *cases* affecting ambassadors, other public ministers and consuls;--to all *cases* of admiralty and maritime jurisdiction;--to *controversies* to which the United States shall be a party;--to *controversies* between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.)

(emphasis added).

²⁴ See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). (stating that the case or controversy requirement is the primary source of this rule).

²⁵ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881 (1983) (stating that standing is directly derived from the separation of powers); see also Chemerinsky, *supra* note 16, at 60.

²⁶ *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J. Concurring).

vigorous advocacy by requiring that the person bringing suit has a personal stake in the outcome.²⁷ Fourth, standing protects third parties from having their rights litigated by persons with no concrete interest in the outcome of the litigation.²⁸

With the above policies in mind, federal courts have struggled to establish a coherent body of law that clearly and rationally explains and justifies standing.²⁹ As a result, there is now a complex set of both constitutional and prudential requirements that plaintiffs must satisfy, both of which are often inconsistently applied.

Standing's constitutional requirements are derived directly from Article III of the constitution and cannot be waived by congress, the courts, or the parties; these requirements are summarized below.³⁰ Also, the Supreme Court of the United States has articulated three important prudential requirements. These requirements are not derived from the "cases" or "controversies" clause; rather, they are derived from prudent judicial administration.³¹ Unlike their constitutional counterparts, prudential requirements can be overridden by an act of congress.³² Currently, there are three key prudential requirements in federal courts; they are: (1) A prohibition on raising third-

²⁷ Baker v. Carr 369 U.S. 186, 204 (1962) (stating that "such a personal stake in the outcome . . . assure[s] . . . concrete adverseness . . .").

²⁸ Chemerinsky, *supra* note 16 at 62.

²⁹ Compare Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) and Warth v. Seldin, 422 U.S. 490 (1975), with Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) and FEC v. Akins, 524 U.S. 11 (1998).

³⁰ Chemerinsky, *supra* note 16 at 62.

³¹ Chemerinsky, *supra* note 16 at 63.

³² *Id.*

party claims;³³ (2) A prohibition on generalized grievances as a taxpayer or citizen suits;³⁴ and (3) A requirement that the plaintiff be within “the zone of interests” protected by the statute.³⁵

For the constitutional requirements, in Lujan v. Defenders of Wildlife,³⁶ the United States Supreme Court laid out the minimal *constitutional* requirements for standing in the federal courts.³⁷ These constitutional requirements can be distilled down to three key elements.³⁸ First, the plaintiff must have suffered an “injury in fact” - an invasion of a legally protected interest that is “concrete and particularized,” and “actual or imminent,” not “conjectural” or “hypothetical.”³⁹ Second, there must be a causal connection between the injury and the conduct complained of; in other words, the injury has to be “fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.”⁴⁰ Lastly, it must be “likely,” as opposed to merely speculative, that the injury will be

³³ See generally Lujan v. Defenders of Wildlife, 504 U.S. 555, 592 (1992) (citing cases); see also Chemerinsky, *supra* note 16 at § 2.5.

³⁴ See generally United States v. Richardson, 418 U.S. 166 (1974); see also Chemerinsky, *supra* note 16 at § 2.5.

³⁵ See generally Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Chemerinsky, *supra* note 16 at § 2.5.

³⁶ At least one commentator has stated that Lujan’s test was basically “made up.” See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries” and Article III*, 91 MICH. L. REV. 163, 185 (1992).

³⁷ Lujan v. Defenders of Wildlife, 504 U.S. 555, 592 (1992).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

“redressed by a favorable decision.”⁴¹ Unless a plaintiff can satisfy these three prongs, their case will be summarily dismissed.

When applying the above Lujan criteria, the difficulty arises when the constitutional “injury in fact” requirement collides with congress’ allowance of citizen suits.⁴² As a result of this collision, the United States Supreme Court has crafted an inconsistent and troubling body of jurisprudence. Out of these three elements, the crux most often is satisfying the “actual injury” requirement. As will be discussed *infra*, in a series of United States Supreme Court cases, the Court handed down several arguable inconsistent holdings addressing this issue.⁴³ And, as the Court itself has said, “[w]e need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency”⁴⁴

B. STANDING IN MICHIGAN: FROM ITS HUMBLE PRUDENTIAL BEGINNING TO ITS RECENT CONSTITUTIONAL REBIRTH

Unlike federal standing jurisprudence, Michigan’s law on standing—until its recent adoption of the Lujan⁴⁵ test—was wholly prudential.⁴⁶ This was—and still is—

⁴¹ *Id.*

⁴² The Supreme Court of the United States has struggled with this problem. Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), with *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167 (U.S. 2000).

⁴³ See Part Four.

⁴⁴ *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982).

⁴⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁴⁶ See generally *Lee v. Macomb County Bd. of Comm'rs*, 629 N.W.2d 900, 909 (Mich. 2001) (Weaver, J., Concurring); Susan J. Mahoney, *Muddying the Waters: The Effect of the Cleveland Cliffs Decision and the Future of the MEPA Citizen Suit*, 83 U. DET. MERCY L. REV. 229, 232 (2006).

because there are major structural, textual, and historical differences between the Michigan and Federal constitutions. For instance, Michigan's constitution does not contain a "cases" or "controversies" provision.⁴⁷ Further, unlike its federal counterpart, Michigan's constitution expressly allows advisory opinions, which have been consistently held unconstitutional under federal law.⁴⁸ Largely because of these real differences, until Lee was decided in 2001, the Michigan Supreme Court described standing merely as "a legal term used to denote the existence of a party's interest in the outcome of the litigation that will ensure sincere and vigorous advocacy Standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected"⁴⁹ In fact, there is not one pre-Lee case that linked Michigan's standing doctrine to the state constitution; however, there are several cases that describe the doctrine as being merely prudential.⁵⁰

⁴⁷ Compare MICH. CONST. of 1963, with U.S. CONST. art. III, § 2.

⁴⁸ Compare MICH. CONST. of 1963, art. III § 8 (stating that "Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality."), with U.S. CONST. art. III, § 2 and *Hayburn's Case*, 2 U.S. 409 (1792) (interpreting Article III of the federal constitution to prohibiting Article III courts from giving advisory opinions). of legislation after it has been enacted into law but before its effective date.")

⁴⁹ *House Speaker v. Governor*, 495 N.W.2d 539 (Mich. 1993); see also *City of Detroit Downtown Dev. Auth. v. US Outdoor Adver., Inc.*, 742 N.W.2d 133 (Mich. 2007) (stating that the pre-Lee test for standing was purely prudential); *Rohde v. Ann Arbor Pub. Sch.*, 479 Mich. 336, 370 (Mich. 2007) (stating that "[t]he prudential standing test is a long-established test that was used by this Court to provide a standard for litigants to meet in order to have standing to sue.).

⁵⁰ See generally *Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, 479 Mich. 280, 317 (Mich. 2007) (dissenting opinion) (citing *Ray v Mason Co Drain Comm'r*, 393 Mich. 294, 305; 224 N.W.2d 883 (1975) (stating that MEPA grants standing to "any person" has been unquestioned for more than 30 years); *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich. 741; 275 N.W.2d 538 (1979); *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich. App. 495; 320 N.W.2d 668 (1982); *Trout Unlimited, Muskegon-White River Chapter v White Cloud*, 195 Mich. App. 343; 489 N.W.2d 188 (1992); *Nemeth v Abonmarche Dev, Inc*, 457 Mich. 16; 576 N.W.2d 641 (1998)

This all changed—for reasons which are likely not rooted in sound judicial reasoning—in 2001.⁵¹ In Lee, a majority of the Michigan Supreme Court abandoned its prior prudential test for a constitutional test modeled after federal law. In its place, the Court adopted the Lujan test outlined above. In reaching this conclusion, the Court agreed with the United States Supreme Court in its belief that there are constitutional components to standing. The Michigan Supreme Court stated that “[i]t is important . . . to recognize that in Michigan, as in the federal system, standing is of great consequence so that the neglect would imperil the constitutional architecture.”⁵² All this drama aside, the Michigan Supreme Court could not cite one Michigan decision that elevated standing to this omnipotent stature; rather, the Court was forced to rely wholly on non-binding federal law.⁵³ Possibly realizing this potential vulnerability, the Court pithily declared that the Michigan Constitution clearly states that courts exercise the “judicial power”;⁵⁴ as such, the Court held, even though it had never held so in the past, standing is “clearly” integral to the Michigan Constitution.⁵⁵ The Court reasoned that this result is dictated by the existence of a tripartite government.⁵⁶ As will be illustrated *infra*,

⁵¹ See *Lee v. Macomb Co. Bd. of Comm'rs*, 464 Mich. 726 (2001).

