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# NOTE

## REKINDLING AN OLD FLAME: THE SUPREME COURT REVIVES ITS “LOVE AFFAIR WITH ENVIRONMENTAL LITIGATION” IN *FRIENDS OF THE EARTH V. LAIDLAW* *ENVIRONMENTAL SERVICES*

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## I. INTRODUCTION

For over a decade, the United States Supreme Court has misdirected<sup>1</sup> the will of Congress<sup>2</sup> by seriously impairing citizens' standing to sue suspected polluters.<sup>3</sup> That trend, however, appears to be changing with the Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*<sup>4</sup> Indeed, environmentalists describe *Laidlaw* as "one of the biggest legal victories . . . in the past 20 years."<sup>5</sup> In *Laidlaw*, the Court bolstered private citizens' standing to sue for environmental harm by acknowledging the following: (1) reasonable concerns about environmental violations that directly affect the recreational, aesthetic, and economic interests of a citizen

1. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881, 885-86 (1983) (espousing an anti-majoritarian view of standing that suggests it may be favorable to misdirect the will of Congress in order to ensure that the requirements of standing are met).

2. See JOHN D. ECHEVERRIA & JON T. ZEIDLER, ENVTL. POLICY PROJECT, BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE FEDERAL ENVIRONMENTAL LAW 1 (1999) (explaining that Congress included citizen suit provisions in all of its major environmental laws so that citizens could "supplement[] the government's limited enforcement resources . . . [and] temper the risk that changing political winds and special interest influence could undermine diligent enforcement of environmental laws"). Refer to note 153 *infra* (discussing the legislative intent behind 33 U.S.C. § 1365 (1994) (the Clean Water Act) and specifically its citizen suit provision).

3. See ECHEVERRIA & ZEIDLER, *supra* note 2, at 12 (listing examples of environmental lawsuits in which citizens were denied access to the courts for lack of standing).

4. 120 S. Ct. 693 (2000).

5. Henry Weinstein, *Court Upholds Citizen Suits Over Pollution*, L.A. TIMES, Jan. 13, 2000, at A3 (reporting the opinion of David Beckman, staff attorney for the Natural Resources Defense Council in Los Angeles, which filed an amici brief in support of the plaintiffs in *Laidlaw*).

sufficiently establish injury;<sup>6</sup> and (2) civil penalties payable to the United States Treasury can serve as redress in cases of ongoing violations because the penalties encourage defendants to discontinue current violations and deter them from committing future ones.<sup>7</sup>

This Casenote applauds *Laidlaw's* promotion of the legislative intent behind citizen suit provisions and analyzes the decision's implications for the future of environmental law. Part II of this Article traces the lower courts' disposition of *Laidlaw* and recites the Supreme Court's reasoning in the case. Part III provides a brief overview of the standing doctrine. Part IV explores Justice Antonin Scalia's standing theory, which, until *Laidlaw*, was the driving force behind the Court's long trend toward ending what Scalia described as the federal "judiciary's long love affair with environmental litigation."<sup>8</sup> Part IV also considers the liberal approach taken by Justice Ruth Bader Ginsburg, author of the *Laidlaw* decision, in confronting the standing doctrine. Part V examines the effects of the *Laidlaw* decision and analyzes the Court's reasoning. Finally, Part VI analyzes *Laidlaw's* subtler implications about the Court's future attitude toward environmental plaintiffs and the laws they invoke.

## II. RECITATION OF THE CASE

### A. *The Case in District Court*

In 1992, a group of environmental interest organizations,<sup>9</sup> led by Friends of the Earth (FOE), brought an enforcement action against Laidlaw Environmental Services, Inc. (*Laidlaw*) under the Clean Water Act's citizen suit provision.<sup>10</sup> FOE alleged that *Laidlaw* had violated the terms of its National Pollutant Discharge Elimination Systems (NPDES) permit by discharging hazardous amounts of mercury and other pollutants into the North Tyger River in Roebuck, South Carolina.<sup>11</sup> The plaintiffs

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6. See *Laidlaw*, 120 S. Ct. at 706.

7. See *id.* at 706-07.

8. See Scalia, *supra* note 1, at 884.

9. See *Laidlaw*, 120 S. Ct. at 702. The plaintiffs included Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., and the Sierra Club. See *id.*

10. See *id.* (reporting that FOE filed the citizen suit against *Laidlaw* pursuant to 33 U.S.C. § 1365 (1994)).

11. See *id.* at 701. *Laidlaw* operated a hazardous waste incinerator facility that included a wastewater treatment plant. See *id.* The NPDES permit specifically limited the amount of mercury and other pollutants that *Laidlaw* could discharge

sought civil penalties as well as declaratory and injunctive relief.<sup>12</sup>

The district court imposed a civil penalty of \$405,800.<sup>13</sup> The court, however, denied the plaintiffs' requests for declaratory and injunctive relief because Laidlaw was in compliance with permit requirements at the time of the order.<sup>14</sup>