⁵² *Id.* at 735.

⁵³ *Id.* The decision is entirely devoid of any citation to prior Michigan case law supporting this belief.

⁵⁴ *Id.* Is there one state where the courts exercise anything but “judicial power?” The author proposes that the answer is no.

⁵⁵ *Id.*

⁵⁶ *Id.*

however, a majority of states disagree and many respected constitutional scholars disagree, as well.⁵⁷

The Lee majority also stated that it was important to adopt the Lujan test for a pragmatic reason—namely: The prior prudential test was unworkable.⁵⁸ In explaining why the federal test was superior, the Court stated that “further explication of the essential elements of standing has proven difficult.”⁵⁹ Influenced by this belief, the Court adopted Lujan. As will be illustrated in Part Five, however, the nation’s leading constitutional law scholars have stated that the *federal test* is very opaque and problematic. For instance, Professor Vining stated that it is impossible to read federal standing decisions “without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate.”⁶⁰

The preceding discussion is important for several reasons. First and foremost, if standing is only a prudential requirement, the Michigan State Legislature can grant standing for any reason that it sees fit.⁶¹ This is common in environmental statutes and other remedial statutes where citizen attorney generals will zealously protect vital

⁵⁷ However, if this were the case, twenty six other states would not have rejected this argument. *See supra* note 14; *see also* Part Four.

⁵⁸ *Lee v. Macomb Co. Bd. of Comm'rs*, 464 Mich. 726, 739 (2001).

⁵⁹ *Id.*

⁶⁰ Chemerinsky, *supra* note 16 at 60 (quoting Professor Vining).

⁶¹ *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) (stating that “courts have discretion to waive a prudential requirement.”)

public interests.⁶² If it is a constitutional requirement, however, any grant of standing that does not meet the federal Lujan test will be unconstitutional, regardless of the legislature's intent.

C. The Rise and Fall of the Michigan Environmental Protection Act

The 1960s witnessed one of the greatest proliferations of statutes designed to protect the environment.⁶³ During this time, there were several factors that contributed to Michigan's enactment of the MEPA. These were: (1) the increased evidence of environmental damage from industry; (2) the inability or lack of desire of Michigan's government to prevent such damage; (3) the regulatory agencies' lack of ambition and deference to industry⁶⁴; and (4) the growth of proactive environmental organizations.⁶⁵

The drafter of the MEPA—Professor Sax⁶⁶—stated that the primary motivations for adopting the MEPA were to: “(1) to recognize the public right to a ‘decent environment’ as an enforceable legal right; (2) to make this right enforceable by private citizens suing as members of the public; and (3) to set the stage for the development of a

⁶² See generally *Cox v. City of Dallas*, 256 F.3d 281, 290 (5th Cir. 2001) (stating that “citizen suit provisions are common in environmental statutes.”).

⁶³ Heather Terry, *Still Standing but “Teed Up,”* 2005 MICH. ST. L. REV. 1297, 1301 (2005).

⁶⁴ As the Michigan Supreme Court stated “Not every public agency proved to be diligent and dedicated defenders of the environment.” *Ray v. Mason County Drain Comm'r*, 393 Mich. 294, 305 (1975).

⁶⁵ Joseph F. Castrilli, *Environmental Rights Statutes in The United States and Canada*, 9 VILL. ENVTL. L.J. 349, 358-359 (internal citations omitted).

⁶⁶ Professor Sax is a retired professor who taught at the University of Michigan, Boalt, Stanford, and numerous other institutions. He is regarded as one of the preeminent environmental law scholars in the nation. Professor Sax also served as counsel to the Secretary of the Interior during the Clinton Administration. See generally School of Law – Boalt Hall, Faculty Profiles, available at <http://www.law.berkeley.edu/faculty/profiles/facultyProfile.php?facID=141>.

common law of environmental quality.”⁶⁷ Professor Sax further believed that MEPA was a tailored and direct response to Michigan’s constitutional mandate to protect Michigan’s environment.⁶⁸ Professor Sax stressed that a key provision allowed citizen enforcement in addition to government enforcement; this would help to ensure that environmental wrongs were redressed.⁶⁹ In the face of strong opposition from Michigan businesses, Professor Sax’s bill was passed by the House and the Senate.⁷⁰ Remarkably, the final version of the MEPA was almost identical to Professor Sax’s draft.⁷¹ Republican Governor William Milliken signed the bill on July 27, 1970, and the bill became effective October 1, 1970.⁷²

As enacted, the MEPA allows “any person” to file suit in circuit court for declaratory or equitable relief in order to protect the environment from “pollution, impairment or destruction.”⁷³ For a plaintiff to prove a *prima facie* case under the MEPA’s citizen suit provision, they must demonstrate that the defendant’s conduct has caused, or is likely to cause, pollution, impairment or destruction of “the air, water, and other natural resources and the public trust in these resources.”⁷⁴ The defendant,

⁶⁷ *Id.* at 361 (internal citations omitted).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Joseph H. Thibodeau, *Michigan’s Environmental Protection Act of 1970: Panacea or Pandora’s Box*, 48 J. URB. L. 579, 581 (1971).

⁷¹ *Id.*; see also Heather Terry, Still Standing but “Teed Up,” 2005 Mich. St. L. Rev. 1297, 1301 (2005).

⁷² *Id.*; Mich. Comp. Laws §§ 324.1701-1706.

⁷³ Mich. Comp. Laws § 324.1701.

⁷⁴ Martha L. Black & Ellen J. Kohler, *Diminishing Democracy: A Review of Public Participation in Michigan’s Environmental Decision-making*, 50 WAYNE L. REV. 219, 267-68 (2004).

however, may rebut plaintiff's case; further, defendant can offer an affirmative defense that he had no "feasible and prudent" alternatives and thus that its conduct is consistent with public health, safety, and welfare.⁷⁵

As several prominent Michigan Environmental Law Attorneys have noticed—and prior and in addition to the Court's recent abrogation of prudential standing—recent judicial interpretation of what constituted a *prima facie* case under the MEPA appeared to require more of plaintiffs than had originally been required during the first ten years of MEPA's life.⁷⁶ This may have been indicative of the Michigan Supreme Court's shifting sands. Regardless of this fact, the Michigan Supreme Court—clearly and unequivocally—upheld the MEPA's citizen suit provision for over thirty-years.⁷⁷

⁷⁵ Black, *Supra* note 68, at 267-68 (stating that "[d]espite what appears to be broad provisions allowing private citizens to sue to stop environmental impairment, fewer MEPA suits than anticipated have been filed over the years. While the lack of suits could be attributed to many factors, the unavailability of dollar damages for recover of attorney fees is significant. Many potential plaintiffs cannot afford to bring suit.").

⁷⁶ Black, *supra* note 68, at 268 (citing James M. Olson and Christopher Bzdok, *The MEPA Lives--in Northern Michigan and Beyond*, 78 MICH. BAR J. 418 (1999)).

⁷⁷ Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280, 317 (Mich. 2007) (dissenting opinion) (citing *Ray v Mason Co Drain Comm'r*, 393 Mich. 294, 305; 224 N.W.2d 883 (1975) (stating that MEPA grants standing to "any person" has been unquestioned for more than 30 years); *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich. 741; 275 N.W.2d 538 (1979); *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich. App. 495; 320 N.W.2d 668 (1982); *Trout Unlimited, Muskegon-White River Chapter v White Cloud*, 195 Mich. App. 343; 489 N.W.2d 188 (1992); *Nemeth v Abonmarche Dev, Inc*, 457 Mich. 16; 576 N.W.2d 641 (1998)).

III. MICHIGAN CITIZENS FOR WATER CONSERVATION V. NESTLE WATERS NORTH AMERICA,
INC

A. Factual and Procedural Background

In 1970, Nestle Waters North American, Inc (“Nestle”) was granted the water rights to a 139 acre tract of land on the North Shore of Osprey Lake.⁷⁸ Osprey Lake is situated next to several other bodies of water, namely: Thompson Lake, Dead Stream, and several wetlands.⁷⁹ Before Nestle could begin pumping water, however, it was necessary for it to obtain permits from the Michigan Department of Environmental Quality (“DEQ”).⁸⁰ Nestle duly applied for the requisite permits, and in August 2001, DEQ issued Nestle permits to convert its two test wells into production wells.⁸¹ As a necessary corollary, Nestle was allowed to install water mains, pump stations, and booster stations to transport the water to their bottling facility.⁸² The permit from DEQ authorized Nestle to pump 400 gallons per minute; as such, Nestle began pumping in 2002.

In June of 2001, Michigan Citizens for Water Conservation⁸³ (“MCWC”) initiated a cause of action against Nestle and sought to enjoin the pumping.⁸⁴ The trial court

⁷⁸ Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280, 286 (2007).

⁷⁹ *Id.*

⁸⁰ *Id.* at 286-87.

⁸¹ *Id.*

⁸² *Id.* at 287.

⁸³ Members of the association owned property on Dead Stream and Thompson Lake. *Id.*

⁸⁴ *Id.* 287-88.

dismissed several of the charges,⁸⁵ but the trial judge allowed a common law groundwater claim and the MEPA claim to proceed to trial.⁸⁶ Under MEPA:

The attorney general *or any person* may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.⁸⁷

Based on the above statute, which had been faithfully applied by Michigan courts for over thirty-years,⁸⁸ the district court allowed plaintiffs to have standing. After a bench trial, the court enjoined Nestle from pumping water. On appeal to the Michigan Court of Appeals, Nestle argued that MCWC lacked standing as to Osprey Lake and the wetlands because MCWC's members did not own property on these bodies of water, nor did they use the bodies of water. Nestle argued that the language of "any person" was too broad and unconstitutional. The court of appeals, however, held that these bodies of water sufficiently "interconnected"⁸⁹ and allowed MCWC to have standing.⁹⁰ The Michigan Supreme Court granted leave to appeal to address the issue of standing.

⁸⁵ *Id.* at 288 (The complaint "consisted of (1) a claim for an injunction, (2) a claim that withdrawal of water violated the common law applicable to riparian water rights, (3) a claim that the withdrawal violated the common law applicable to groundwater, (4) a claim that the water of Sanctuary Springs is subject to the public trust doctrine, (5) a claim that Nestle's use of the water would be an unlawful taking, and (6) a claim that the water extractions violated the Michigan Environmental Protection Act (MEPA).").

⁸⁶ *Id.*

⁸⁷ Mich. Comp. Laws 324.1701.

⁸⁸ *See infra* note 77.

⁸⁹ Nestle, 479 Mich. at 298-99. The Court of Appeals held that all of the bodies of water were connected through a "complex, reciprocal nature of the ecosystem that encompasses the pertinent natural resources noted above and because of the hydrologic interaction, connection, or interrelationship between these

B. The Court's Holding

The Michigan State Supreme Court began by stating that Michigan has a tripartite system of government.⁹¹ As a result of this triad, the majority stated that courts are only able to exercise “judicial power.”⁹² After making this obvious observation, the majority held that standing is “an indispensable doctrine rooted in our constitution and the tripartite system of government it prescribes.”⁹³ Furthermore, even though Michigan’s constitution does not have a “cases” or “controversies” clause similar to the federal constitution, the Michigan Supreme Court unequivocally held that “[s]tanding ensures that a genuine *case or controversy* is before the court.”⁹⁴ Relying solely on federal law as a guidepost—because there was no state law consistent with its theory—the Court went on to hold that it was merely exercising “self-discipline to resist the temptation of usurping power from the other branches.”⁹⁵

natural resources, the springs, the aquifer, and defendant Nestle's pumping activities, whereby impact on one particular resource caused by Nestle's pumping necessarily affects other resources in the surrounding area.” *Id.* The majority, however, relying on the United States Supreme Court case of *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. Inc.*, 528 U.S. 167, 181 (2000), rejected the Court of Appeal’s holding.

⁹⁰ *Id.*

⁹¹ *Id.* at 291 (citing *Mich. Chiropractic Council v. Comm'r of the Office of Fin. & Ins. Servs.*, 475 Mich. 363, 369 (2006)).

⁹² *Nestle*, 479 Mich. at 291-92.

⁹³ *Id.*

⁹⁴ *Id.* at 294.

⁹⁵ As Justice Weaver stated, however, “the majority showed its lack of judicial restraint by compromising the Legislature's constitutional duty to enact laws for the protection of the environment and enlarging the Court's capacity to overrule statutes under the guise of the majority's self-initiated, erroneous “constitutional” doctrine of standing.” *Id.* at 315 (Weaver, J., dissenting). Further, the courts are merely performing their proper role, deciding cases before it. This does not abridge separation of powers.

After firmly stating that standing is a constitutional requirement under Michigan law, the Court confirmed that the test announced in Lujan,⁹⁶ and adopted in Lee,⁹⁷ is the test that plaintiffs must satisfy. Namely, plaintiffs must have (1) an injury that was (2) caused by the party's action and that a favorable court holding will (3) redress the injury.⁹⁸

Applying the Lujan standard to the case at hand, the Court held that Plaintiffs did not have standing to challenge the impact on Osprey Lake or the Wetlands. The Court held that "Plaintiffs failed to establish that they have a substantial interest in these areas, detrimentally affected by Nestle's conduct, that is distinct from the interest of the general public." The court held that "[t]he absence of a concrete, particularized injury in fact [was] fatal to plaintiffs' standing to bring a MEPA claim with respect to Osprey Lake and [the] Wetlands."⁹⁹

In rejecting plaintiffs' claims regarding Osprey Lake and the wetlands, the court rejected an "interconnectedness" or "environmental nexus" theory that argued that all the bodies of water are connected through complex interaction.¹⁰⁰ Again, in reaching this holding, the Court did not rely on State law; rather, the court relied entirely on

⁹⁶ See *supra* Part One.

⁹⁷ See *supra* Part One.

⁹⁸ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 592 (1992); see also Part One (discussing what the doctrine of standing requires).

⁹⁹ *Nestle*, 479 Mich. at 297.

¹⁰⁰ *Id.*

federal jurisprudential concepts.¹⁰¹ In rejecting the lower courts' holding that plaintiffs had standing because of the "hydrological interaction, connection [and] interrelationship," the court stated that this is an improper "bootstrapping" argument that is designed to avoid the constitutional requirements of standing.¹⁰² The Court, however, stressed that this just affected a portion of MCWC's claim.¹⁰³

The Court, also, rejected a textual argument that the "new" standing analysis should not apply to MEPA because the constitution "establishes [a] public interest in the protection of Michigan's natural resources and that [the constitution] directs the Legislature to enact appropriate legislation to protect these natural resources."¹⁰⁴ The court rejected plaintiff's and their numerous amici'¹⁰⁵ argument that "the Legislature carried out this constitutional directive by enacting MEPA, in which the Legislature created a legally cognizable right to clean air, water, and other natural resources that 'any person' can vindicate if that right is invaded."¹⁰⁶ In summarily rejecting this clear textual argument based on the constitution, the Court stated that these constitutional directives cannot override the Court's newfound constitutional standing requirement. The court reached this conclusion even though the constitutional mandate was express

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*301-02.