### *B. The Appeal to the Fourth Circuit*

Friends of the Earth appealed only the civil penalty, which it considered inadequate.<sup>15</sup> Laidlaw's cross-appeal argued that FOE lacked standing to sue because it had failed to demonstrate injury-in-fact.<sup>16</sup>

The United States Court of Appeals for the Fourth Circuit found that Laidlaw's compliance with NPDES standards prior to the final disposition of the case precluded injunctive and declaratory relief.<sup>17</sup> Relying on Supreme Court precedent, the court determined that the only remaining remedy, namely civil penalties payable to the United States treasury, did not satisfy the standing doctrine's redressability requirement.<sup>18</sup> Thus, the

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into the waterway. *See id.* FOE alleged violation of the allowable discharge limits. *See id.* at 701-02.

12. *See id.* at 702. The Clean Water Act authorizes injunctive relief and civil penalties in citizen suit cases. *See* 33 U.S.C. § 1365(a) (1994).

13. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 956 F. Supp. 588, 612 (D.S.C. 1997) *vacated*, 149 F.3d 303 (4th Cir. 1998), *and cert. granted*, 525 U.S. 1176 (1999), *and rev'd*, 120 S. Ct. 693 (2000). The district court determined that Laidlaw had violated the mercury limits of the NPDES permit 489 times between 1987 and 1995. *See id.* at 600. The district court further concluded that Laidlaw had derived a total economic benefit of \$1,092,581 from its period of noncompliance with the mercury limitations of the NPDES permit. *See id.* at 603. The district court thus determined that a civil penalty of \$405,800 would adequately deter future violations in light of the fact that Laidlaw was also ordered to reimburse the plaintiffs' legal fees. *See id.* at 610-11.

14. *See id.* at 611. Moreover, the court noted "[t]he lack of demonstrated harm" to the environment. *See id.*

15. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 149 F.3d 303, 305 (4th Cir. 1998), *vacating as moot* 956 F. Supp. 588 (D.S.C. 1997), *rev'd*, 120 S. Ct. 693 (2000).

16. *See id.* at 305 (noting that the district court rejected this argument and ruled that FOE had standing to bring the suit, "albeit 'by the very slimmest of margins.'" Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 120 S. Ct. 693, 702 (2000)).

17. *See Laidlaw*, 149 F.3d at 305.

18. *See id.* at 306-07 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998)). To establish standing, a plaintiff must show, among other things, that it is "likely," as opposed to merely "speculative," that a favorable decision will redress her or his injury. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Supreme Court expounded upon this requirement in 1998, explaining that the test for redressability is whether the plaintiff would derive a concrete benefit from a favorable remedy. *See Steel Co.*, 523 U.S. at 103 & n.5.

Fourth Circuit reasoned that the redressability requirement was unattainable and that the case was therefore moot.<sup>19</sup> Accordingly, the court vacated the lower court's opinion and remanded the case for dismissal.<sup>20</sup> The Fourth Circuit also denied FOE's request for attorneys' fees or other litigation costs based upon its "failure to obtain relief on the merits of [its] claims."<sup>21</sup>

### C. *The Supreme Court Decision*

1. *Grant of Certiorari.* In contrast to the Fourth Circuit's holding, a number of circuits had previously held that an action is not moot merely because injunctive relief is no longer available when a defendant voluntarily complies with its permit *after* the commencement of litigation.<sup>22</sup> The Supreme Court granted FOE's petition for certiorari<sup>23</sup> to resolve this inconsistency.<sup>24</sup>

2. *The Majority Opinion.* The Supreme Court, in a seven-to-two decision, reversed the Fourth Circuit and announced that the FOE had standing to bring a citizen suit, and, absent a showing that violations could not reasonably be expected to recur, FOE's suit was not rendered moot by Laidlaw's post-complaint compliance with its NPDES permit or by the closure of

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19. See *Laidlaw*, 149 F.3d at 306-07.

20. See *id.* at 307.

21. *Id.* at 307 n.5.

22. See *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997) (holding that a case is not mooted when a defendant cures a Clean Water Act violation while a citizen suit is pending); *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 503-04 (3d Cir. 1993) (finding that a claim for damages was not moot simply because an intervening NPDES permit eliminated the possibility of injunctive relief); *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020-21 (2d Cir. 1993) (concluding that a citizen suit for civil penalties was not moot even though the violator had come into compliance after the complaint was filed); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134 (11th Cir. 1990) (holding that post-complaint compliance will not moot the request for civil penalties).

23. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 525 U.S. 1176-77 (1999).

24. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. 693, 703 (2000). The questions presented for review were as follows: (1) whether a citizen suit seeking civil penalties under the Clean Water Act is constitutionally moot due to lack of redressability, where plaintiffs had standing at the time of the complaint but have not obtained injunctive relief and defendant came into compliance with the law prior to trial; and (2) whether plaintiffs could be denied attorneys' fees or litigation costs because the case was dismissed for mootness, even if the litigation was responsible for bringing the defendant into compliance with the Clean Water Act. See *id.* at 700.

its facility.<sup>25</sup> The Court declined to rule on the issue of attorneys' fees, leaving the question to be resolved upon remand.<sup>26</sup>

Writing for the majority, Justice Ruth Bader Ginsburg explained that the court of appeals had "conflated" Supreme Court precedent on standing to bring suit with the Court's precedent on post-commencement mootness.<sup>27</sup> Justice Ginsburg indicated the Fourth Circuit failed to recognize the legitimate potential of civil penalties to serve as a deterrent and thereby function to redress an injury.<sup>28</sup> The majority opinion noted that although the concepts of mootness and standing emanate from the same constitutional provision, the two doctrines differ distinctly.<sup>29</sup> Because the Court believed the Fourth Circuit had erroneously rested its decision on the mootness doctrine, without deciding the issue of standing,<sup>30</sup> the majority reasoned that it was obligated to fully analyze the standing question before moving on to the issue of mootness.<sup>31</sup>

The majority first reviewed the three requirements needed to satisfy Article III's case-or-controversy clause: (1) the plaintiff has suffered an "injury in fact" that is concrete, particularized, and actual, rather than hypothetical; (2) the injury is "fairly traceable" to the challenged action; and (3) it is likely that a favorable decision will redress the injury suffered.<sup>32</sup> The Court

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25. See *id.* at 708.

26. See *id.* at 712.

27. See *id.* at 700 (explaining that a "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case").

28. See *id.* ("The Court of Appeals also misperceived the remedial potential of civil penalties. Such penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation.")

29. See *id.* at 703-04. Standing and mootness both arise out of the case-or-controversy clause found in the United States Constitution. See U.S. CONST. art. III, § 2.

30. The Fourth Circuit's assumption of standing would not have presented a problem if the Court had affirmed the circuit's finding of mootness. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997) (declaring that it is permissible for a court to assume, without deciding, that standing exists in order to reach the issue of mootness). However, because the majority in *Laidlaw* believed the Fourth Circuit's finding of mootness to be erroneous, it felt compelled to explore the standing issue before addressing the validity of the mootness claim. See *Laidlaw*, 120 S. Ct. at 704.

31. See *Laidlaw*, 120 S. Ct. at 704.

32. See *id.* (listing the three requirements articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The majority also noted that an association has standing to sue on behalf of its members if the following are present: (1) its members would have standing to sue in their own right; (2) the interests involved are germane to the association's mission; and (3) the individual participation of the members is not required. See *id.* (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

then addressed Laidlaw's contention that FOE lacked standing to seek injunctive relief because its members had not shown any injury-in-fact to the environment.<sup>33</sup> In accord with the case-or-controversy clause, the Court rejected this argument and refocused the injury question from the environment to the plaintiff.<sup>34</sup> Having examined sworn statements by FOE members indicating their desire to use the river for recreational purposes and an inability to do so because of pollution, the Court determined that FOE had satisfied the injury-in-fact requirement.<sup>35</sup>

Having concluded that FOE had standing to seek injunctive relief, the majority confronted Laidlaw's assertion that FOE lacked standing to seek civil penalties.<sup>36</sup> The majority responded to Laidlaw's argument by focusing on the deterrent effect of civil penalties.<sup>37</sup> The crux of the majority's reasoning was that Congress intended that the mere threat of civil penalties would deter Clean Water Act violations.<sup>38</sup> Essentially, the majority

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33. See *id.* Laidlaw supported its argument by referencing the district court's finding "that there had been 'no demonstrated proof of harm to the environment' from Laidlaw's mercury discharge violations." *Id.*

34. See *id.* (noting that to require a showing of injury to the environment would "raise the standing hurdle higher than the necessary showing for success on the merits"). Bruce Terris, counsel for FOE, expressed concern over this issue prior to the outcome of the case. See Steve France, *What's it To You? Scalia's 'Rude Question' May Help to Clear the Air in His Campaign to Curb Citizen Environmental Suits*, A.B.A. J., Oct. 1999, at 36, 36. Mr. Terris feared that the Court might go beyond mootness and redressability when considering whether citizens have standing in the absence of demonstrated harm to the environment. See *id.* Terris, who was already \$2 million in debt from litigating *Laidlaw*, indicated that such a task would be "prohibitively expensive." See *id.*

35. See *Laidlaw* at 704-05. The Court distinguished the injuries alleged in *Laidlaw* from those in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), *vacated sub nom.* Mountain States Legal Found. v. National Wildlife Fed'n, 497 U.S. 1020 (1990). In *Lujan*, the Court held that an organization could not satisfy the injury-in-fact requirement by merely alleging that one of its members used unspecified portions of vast areas of land when the challenged activity occurred only on a small portion thereof. See *Lujan*, 497 U.S. at 889. The *Laidlaw* Court distinguished the case *sub judice* by noting that the challenged action in *Laidlaw* directly affected the plaintiffs' interests and amounted to more than the "general averments" and "conclusory allegations" it previously found insufficient in *Lujan*. See *Laidlaw*, 120 S. Ct. at 705-06.