¹⁰⁵ Among plaintiff's amici were the National Wildlife Federation, Michigan United Conservation Clubs, Tip of the Mitt Watershed Council, Pickerel-Crooked Lakes Association, and Burt Lake Preservation Association.

¹⁰⁶ *Id.*

and the standing requirement was only implied (and newly at that) in the constitution's overall structure.¹⁰⁷

Ameliorating the Court's decision, the Court noted that the plaintiffs still had standing under the Lujan test to vindicate the harm to Thompson Lake and Dead Stream. As a pragmatic matter, this conclusion remedied the plaintiffs' immediate concerns.¹⁰⁸ By the plaintiffs enforcing their rights as they applied to Thompson Lake and the Dead River, Nestle would *still* have to cease pumping because it was part of the same operation.¹⁰⁹ As such, these plaintiffs received the relief they sought.

C. The Minority Opinion: The Michigan Supreme Court's Seemingly Perpetual 4-3 Split

Justice Weaver¹¹⁰ began her dissent by noting that the Nestle case marks the "culmination" of a line of cases where the Michigan Supreme Court's majority¹¹¹ has eroded Michigan's traditional prudential standing doctrine.¹¹² Justice Weaver stated that prior to the Lee and Nestle decisions, not one Michigan case stated that standing had constitutional requirements nor did any case state that Michigan is subject to the federal court's "case" or "controversy" requirement.¹¹³ Rather, as Justice Weaver points

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (The majority stated that "as a practical matter, injunctive relief ordering Nestle to reduce or to stop its pumping activities could benefit Osprey Lake and Wetlands 112, 115, and 301")

¹⁰⁹ *Id.* (Weaver, J., dissenting).

¹¹⁰ Justice Weaver was joined by Justices Kelly and Cavanagh.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

out, Michigan courts have repeatedly held that Article III of the federal constitution does not apply to Michigan's courts.¹¹⁴ Justice Weaver further stated that the Michigan Supreme Court had previously acknowledged and validated MEPA's citizen suit provision throughout its thirty year history.¹¹⁵

Justice Weaver next noted that the majority's opinion undermined the constitution's textual commitment to protecting the environment. Particularly, Justice Weaver stated that by "holding that plaintiffs in this case cannot bring suit . . . pursuant to the standing granted by MEPA, the majority takes away the people's power to ensure protection of Michigan's natural resources."¹¹⁶ Justice Weaver stated that the Legislature gave all citizens a sizable share of the initiative for environmental law enforcement; however, the majority has taken away that initiative, and nothing short of a constitutional amendment that must be "even more explicit than Const 1963, art 4, § 52" can give that initiative back.

IV. JUDICIAL ACTIVISM AND SHAM FORMALISM TAKES ITS TOLL ON MICHIGAN'S JURISPRUDENCE – ESPECIALLY FOR PLAINTIFFS

The decision in Nestle was likely the result of an activist court's improper use of standing to limit the ability of plaintiffs to bring meritorious causes of action.¹¹⁷ It is likely that the Court overruled thirty years of law because it was the easiest way to

¹¹⁴ *Id.*

¹¹⁵ *See infra* note 77; *see also* Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280, 317 (2007) (Weaver, J. dissenting).

¹¹⁶ *Id.* at 316.

¹¹⁷ This has been a common complaint of standing in general. *See generally* Gene Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650 (1985).

reach the conclusion that they wanted. As a result, Michigan's Environmental Law was altered in a drastic fashion. This section will illustrate that the Majority's result was likely influenced by criteria other than "law." To support this bold proposition, this section will illustrate that: (1) national commentators (and Michigan Judges and Bar) have called the Michigan Supreme Court the most activist court in the nation and questioned the Court's impartiality in dozens of recent decisions; (2) the Michigan Supreme Court's assertion that constitutional standing is a prerequisite of any tripartite government is patently false; and (3) the Michigan Supreme Court's assertion that the new constitutional test for standing is easier to apply is contrary to actual experience, so this assertion seems to be merely a pretext.

A. LAW AND POLITICS: JUDICIAL ACTIVISM IN MICHIGAN'S HIGHEST COURT¹¹⁸

In recent years, the Michigan Supreme Court has received much notoriety as being politically motivated and not deciding cases based on sound judicial reasoning.¹¹⁹ National commentators have noted that the Michigan Supreme Court seems closely tied

¹¹⁸ A small portion of this section was taken from an earlier paper by the author. The paper is available upon request.

¹¹⁹ See Steven Gursten, *Has the Michigan Supreme Court Lost its Way?*, MICHIGAN PERSONAL INJURY INFORMATION, http://michiganautolaw.com/blog/michiganpersonalinjury/archive/2004_08_08_archive.php [hereinafter Gursten, *Has the Mich. Sup. Ct. Lost its Way?*] (noting that "[l]egal scholars around the United States have had harsh words about the integrity of the Michigan Supreme Court in recent years. Lawyers . . . have blasted the perceived far-right wing tilt of the Court. In recent years our highest court has overturned existing law and reversed prior decisions at an alarming rate . . ."); see also Nelson P. Miller, "Judicial Politics": *Restoring the Michigan Supreme Court*, 85 MICH. BAR. J. 38 (2006) (observing that the Michigan Supreme Court has been very willing to ignore stare decisis with a bare majority at a very high rate). *But see* Victor E. Schwartz, *A Critical Look at the Jurisprudence of the Michigan Supreme Court*, 85 MICH. BAR. J. 38 (2006) (countering Professor Miller's argument above and stating that the Michigan Supreme Court follows reason and the rule-of-law and is one of the best courts in the nation).

to big business and the insurance industry.¹²⁰ Perhaps most alarming, one popular law school torts case book features the Michigan Supreme Court below the heading “Judicial Politics.”¹²¹ These criticisms are not only from a primarily liberal plaintiff’s bar; rather, this belief seems to have transcended both party lines and both sides of the aisle.¹²²

In a recent publication in Michigan Lawyer’s Weekly, there was a survey that polled how Michigan’s attorneys—both plaintiff’s and defendant’s—felt about the Michigan Supreme Court.¹²³ The results were surprising, even to a conspiratorially suspicious law student. The first question asked: “Do you generally agree that the decisions and opinions of the Michigan Supreme Court majority are the result of an agenda that is better left to the legislative branch?”¹²⁴ Eighty Four Percent (84%) answered yes. Question two of the survey asked: “Do you generally agree that the decisions and opinions of the Michigan Supreme Court majority suggest a pattern of bias that favors insurance companies and large corporate interests over those of ordinary citizens in civil litigation matters?”¹²⁵ In response to this question, seventy nine percent (79%) answered in the affirmative. The third question queried: “Do you

¹²⁰ See Howard Yale Lederman, *Judicial Overruling: Time for a New General Rule*, 83 MICH. BAR J. 9, 22 (2004) (the author criticizes the Court as being partisan and partial by overruling prior cases at such a high rate).

¹²¹ DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 283 (3d ed. 2004).

¹²² Robert F. Garvey, *Both Plaintiff’s and Defendant’s Counsels Believe the Michigan Supreme Court is Biased*, *Michigan Lawyer’s Weekly*, available at <http://tcattorney.typepad.com/michigansupremecourt/>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

generally agree that the decisions and opinions of the Michigan Supreme Court majority have resulted in a pattern of denial of the right to trial by jury in the State of Michigan?"¹²⁶ Again, eighty percent (80%) answered yes. No one can legitimately argue that these results—whether founded in fact or fiction—are not unfortunate. It is deeply troubling that Michigan's bar feels this way about the State's highest court.¹²⁷

In light of these numerous criticisms, the difficult question that must be asked is whether the decision in Nestle was motivated by sound judicial interpretation of MCL § 324.1701, Michigan's Constitution, and prior standing jurisprudence or by activist justices focused on excluding plaintiffs from court. This question will be explored below.

There are several real and perceived problems with the Michigan Supreme Court's impartiality, which make any decision opaque and uncertain.¹²⁸ First, the Michigan Supreme Court has abandoned stare decisis¹²⁹ by overturning past precedents

¹²⁶ *Id.*

¹²⁷ If the Michigan bar feels this way about the Michigan Supreme Court, how does the citizenry at large feel? If Michigan's citizens feel the same way, this greatly devalues the rule of law in Michigan. How can the citizenry trust a judiciary that seems influenced more by personal ideology than by law?

¹²⁸ *Id.*

¹²⁹ See *Robinson v. City of Detroit*, 613 N.W.2d 307 (Mich. 2001) (Justice Taylor laid out a two part test to guide Michigan courts in overturning precedent. "The first question, of course, should be whether the earlier decision was wrongly decided." *Id.* at 321-22. Second, "the Court must proceed on to examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance.") *Id.*; see also BLACK'S LAW DICTIONARY (8th ed. 2004) ("[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.").

faster than any court in the country.¹³⁰ This attitude is readily apparent in recent cases, and was unfortunately very apparent in Nestle.¹³¹ For instance, in *Anderson v. Pine Knob Ski Resort, Inc.*,¹³² the Majority stated that “a majority of this court is at liberty to change the common law regarding open and obvious dangers should it be moved to do so.”¹³³ This statement reflects a lack of respect for stare decisis, and illustrates that the court is governed only by the rule-of-the-majority. Professor Miller¹³⁴ opined that, “the [Anderson] statement does reveal something of the court's raw political power. Is a majority really all it takes? What of the principle of stare decisis? What of the need to justify Court decisions with sound logic and legal reasoning? What of the structure of state government?”¹³⁵ Professor Miller’s concern seems justified in light of Nestle. If the court has completely disregarded stare decisis, it is likely that they are deciding cases

¹³⁰ See *Lugo v Ameritech*, 464 Mich. 512 (2001). (the court adopted an “open and obvious” doctrine which partially repealed the statutory doctrine of comparative negligence in premises cases); *Neal v Wilkes*, 470 Mich. 661 (2004) (expanding the scope of immunity granted to landowners. Immunity was historically limited to large tracts of undeveloped land, but the court granted immunity to developed suburban lots as well); *Rory v Continental*, 473 Mich. 457 (2005). (holding that, in opposition to established law, that insurance companies can write shorter statute of limitations into insurance contracts); see also Sarah K. Delaney, *Stare Decisis v the “New Majority”: The Michigan Supreme Court’s Practice of Overruling Precedent, 1998-2000*, 66 ALB. L. R. 871 (2003) (for a general discussion on the Michigan Supreme Court’s abandonment of stare decisis).

¹³¹ See *People v. Cornell*, 646 N.W.2d 127 (Mich. 2002) (overturning longstanding precedent of including lesser included offenses); see also *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567 (Mich. 2002) (overruling prior precedent that determined whether a mental injury was compensable).

¹³² *Anderson v. Pine Knob Ski Resort, Inc.*, 664 N.W.2d 756 (Mich. 2003).

¹³³ *Id.* at 766 (Weaver, J. dissenting).

¹³⁴ Nelson P. Miller received his juris doctor from the University of Michigan Law School and is a Torts professor and assistant dean at The Thomas M. Cooley Law School. For a more complete biographical profile, see <http://www.cooley.edu/faculty/millernelson.htm> (last visited Jan. 13, 2007).

¹³⁵ Miller, *supra* note 152, at 38.

on criteria other than the “law.”¹³⁶ For instance, in Nestle, the court abandoned thirty years of unwavering support of the MEPA.¹³⁷ Furthermore, through Lee, Cleveland Cliffs, and Nestle, the court overturned the Court’s past standing test which had been entirely rooted in prudential precepts, not constitutional mandate. Both of these doctrinal changes were abrupt and drastic and not in accord with stare decisis.

The lack of respect for stare decisis is not the only indicator that judicial politics is afoot in Michigan’s highest court. In the last couple years, Michigan Supreme Court justices have been increasing vocal about the dysfunctional inner workings of the Court.¹³⁸ In a dissent to the election of Justice Taylor of the Michigan Supreme Court to Chief Justice, Justice Weaver stated that “the majority of four¹³⁹ . . . has misused and abused the judicial power by suppressing, or attempting to suppress, dissent and has engaged in repeated disorderly, unprofessional and unfair conduct in the performance

¹³⁶ The word law is being used in its colloquial fashion. However, for the deeper question of what is law, see e.g., JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H.L.A. Hart ed. 1954) (1832) (taking a positivist approach to “law” and explaining that all “laws” are orders backed by threats); H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) (Hart critique’s Austin’s approach to positivism and espouses his own theory of “law” by using primary rules, secondary rules, and rules of recognition); *see also* RONALD DWORKIN, LAW’S EMPIRE (1986) (critiquing positivist definitions of “law” and proposing an interpretive model that stresses “law as integrity”).

¹³⁷ *See infra* note 77.

¹³⁸ *See* Dissent to Election of Chief Justice Clifford Taylor as Chief Justice (Jan. 5, 2007) (Weaver, J., dissenting) [hereinafter Weaver’s Dissent], *available at* http://www.justiceweaver.com/pdfs/1-5-07_DissenttoCJ.pdf (expressing frustration with the Michigan Supreme Court majority’s suppression of dissent via an administrative “gag-order”).

¹³⁹ Justice Weaver was referring to Chief Justice Taylor, and Justices Corrigan, Young and Markman. *See* Biography of the Justices, <http://www.courts.michigan.gov/supremecourt/AboutCourt/biography.htm> (last visited Feb. 2, 2007) (providing biographies for the current Michigan Supreme Court justices).

of the judicial business of the Court.”¹⁴⁰ This very public dispute¹⁴¹ further creates the impression that the law is not all that is driving the Michigan Supreme Court’s decisions. It is difficult to find a recent opinion where the Justices do *not* verbally attack each other. Among the more serious accusations made by Justice Weaver was that Chief Justice Taylor proposed a trade of judicial votes as part of a deal to suppress dissent!¹⁴² This indicates that a majority of the Michigan Supreme Court misconstrues its role on the Court. They are judges not congressmen! While trading votes may be common place in the Michigan Senate or House of Representatives, judicial decisions are supposed to be made on the basis of sound reasoning and neutral application of the law, not logrolling and vote trading.

If this criticism was only from one rogue Justice, it could be more easily discounted; however, it is not. In *Mack v. City of Detroit*, a civil rights case where the majority nullified a city charter that created a cause of action for discrimination based on sexual orientation, Justice Cavanaugh argued that the majority was advancing its own ideological preferences through blatant activism.¹⁴³ Justice Cavanaugh concluded

¹⁴⁰ Weaver’s Dissent, *supra* note 164, at 3.

¹⁴¹ This dispute has expanded well beyond Michigan and has been getting national attention. See *It’s Getting Ugly on the Michigan Bench*, CNN, Jan. 17, 2007, <http://www.cnn.com/2007/LAW/01/16/michigan.courts.ap/index.html>.

¹⁴² See Weaver’s Dissent, *supra* note 164, at 14 (stating that “[the Chief Justice] might change his vote and grant the stay in *Grievance Administrator v Fieger* if [Justice Weaver] would not release [her] dissenting statement and ‘never again’ attempt such a dissent).