36. See *Laidlaw*, 120 S. Ct. at 706. Laidlaw maintained that even if private citizens had standing to seek injunctive relief they can never have standing to seek civil penalties because monies paid to the government do not redress private injuries. See *id.*

37. See *id.* (emphasizing "all civil penalties have some deterrent effect") (quoting *Hudson v. United States*, 522 U.S. 93, 102 (1997)).

38. See *id.* The Court stated: "The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Id.* (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)).

adopted Congress's faith in the deterrent value of civil penalties.<sup>39</sup> Justice Ginsburg explained: "To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct."<sup>40</sup> Concluding this analysis, the majority recognized the possibility that the deterrent effect of civil penalties could become too insubstantial to support citizen standing.<sup>41</sup> Justice Ginsburg reasoned, however, that the "vanishing point" had not been reached in this case because here it was likely, rather than merely speculative, that civil penalties would both abate current violations and deter future ones.<sup>42</sup>

The Court next distinguished the facts in *Laidlaw* from those of another recently decided standing doctrine case.<sup>43</sup> In *Steel Co. v. Citizens for a Better Environment*,<sup>44</sup> the Court concluded that citizens lack standing to seek civil penalties for violations abated prior to litigation.<sup>45</sup> Justice Ginsburg distinguished *Laidlaw* by pointing out that the Court's holding in *Steel Co.* did not decide the issue of whether a citizen had "standing to seek penalties for violations that [were] ongoing at the time of the complaint and that could continue into the future if undeterred."<sup>46</sup> Because the violations in *Laidlaw* could reasonably have continued undeterred after FOE filed suit,<sup>47</sup> the Court found that FOE had standing to seek civil penalties as redress.<sup>48</sup>

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39. See *id.* at 706-07 (remarking that sanctions effectively abate violations and prevent recurrence, thus satisfying the redressability requirement).

40. See *id.* The majority addressed the dissent's contention that the availability, rather than the imposition, of civil penalties acted as a deterrent—pointing out that unenforced civil penalties lack credibility. See *id.* at 707. In a statement often quoted by the media in the days after the decision was released, Justice Ginsburg stressed: "A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again." *Id.*

41. See *id.*

42. See *id.* (declining the opportunity to explore the principle's "outer limits").

43. See *id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)).

44. 523 U.S. 83 (1998).

45. See *id.* at 108. The Court in *Steel Co.* specifically noted that there was neither an allegation nor a reason to suspect that violations were continuing or imminent. See *id.*

46. *Laidlaw*, 120 S. Ct. at 708.

47. See *id.* at 696-98. The suit was filed on June 12, 1992. See *id.* at 696. The record indicated that *Laidlaw* violated the mercury discharge limits of its permit 13 times after FOE filed suit. See *id.* at 697. Additionally, *Laidlaw* violated its monitoring and reporting requirements during that same period. See *id.*

48. See *id.* at 708.

The majority then addressed the mootness issue.<sup>49</sup> Justice Ginsburg characterized Laidlaw's voluntary compliance during the pendency of underlying litigation as "[t]he only conceivable basis for a finding of mootness."<sup>50</sup> The majority also noted the strict standard for determining whether a case was mooted by a defendant's voluntary compliance.<sup>51</sup> Specifically, "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."<sup>52</sup>

Applying this standard, the Court examined the appellate court's ruling.<sup>53</sup> In sum, Justice Ginsburg distinguished mootness from standing<sup>54</sup> and indicated that the court of appeals erred by applying *Steel Co.*'s holding to the question of mootness in *Laidlaw*.<sup>55</sup> The majority explained that, although mootness is often referred to as "the doctrine of standing set in a time frame,"<sup>56</sup> there are significant differences between the doctrines.<sup>57</sup> Most important, a plaintiff seeking to establish standing must establish that a defendant's wrongful conduct is continuing or that threatened injury is imminent.<sup>58</sup> A defendant asserting mootness, on the other hand, "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."<sup>59</sup> "The plain lesson," according to Justice Ginsburg, was that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."<sup>60</sup> The

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49. *See id.*

50. *Id.*

51. *See id.* (explaining that if voluntary compliance alone deprived a court of its jurisdiction, a defendant would be free to resume its violation after the dismissal of such enforcement suits).

52. *Id.* (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.* at 709 (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). This phrase encompasses the idea that the "personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Geraghty*, 445 U.S. at 397 (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

57. *See Laidlaw*, 120 S. Ct. at 709 (reflecting on long-recognized exceptions to mootness that show the time frame description is not comprehensive).

58. *See id.*

59. *Id.*

60. *Id.*

majority also recognized that the district court based its award for penalties on the need for civil deterrence.<sup>61</sup> Thus, the Court concluded that either Laidlaw's substantial compliance or the closure of Laidlaw's Roebuck facility might deem the case moot if either of those factors made it absolutely clear that no future violations could reasonably be expected to recur.<sup>62</sup> This issue, however, was not litigated in the lower courts and therefore was not decided by the Court.<sup>63</sup>

As to FOE's request for attorneys' fees, the Court reasoned that the court of appeals erred in reaching the question because the issue had not yet been resolved by the district court.<sup>64</sup> Justice Ginsburg did not imply that the issue was not ripe, but rather stated that the district court, not the Supreme Court, should address in the first instance any request for fees.<sup>65</sup> Thus, the Court reversed the Fourth Circuit opinion and remanded the case for a determination of the reasonableness of FOE's concerns over future violations and its request for attorneys' fees.<sup>66</sup>

4. *Justice Stevens's Concurring Opinion.* Justice Stevens concurred with the majority's finding on the mootness issue<sup>67</sup> and urged that even if Laidlaw's post-complaint compliance with its NPDES permit and the closure of its Roebuck facility was sufficient to moot a claim for injunctive relief, it did not moot a claim for civil penalties or warrant vacating the district court's order.<sup>68</sup> Pointing to the Clean Water Act, which authorizes civil penalties at the time a permit is violated,<sup>69</sup> Justice Stevens opined that a claim for civil penalties is akin to a claim for punitive damages, and thus cannot be mooted by a defendant's post-complaint conduct.<sup>70</sup>

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61. *See id.* at 710.

62. *See id.* at 711.

63. *See id.* (describing the effects of Laidlaw's compliance with its NPDES permit and the closing of its Roebuck facility as disputed factual matters to be resolved upon remand).

64. *See id.* at 712 (noting that when "the Court of Appeals addressed the availability of counsel fees [for FOE] in this case, no order was before it either denying or awarding fees").

65. *See id.*

66. *See id.* at 711-12.

67. *See id.* at 712 (Stevens, J., concurring).

68. *See id.* (Stevens, J., concurring) (noting the uniformity in appellate court decisions, from circuits other than the Fourth, on this issue).

69. *See id.* (Stevens, J., concurring).

70. *See id.* (Stevens, J., concurring) (declaring that post-complaint conduct never moots a claim for punitive damages).

5. *Justice Kennedy's Concurring Opinion.* Justice Kennedy, in a separate opinion, focused on what he characterized as the difficult constitutional issues underlying the statutory delegation of the Executive's enforcement power to private citizens.<sup>71</sup> Indeed, Justice Kennedy hinted that this practice may be unconstitutional.<sup>72</sup> Because this question was not before the Court, Justice Kennedy left the issue for another day.<sup>73</sup> That Justice Kennedy's concern was also expressed by Justice Scalia in his dissent indicates that at least two Justices believe the constitutional question surrounding citizen suits warrants judicial resolution.<sup>74</sup>

6. *Justice Scalia's Dissenting Opinion.* Justice Scalia, joined by Justice Thomas, dissented to all parts of the majority opinion save the mootness determination.<sup>75</sup> The dissent first argued that FOE failed to establish injury-in-fact.<sup>76</sup> Justice Scalia's discontent centered on the plaintiffs' uncorroborated affidavits and testimony, which he considered "vague, contradictory, and unsubstantiated."<sup>77</sup> Justice Scalia argued further that the majority's casual finding of an injury violated the Court's previous standing doctrine decisions and made a "sham" of *Lujan's* injury-in-fact requirement.<sup>78</sup>

Justice Scalia next attacked the majority's "cavalier" treatment of the redressability requirement and accused the majority of impermissibly expanding the standing doctrine beyond constitutional bounds.<sup>79</sup> Moreover, Justice Scalia implied that Congress violated the Constitution by giving a private citizen the right to invoke a public remedy.<sup>80</sup>

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71. See *id.* at 713 (Kennedy, J., concurring).

72. See *id.* (Kennedy, J., concurring).

73. See *id.* (Kennedy, J., concurring).

74. Refer to Part VI.B *infra* (discussing the Justices' willingness to consider the constitutionality of citizen suit provisions in environmental laws).

75. See *Laidlaw*, 120 S. Ct. at 713, 720 (Scalia, J., dissenting).

76. See *id.* at 713 (Scalia, J., dissenting) (contending that plaintiffs' averments alone did not meet the "concrete and particularized" injury" standard applied in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

77. See *id.* at 715 (Scalia, J., dissenting).

78. See *id.* (Scalia, J., dissenting) (emphasizing that the Court, in *Lujan*, "refused to find standing based on the 'conclusory allegations of an affidavit'" (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), *vacated sub nom.* *Mountain States Legal Found. v. National Wildlife Fed'n*, 497 U.S. 1020 (1990)).