¹⁴³ *Mack v. City of Detroit*, 467 Mich. 186, 224 (2002) (Cavanaugh, J. dissenting) (noting that the majority’s activism typically takes the form of either 1) ignoring stare decisis, 2) granting leave to parties to appeal issues not raised, and 3) holding issues dispositive that were never raised or argued).

that the only explanation for the court's bizarre behavior is that it is the only way that the court can arrive at "its destination."¹⁴⁴

Wait! There is an explanation for the apparent abandonment of stare decisis. In a recent presentation,¹⁴⁵ Justice Markman¹⁴⁶ stated that a majority of the Michigan Supreme Court justices are textualists.¹⁴⁷ He used this to explain that precedent was overturned because prior decisions were contrary to the plain meaning of the (fill in the blank: statute, constitution, ordinance, etc.) and were therefore wrong.¹⁴⁸ However, the current majority of the Michigan Supreme Court cannot have it both ways. They cannot claim to be textualists if they only follow textualist tenets when convenient. For instance, in Nestle, the Court mocked Justice Weaver for pointing out the textual differences between the state and federal constitutions while supporting stare decisis.¹⁴⁹

¹⁴⁴ *Id.* (emphasis in original).

¹⁴⁵ Justice Stephen J. Markman, Presentation to the Federalist Society at Michigan State College of Law (Oct. 25, 2006) [hereinafter Markman's Presentation] (Justice Markman's presentation was focused on the proper role of the American judiciary, with particular emphasis on textualist and positivist legal theory).

¹⁴⁶ Justice Markman was appointed to the Court by Governor Engler, effective October 1, 1999. In 2000 he was elected to complete the term, which expired January 1, 2005. In 2004 he was reelected to an eight-year term which expires January 1, 2013. See Biography of the Justices, <http://www.courts.michigan.gov/supremecourt/AboutCourt/biography.htm> (last visited Feb. 2, 2007) (providing biographies for the current Michigan Supreme Court Justices).

¹⁴⁷ See Markman's Presentation, *supra* note 177.

¹⁴⁸ *Id.*; see also Stephen Markman, *Precedent: Tension Between Continuity in the Law and Perpetuation of Wrong Decisions*, 8 TEX. REV. L. & POL. 283 (2004) (discussing the Michigan Supreme Court's recent reputation of overturning stare decisis, and stating that "[he is] not persuaded that the stability of the law is truly enhanced by a precedent that reads the words of the law to mean something other than what they plainly mean"). However, it is commonly accepted that words and statutes can have more than one meaning, and the interpreter can easily import bias. This is a common complaint of textualist judges such as the Michigan Supreme Court Majority. See generally Scott Fruehwald, *Pragmatic Textualism and the Limits of Statutory Interpretation*, 35 Wake Forest L. Rev. 973, 974 (2000) (stating that textualists have to overcome the problem that words often have more than one meaning).

¹⁴⁹ Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280, 307 (2007).

The majority went so far as to call her theory a mere “caricatured textualism.”¹⁵⁰ Furthermore, the court discounted the constitution’s textual commitment that the legislature *must* pass laws to protect the environment; this is arguably a strong constitutional and textual argument that cuts against the majority’s holding. In place of this express textual argument, the court opted for an “implied” and “structural” argument that they extracted from the state constitution.

There also is a problem with how the standing issue was originally raised in Michigan. In Lee,¹⁵¹ neither party raised or briefed the issue of standing.¹⁵² This was likely the result of the fact that under Michigan’s prior prudential test there was no issue of standing. The Court, however, on its own *sua sponte* motion, raised the issue of standing. Through this non-adversarial *sua sponte* motion, the Court adopted the federal test for standing.¹⁵³ Raising issues not raised by the parties is a common complaint about the Michigan Supreme Court’s judicial advocacy, and in light of this, it seems justified.¹⁵⁴

¹⁵⁰ *Id.*

¹⁵¹ *See supra* Part One.

¹⁵² Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280, 313 (2007) (Weaver, J. dissenting).

¹⁵³ *Id.*

¹⁵⁴ *See generally* Mack v. City of Detroit, 467 Mich. 186, 224 (2002) (Cavanagh, J. dissenting) (noting that the majority’s activism typically takes the form of either 1) ignoring stare decisis, 2) granting leave to parties to appeal issues not raised, and 3) holding issues dispositive that were never raised or argued) (citing cases).

B. CONSTITUTIONAL STANDING IS A MANDATORY PREREQUISITE TO A TRIPARTITE GOVERNMENT -- SAYS WHO?

In reaching its decision in Nestle, the Michigan Supreme Court relied on its facial observation that “[s]tanding is an indispensable doctrine rooted in our constitution and the tripartite system of government it prescribes.”¹⁵⁵ The Court further stated that an opposite conclusion “would imperil the constitutional architecture whereby governmental powers are divided between the three branches of government.”¹⁵⁶ If this statement were accurate, one would certainly expect to find *all* other constitutional tripartite governments adhering to the same basic rule; if not all – at least a majority.

This, however, is far from the truth. In fact, a *majority*¹⁵⁷ of the nation’s highest courts have refused to follow the federal test, and opted for their own prudential standing requirements. In doing so, these courts have expressly declared that standing is not a constitutional prerequisite to suit in their courts.¹⁵⁸ With the Michigan Supreme Court not acknowledging or discussing this fact, their argument that a tripartite system dictates a constitutional standing requirement seems disingenuous and contrived at best, and suspiciously activist at worst. Furthermore, as will be discussed in this section, a legislature’s conferral of citizen standing in no way abridges the doctrine of separation of powers.

¹⁵⁵ Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280, 292 (2007).

¹⁵⁶ Lee v. Macomb Co. Bd. of Comm'rs, 464 Mich. 726, 735 (2001)

¹⁵⁷ See *infra* the remaining portion of this Part.

¹⁵⁸ See *infra* Part Four listing the states that have rejected standing as a constitutional prerequisite to a tripartite government and separation of powers; see also note 16.

Several states have expressly stated that since their constitution does not contain a “cases” or “controversies” clause like the federal constitution, the federal reasoning is wholly inapplicable to their state’s jurisprudence. For instance, Arizona’s highest court stated that “the question of standing in Arizona is not a constitutional mandate since we have no counterpart to the ‘case or controversy’ requirement of the federal constitution.”¹⁵⁹ Similarly, in declining to hold that standing is constitutional, Idaho’s highest court has stated that federal courts are constrained by the cases and controversies clause of the federal constitution, and Idaho is not.¹⁶⁰ Again, the Iowa Supreme Court stated that due to the federal case or controversy requirement, “the federal test for standing is based in part upon constitutional strictures and prudential considerations while our rule on standing is self-imposed.”¹⁶¹ This concept is echoed again and again in other states.¹⁶² As such, many states have chosen to distinguish

¹⁵⁹ *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 (Ariz. 2005)

¹⁶⁰ *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus*, 127 Idaho 239, 241 (Idaho 1995)

¹⁶¹ *Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 869 (Iowa 2005)

¹⁶² *In re Hickson*, 573 Pa. 127 (Pa. 2003) (stating that “in the federal courts, the standing doctrine springs from a constitutional source. state courts, however, are not governed by U.S. Const. art. III and are thus not bound to adhere to the federal definition of standing. Furthermore, the Pennsylvania Constitution has no counterpart to Article III’s case or controversy requirement. While it is not constitutionally compelled, the Commonwealth’s standing doctrine nonetheless has a long, venerable history as a useful tool in regulating litigation”); *Sierra Club v. DOT*, 115 Haw. 299, 319 (Haw. 2007) (“Though the courts of Hawaii are not subject to a “cases or controversies” limitation like that imposed upon the federal judiciary by Article III, § 2 of the United States Constitution, we nevertheless believe judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context.”); *City of Picayune v. Southern Reg'l Corp.*, 916 So. 2d 510, 525-526 (Miss. 2005) (“This Court has explained that while federal courts adhere to a stringent definition of standing, limited by Art. 3, § 2 of the United States Constitution to a review of actual cases and controversies, the Mississippi Constitution contains no such restrictive language.”)

themselves on the same grounds as the Dissent in Nestle urged—namely: there are real textual differences between the state and federal constitutions.