79. See *id.* (Scalia, J., dissenting) (declaring that the majority's unprecedented holding empowered the Court to resolve matters that are not "cases and controversies").

80. See *id.* at 717 (Scalia, J., dissenting) (admonishing that "Congress has done precisely what we have said it cannot do: convert an 'undifferentiated public interest' into an 'individual right' vindicable in the courts") (quoting *Lujan v.*

The dissent then noted that even if the deterrent effect of a public penalty could properly serve as redress as a matter of law, its deterrent effect in the instant case was entirely speculative as a matter of fact.<sup>81</sup> Justice Scalia criticized the majority for failing to adequately explain how the deterrent effect of civil penalties levied against Laidlaw redressed the plaintiffs' injuries.<sup>82</sup> He insisted that the majority misinterpreted the district court's statement that a civil penalty would provide "adequate deterrence," and dismissed the statement as a mere judicial finding that the penalty imposed met statutory requirements.<sup>83</sup> The only additional deterrence to be achieved, according to the dissent, was a marginal increase in Laidlaw's fear of new federal penalties compounding the state penalties already imposed.<sup>84</sup> Justice Scalia claimed to know "for certain that it [was] entirely speculative whether [this marginal increase would] make the difference between [the] plaintiffs' suffering injury in the future and [the] plaintiffs' going unharmed."<sup>85</sup>

Justice Scalia next observed that *Laidlaw* raised constitutional questions as to the legitimate delegation of executive power under Article II of the Constitution.<sup>86</sup> Like Justice Kennedy, however, the dissent left those questions for another day.<sup>87</sup> The dissent also commented on *Laidlaw's* impact on the structure of government.<sup>88</sup> Essentially, Justice Scalia claimed that allowing private citizens to enforce public law transforms a Clean Water Act plaintiff into a "self-appointed mini-EPA,"<sup>89</sup> with the power to divert public fines to private interests<sup>90</sup> and deprive the government of its discretion to

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Defenders of Wildlife, 504 U.S. 555, 577 (1992)).

81. See *id.* (Scalia, J., dissenting).

82. See *id.* (Scalia, J., dissenting) (failing to find sufficient explanation for the majority's belief that a civil penalty was "likely" to deter Laidlaw from polluting, as required by Article III) (citing *Lujan*, 504 U.S. at 561).

83. See *id.* (Scalia, J., dissenting) (discussing the absence of statutory language regarding general deterrence or future deterrence).

84. See *id.* at 718 (Scalia, J., dissenting) (refusing to unequivocally say this marginal increase would be zero, but arguing the state penalties levied against Laidlaw had already pushed the capacity of civil penalties to deter pollution to "near the top of the graph").

85. *Id.* (Scalia, J., dissenting).

86. See *id.* at 719 (Scalia, J., dissenting) (citing Article II, section 3 as committing the President to "take Care that the Laws be faithfully executed").

87. See *id.* (Scalia, J., dissenting).

88. See *id.* (Scalia, J., dissenting) (warning that the Court's decision impacted Article III significantly).

89. See *id.* (Scalia, J., dissenting).

90. See *id.* (Scalia, J., dissenting) (contending that citizen plaintiffs are empowered to force negotiated settlements requiring defendants to contribute to "environmental projects of the plaintiffs' choosing").

determine which environmental violations should be prosecuted.<sup>91</sup>

In conclusion, the dissent agreed with the majority's decision to leave the "fact-intensive" mootness question for consideration upon remand.<sup>92</sup> The dissent expressed puzzlement, however, over the majority's "academic excursus" on the differences between standing and mootness, calling it troubling and irrelevant.<sup>93</sup> On that point, Justice Scalia stood firmly by the characterization of mootness as "the doctrine of standing set in a time frame."<sup>94</sup> The dissent de-emphasized differences between the two doctrines as mere "evidentiary presumptions" with no bearing on the basic principle that the plaintiff must have a personal interest in the litigation from its commencement until its termination.<sup>95</sup> In sum, the dissent decried the "unconstitutional consequence" of the majority's decision, which, in its opinion, "plac[ed] the immense power of suing to enforce the public laws in private hands."<sup>96</sup>

### III. AN OVERVIEW OF STANDING DOCTRINE

#### A. *The Roots of Standing Doctrine*

In basic terms, "[s]tanding law answers the question of who can obtain access to the courts."<sup>97</sup> In more complex legal terms, a plaintiff can sue only for a legally cognizable and judicially redressable injury within the zone of interest protected by the statute upon which the plaintiff has based his claim.<sup>98</sup> Thus, the standing question helps determine whether the court may address the plaintiff's concerns.<sup>99</sup> Accordingly, standing is a threshold question in every matter before the judiciary.<sup>100</sup>

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91. See *id.* (Scalia, J., dissenting) (explaining that the EPA can foreclose a citizen suit only by bringing its own action against the defendant pursuant to 33 U.S.C. § 1365(b)(1)(B) (1994)).

92. See *id.* at 720 (Scalia, J., dissenting) (maintaining, nevertheless, that FOE did not have standing to pursue civil penalties in the first instance).

93. See *id.* at 720-21 (Scalia, J., dissenting).

94. See *id.* at 721 (Scalia, J., dissenting) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)).

95. See *id.* at 722 (Scalia, J., dissenting).

96. *Id.* (Scalia, J., dissenting).

97. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742 (1999).

98. See *id.*

99. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (explaining that "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues").

100. See *id.*

Standing is a relatively new judicial inquiry.<sup>101</sup> In fact, some scholars believe the framers of the Constitution never contemplated the standing doctrine as a test of whether a plaintiff could seek redress in federal court.<sup>102</sup> Nevertheless, during the first half of the twentieth century, Justices Brandeis and Frankfurter developed the standing doctrine as a way to restrict activist judges from defeating the will of the people by declaring New Deal statutes and agency actions unconstitutional.<sup>103</sup> “Thus, the roots of modern standing law lie in a perceived need to insulate democratic institutions from activist, politically unaccountable judges who were hostile to the new preferences expressed by the people and their elected representatives.”<sup>104</sup>

*B. Standing Doctrine in the Early Environmental Era*

The doctrine of standing is derived from Article III, Section 2 of the Constitution, which states in part:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . . 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 Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>105</sup>

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101. See Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1064 (1994) (noting that standing was not commonly used until the middle of the twentieth century and thus, “[t]he need to address the issue of standing is a relatively recent phenomenon”).

102. See ECHEVERRIA & ZEIDLER, *supra* note 2, at 4 (observing that the term “standing” is absent from the Constitution); see also Pierce, *supra* note 97, at 1763 (reasoning that the terms “case” and “controversy” are “broad enough linguistically to encompass every case the Court has declined to resolve on standing grounds”). Moreover, James Madison asserted that the judicial power of the United States should “be limited to cases of a Judiciary Nature.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., rev. ed. 1966). This suggests that the Framers intended the judiciary to resolve the types of cases it had traditionally resolved. See Pierce, *supra* note 97, at 1764. Furthermore, “[n]either English nor colonial courts applied any jurisdictional limit that bore any resemblance to the modern law of standing.” *Id.* (detailing the types of cases and controversies resolved by English and colonial courts).

103. See Pierce, *supra* note 97, at 1767.

104. *Id.* The Brandeis/Frankfurter standing doctrine did not limit Congress’s power to create a cause of action by statute. See *id.*

105. U.S. CONST. art. III, § 2.

Thus, the Constitution limits federal court jurisdiction to the “irreducible minimum” of cases and controversies.<sup>106</sup> For that reason, scholars thirty years ago would have doubted a plaintiff’s ability to recover for anything more than impending pecuniary or physical harm.<sup>107</sup> In the 1960s, however, the Court’s expansion of its traditional standing doctrine created opportunities to bring environmental concerns into the judicial arena.<sup>108</sup>

In the landmark decision *Sierra Club v. Morton*,<sup>109</sup> the Supreme Court recognized a plaintiff’s right to seek judicial redress of a legally cognizable injury.<sup>110</sup> One year later, in *United States v. Students Challenging Regulatory Agency Procedures*<sup>111</sup> (“*SCRAP*”), the Court expanded its standing doctrine even farther. The Court found that a group of students had standing to seek review of Interstate Commerce Commission rates that made it less expensive to ship new metal rather than scrap metal, which, in turn, discouraged recycling.<sup>112</sup> The students in *SCRAP* were able to illustrate a cognizable injury by showing that they used the forests, streams, mountains and other resources for outdoor recreation and that the new rates would result in more litter in these areas.<sup>113</sup>

After these early environmental cases, the Court in *Lujan* clarified that under Article III a plaintiff must establish the following: (1) the injury-in-fact; (2) a causal connection between the injury and the challenged action; and (3) that the injury is likely to be redressed by a favorable court decision.<sup>114</sup>

The Court’s willingness to recognize environmental plaintiffs’ right to sue was short-lived.<sup>115</sup> Beginning in the 1980s, the Supreme Court, under the sway of Justice Antonin Scalia,

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106. See *Lujan*, 504 U.S. at 590 (Blackmun, J., dissenting).

107. See Philip Weinberg, *Are Standing Requirements Becoming a Great Barrier Reef Against Environmental Actions?*, 7 N.Y.U. ENVTL. L.J. 1, 2 (1999) (recounting the chilling effect of traditional standing doctrine on environmental movements).

108. See *id.* (explaining that in the 1960s and 1970s, courts in general, and especially the Supreme Court, expanded standing for environmental plaintiffs).