Just as many state courts have chosen to distinguish their standing jurisprudence based on the cases or controversies requirement, other states have chosen to follow federal law *because* their constitutions *do* contain analogous case or controversy requirements. For instance, West Virginia’s highest court stated that because West Virginia’s constitution contains the word “controversy,” standing is a constitutional requirement.¹⁶³ Likewise, the Montana Supreme Court reached the same conclusion because the Montana State Constitution contains the limitation of “cases at law and in equity.”¹⁶⁴ Again, other states have chosen not to gloss over this textual distinction, as the *textualist* Nestle majority did. Justice Weaver in her Nestle dissent pointed out this obvious textual distinction; however, the Nestle Majority attacked Justice Weaver’s dissenting opinion by stating that:

This argument that separation of powers should be understood differently in the Michigan Constitution because the words “case” and “controversy” are not in our constitution suggests to us that Justice Weaver *fundamentally misunderstands* the doctrine of separation of powers. She refuses to accept that there is a constitutional limit on the Legislature’s authority to expand “judicial power” in the area of standing.¹⁶⁵

¹⁶³ State ex rel. Abraham Linc Corp. v. Bedell, 216 W. Va. 99, 113 (W. Va. 2004)

¹⁶⁴ Stewart v. Board of County Comm’rs, 175 Mont. 197, 200 (Mont. 1977)

¹⁶⁵ Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280, 308 (2007) (emphasis added).

This statement, however, reflects that the Majority “fundamentally misunderstands” the importance of this distinction, unless, of course, dozens of other state courts and commentators have been mistaken as well.

Also indicative of the fact that many state supreme courts disagree with the statement that “[s]tanding is an indispensable doctrine rooted in . . . [a] tripartite system of government,”¹⁶⁶ is the reality that many court’s unequivocally allow the legislature to confer standing. Hawaii—a state with a bountiful and beautiful landscape much like Michigan—also allows “any person” to enjoin polluters.¹⁶⁷ The Hawaii Supreme Court has deferred to the State legislature’s goal of protecting the environment by allowing citizen suits by stating that “standing requisites . . . may also be tempered, or even prescribed, by legislative and constitutional declarations of policy.”¹⁶⁸ In a recent Nevada Supreme Court case, Stockmeier v. Nev. Dep’t of Corr. Psychological Review Panel, Stockmeier sued the department of corrections claiming that they violated an “open meeting act” and that he had standing because the statute conferred standing on “any person.”¹⁶⁹ In summarily rejecting the contention that standing is constitutional and Lujan should apply, the court held that “Stockmeier is a ‘person’ under NRS §

¹⁶⁶ nestle

¹⁶⁷ *Sierra Club v. DOT*, 115 Haw. 299, 319 (2007); further, Hawaii’s constitution, much like Michigan’s, expressly elevates the environment. Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

¹⁶⁸ *Id.* 319

¹⁶⁹ *Stockmeier v. Nev. Dep’t of Corr. Psychological Review Panel*, 135 P.3d 220, 228 (Nev. 2006).

241.037(2) and is not required to meet the federal constitutional standing requirements of *Lujan*.¹⁷⁰ As further support, the Connecticut State Supreme Court even went so far to state that it “recognize[s] that an *overwhelming majority* of jurisdictions confer standing on taxpayers to challenge the misappropriation of municipal funds.”¹⁷¹ This “tax payer” standing, of course, is almost entirely prohibited under federal constitutional standing, and now in Michigan as well.¹⁷²

It is also worth noting, contrary to the Nestle majority’s assertion, that it is far from clear that separation of powers demands that courts refuse to recognize congressional grants of standing. In fact, several commentator’s claim the opposite. For instance, Professor Logan argues that:

As a general proposition, the Court should defer to Congress and grant standing to ‘any person’ who is injured in a way colorably contemplated by the remedial legislation unless express legislative history or a clear failure to meet the minimum content of article III compels a contrary judgment. *By deferring in this way to Congress’ broad power to act to cure social ills, the Court serves the principle of separation of powers.*¹⁷³

It is has also been advanced that the notion of standing as an indispensable component of Article III is a new argument. As Professor Sunstein has argued, it is, in fact,

¹⁷⁰ *Id.*

¹⁷¹ *Morascini v. Commission of Public Safety*, 1991 Conn. Super. LEXIS 3071 (Conn. Super. Ct. 1991).

¹⁷² See generally Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60 (2nd ed. 2002).

¹⁷³ David Logan, *In Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37 (1984). For similar arguments see William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (emphasis added).

“surprisingly novel.”¹⁷⁴ Professor Sunstein posits that the proposition “has no support in the text or history of Article III” and it “is essentially an invention of federal judges, and recent [federal judges] at that.”¹⁷⁵

The majority’s argument that separation of powers is violated because the Legislature is taking away the power to enforce laws, an essential component of the “executive power,” and giving that power to the judicial branch is inaccurate and hollow.¹⁷⁶ As the Nestle dissent argued, the majority’s faux judicial restraint is a Potemkin village,¹⁷⁷ “because the majority showed its lack of judicial restraint by compromising the Legislature’s constitutional duty to enact laws for the protection of the environment and enlarging the Court’s capacity to overrule statutes under the guise of the majority’s self-initiated, erroneous “constitutional” doctrine of standing.”¹⁷⁸

Justice Weaver further buttressed her argument by stating that “[t]he legislative branch has the authority to enact laws.”¹⁷⁹ Justice Weaver went on to say that “[n]owhere in the Michigan Constitution does it establish that the Legislature cannot

¹⁷⁴ Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries” and Article III*, 91 MICH. L. REV. 163, 166 (1992).

¹⁷⁵ *Id.*

¹⁷⁶ Mich. *Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, 479 Mich. 280, 315 (2007). The Michigan Supreme Court Majority in Lee stated that “it was merely “*resisting* an expansion of power-not an everyday occurrence in the annals of modern government.”).

¹⁷⁷ Potemkin villages were, fake settlements erected at the direction of Russian minister Grigori Aleksandrovich Potemkin to fool Empress Catherine II during her visit to Crimea in 1787 into believing that Russia was more prosperous than it actual was. *See generally* Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1042 (5th Cir. 1985); Alaska Trams Corp. v. Alaska Elec. Light & Power, 743 P.2d 350, 352 (Alaska 1987).

¹⁷⁸ *Id.* As Justice Scalia, a staunch supporter of Lujan, stated: “faux judicial restraint is judicial obfuscation.”

¹⁷⁹ *Id.*

enact laws granting standing. Nor does the Michigan Constitution establish that the judicial branch is the sole authority in determining who may have standing.”¹⁸⁰ A strong argument can be advanced that MEPA does not even purport to give the judiciary the power of the executive branch to enforce the laws, because that power is given to the *people of Michigan*.¹⁸¹ The court’s role in these “citizen suits” is no different from its role in any other case that comes before it: the court is only hearing the case, interpreting the applicable law, and rendering a decision.¹⁸² How does this violate separation of powers? It does not.

C. OUT OF THE POT AND INTO THE FIRE: THE MICHIGAN SUPREME COURT’S ABANDONMENT OF PRUDENTIAL STANDING FOR AN AMALGAMATION OF COMPLEX FEDERAL LAW

As a motivating factor for the Court’s adoption of Lujan and other federal case law, the court erroneously—or disingenuously—believed that the federal test was easier to apply than Michigan’s prior prudential test.¹⁸³ The majority in Lee stated that “explication of the essential elements of standing has proven difficult as demonstrated by this Court’s experience in attempting to fashion a clear majority [test]”¹⁸⁴ The Court clearly believed that the “Lujan test has the virtues of articulating clear criteria

¹⁸⁰ *Id.*

¹⁸¹ Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280, 315 (2007).

¹⁸² *Id.*

¹⁸³ Lee v. Macomb Co. Bd. of Comm’rs, 464 Mich. 726, 739 (2001).

¹⁸⁴ *Id.*

and of establishing the burden of demonstrating these elements.”¹⁸⁵ This belief, however, is quickly called into question with only a cursory look at the United States Supreme Court’s inconsistent treatment of applying standing to citizen suits and generalized grievances.¹⁸⁶ The Supreme Court has on occasion been very candid about its incapability to articulate clear and consistent guidelines.¹⁸⁷ Illustrative of this problem, Justice Douglas stated that, “generalizations about standing to sue are largely worthless as such.”¹⁸⁸ As many commentators have noted, “[t]he passing years have not blunted this criticism.”¹⁸⁹

In a line of recent cases, the United States Supreme Court has struggled to coherently apply its standing principles to rights conferred by congress. As was stated *supra*, congress is without the ability to waive the constitutional requirements of standing (i.e., injury, redressability, and causation).¹⁹⁰ This premise, however, conflicts with Supreme Court precedent that allows citizen suits for rights created by congress where there appears to be no concrete injury in fact.

In Trafficante v. Metropolitan Life Insurance Co., the Supreme Court allowed two white residents of an apartment to challenge the owner’s discrimination of black

¹⁸⁵ *Id*

¹⁸⁶ Some commentators state that this is because the court does not want to decide these cases on the merits and it uses standing as a tool to get rid of them.

¹⁸⁷ David Logan, *In Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 40 (1984).

¹⁸⁸ *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970).

¹⁸⁹ *See generally* See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries” and Article III*, 91 Mich. L. Rev. 163, 185 (1992).

¹⁹⁰ *See supra* Part One.

tenants.¹⁹¹ The Court held that the Civil Rights Act of 1968 created a right in the white plaintiffs to be able to live in an integrated community.¹⁹² This was a sufficient injury for the plaintiffs. Similarly, in Federal Election Commission v. Akins, a group of plaintiffs challenged the FEC's refusal to characterize the American Israel Public Affairs Committee ("AIPAC") as a "political committee."¹⁹³ The plaintiffs alleged that they were injured because AIPAC would not be subject to the reporting requirements of the Federal Election Campaign Act of 1971.¹⁹⁴ The Supreme Court held that Congress created a right to information about political committees, and the denial of this statutorily conferred right was a sufficient injury.¹⁹⁵ As such, even though there would be no injury in fact absent congress' conferral of the right to receive information, it still satisfied Article III's standing requirements.¹⁹⁶

If congress is able to create rights in election information or the right to live in interracial housing, why can congress not vest a right in all citizens to have a clean and healthy environment? This answer is not entirely clear as two cases will illustrate. In Lujan, the court held that congress could not allow "any person"¹⁹⁷ to bring suit to

¹⁹¹ Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972).

¹⁹² *Id.*

¹⁹³ FEC v. Akins, 524 U.S. 11 (1998).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ 15 USC 1536(g) provides that:

Any person, as defined by section 3(13) of this Act [16 USCS § 1532(13)], may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being,

enjoin polluters.¹⁹⁸ In this case, the plaintiffs averred that their ability to view certain animals would be harmed if the wrong complained of was not enjoined. Specifically, one plaintiff stated that he had traveled to Egypt to observe the habitat of the endangered Nile crocodile and intended to do so again, and that she would suffer harm as a result of the role of the United States in overseeing and developing water projects in Egypt and another member's affidavit stated that the member had traveled to Sri Lanka to observe the habitat of endangered species such as the Asian elephant and the leopard and that the complained of pollution harmed the member because she intended to return to Sri Lanka in the future in an attempt to see these species.¹⁹⁹ This, however, even when coupled with the citizen suit provision was not enough.²⁰⁰ The court stated that this injury was too speculative and not concrete.²⁰¹ In Laidlaw, however, plaintiffs filed suit under the Clean Water Act's citizen suit provision.²⁰² Here, the plaintiffs complained that the North Tyger River was being polluted. Unlike Lujan, the Supreme Court granted standing because one of the plaintiffs "drove over the river" and would like to "fish" and "swim" in it someday.²⁰³ These cases are very analogous, but the court reached completely different results. One possibility is that "injury in fact" is a

carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review.

¹⁹⁸ Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000).

²⁰² *Id.*

²⁰³ *Id.*

mere formality that can be overcome by better pleading. Either way, the Supreme Court's jurisprudence is far from clear.

Based on the above mentioned cases—and an abundance of enthusiastic commentary—it appears that the Michigan Supreme Court may have traded its fluid prudential test for a problematic constitutional test. This in and of itself may not be a massive problem for plaintiffs because it appears that the requirement can be pled around;²⁰⁴ however, it is problematic because the Michigan Supreme Court partially justified its drastic departure with *stare decisis* based on the premise that federal law would be more workable.

HELPING ENSURE THAT THE PEOPLE OF MICHIGAN'S INTENT TO PROTECT THE ENVIRONMENT
IS CARRIED OUT: A NOT SO PRAGMATIC OPTION

So . . . are the people of Michigan defenseless against Lee and Nestle? As Justice Weaver concluded in her dissent, basically nothing short of a hard to pass constitutional amendment can remedy the court's holding in Nestle.²⁰⁵ Beyond a constitutional amendment, what else can be done? The legislature cannot confer the right to a clean environment, the deprivation of which would be a cognizable legal injury, because both the Michigan and United States Supreme Courts have rejected this as an

²⁰⁴ Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), with *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000) (standing for the proposition that by stating more concrete impediments, plaintiffs can still get to court).

²⁰⁵ *Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, 479 Mich. 280 (2007) (Weaver, J. dissenting).

unconstitutional attempt to nullify the constitution's standing requirement.²⁰⁶ Beyond restructuring the Michigan Supreme Court,²⁰⁷ however, this is likely the only proactive possibility. As such, the author proposes the following constitutional amendment:

The Michigan Legislature shall be able to create legally recognizable rights in any person, class, association or entity; further, the deprivation of any legislatively conferred right shall be sufficient to establish standing under the Michigan Constitution providing that the enabling statute expressly declares the legislature's intent to convey standing. The language "any person" shall be considered prima facie evidence of the legislature's intent to confer standing upon the People of Michigan.

This amendment, although difficult to pass, would certainly fix the problem that the Nestle and Lee Courts created.

CONCLUSION

After thirty years of unwavering support, a Majority of the Michigan Supreme Court has emasculated the Michigan Environmental Protection Act. The MEPA was drastically altered by four Michigan Supreme Court justices based on questionable judicial reasoning. As Justice Weaver eloquently stated, "it is a tragic day for Michigan" because "the majority has, mistakenly or intentionally, replaced a clear mandate of the

²⁰⁶ See generally Part One (explaining that both the Michigan Supreme Court and the United States Supreme Court have rejected congress' ability to abridge constitutional injury in fact by creating legal rights).

²⁰⁷ One such possibility would be to impose term limits for Justices on the Supreme Court. This would limit the damage that any one activist judge could cause. For a proposal along these lines, see Justice Weaver has proposed a constitutional amendment along these lines. See Justice Elizabeth A. Weaver, A Proposal to Amend 1963 Const Art VI, § 2, available at http://www.justiceweaver.com/pdfs/8-year_term_Update_103007.pdf.

will of the people of Michigan with irrelevant, misinterpreted, and nonbinding federal law.”²⁰⁸ Only time will tell whether Nestle can be mitigated or remedied.

²⁰⁸ Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280 (2007) (Weaver, J. dissenting).