109. 405 U.S. 727 (1972).

110. See *id.* at 735.

111. 412 U.S. 669 (1973).

112. See *id.* at 676, 685 (relating petitioner’s claims that “the rate structure would discourage the use of ‘recyclable’ materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities”).

113. See *id.* at 685, 688.

114. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

115. See Eric I. Abraham, Comment, *Justice Ginsburg and the Injury in Fact Element of Standing*, 25 SETON HALL L. REV. 267, 287 (1994) (recounting that the federal judiciary was less sympathetic to the desires of environmental litigants in the 1980s than in the previous two decades).

advanced a less favorable attitude toward environmental litigation.<sup>116</sup>

#### IV. THE COMPETING MOTIVATIONS DRIVING THE COURT'S CURRENT STANDING DOCTRINE

##### A. Justice Scalia's Anti-Majoritarian Philosophy

In 1983, then Judge Scalia published a comprehensive, but much criticized<sup>117</sup> theory of the standing doctrine.<sup>118</sup> Essentially, Scalia presented an anti-majoritarian doctrine of "unequal standing."<sup>119</sup> The future Supreme Court Justice posited that the judiciary should focus its efforts on protecting the interests of minorities.<sup>120</sup> Indeed, Scalia argued that concerns over widely shared public injuries should be left to the political process, rather than the courts—that doing otherwise would politicize the judicial forum.<sup>121</sup>

Thus, Scalia indicated that when a party "who is 'the very *object* of a law's requirement or prohibition'" brings suit, that

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116. See Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209, 209 (1987) ("By the 1980's [sic], the courts, led by the Supreme Court, were presenting a much lower profile in environmental cases, even though Congress remained firmly committed to the environmental protection initiatives commenced earlier.").

117. See John D. Echeverria, *Standing Up for the Environment: Justices Should Welcome Green Groups Into Court*, LEGAL TIMES, Oct. 11, 1999, at 58, 58-59. John Echeverria, Director of the Environmental Policy Project at Georgetown University Law Center, notes that numerous scholars have objected to Justice Scalia's theory. See *id.* at 58. For example, the "anti-majoritarian" standing doctrine is not supported by the language of Article III and, arguably, discourages respect for the rule of law. See *id.* Moreover, Scalia's theory ignores the difficulties of "organizing a diffuse constituency" of environmental law supporters into any sort of powerful political force. See *id.* Echeverria observes that Congress created citizen suits to provide a forum for citizens with environmental concerns that could not be effectively addressed by the political process. See *id.* Finally, Justice Scalia's standing doctrine violates the separation of powers principle by encouraging unelected federal judges to ignore or misdirect legislative policies. See *id.* at 58-59. For a more comprehensive criticism of Justice Scalia's anti-majoritarian theory, see Brief Amicus Curiae of Americans for the Environment in Support of Petitioners at 3-6, *Friends of the Earth v. Laidlaw Env'tl. Servs., Inc.*, 120 S. Ct. 693 (2000) (No. 98-822).

118. See Scalia, *supra* note 1, at 881-82 (advocating his view of a limited standing doctrine).

119. See Echeverria, *supra* note 117, at 58 (noting that, under Scalia's theory of unequal standing, environmental activists "should ordinarily be denied standing").

120. See Scalia, *supra* note 1, at 897.

121. See *id.* at 892 ("The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them.").

party will always have standing.<sup>122</sup> Conversely, when a party, such as a citizen suit plaintiff, brings suit “complaining of an agency’s unlawful *failure* to impose a requirement or prohibition on *someone else*,” that party is asserting a majoritarian interest.<sup>123</sup> Accordingly, under such circumstances, a plaintiff’s standing should be recognized only after showing that the government’s “non-enforcement” has caused him particularized injury.<sup>124</sup>

Beginning with his appointment to the Supreme Court in 1986,<sup>125</sup> Scalia implemented his anti-majoritarian theory and orchestrated an overhaul of the Court’s environmental standing jurisprudence.<sup>126</sup> Indeed, in the 1990s, the Supreme Court has, in its opinions authored by Justice Scalia,<sup>127</sup> curbed environmentalists’ access to the courts by declaring four limitations on standing: (1) injunctive relief does not serve to redress a harm where the plaintiff has not alleged a continuing violation;<sup>128</sup> (2) declaratory judgment does not satisfy the redressability requirement where the defendant has already admitted the violation;<sup>129</sup> (3) civil penalties sought pursuant to statutory authority do not redress an injury where such penalties are payable to the United States Treasury rather than to the plaintiff directly;<sup>130</sup> and (4) attorney’s fees and investigation expenses alone are not forms of redress as contemplated by the Article III cases and controversies clause.<sup>131</sup>

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122. See ECHEVERRIA & ZEIDLER, *supra* note 2, at 6.

123. See *id.*

124. See *id.*

125. See *Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 99-1064 (1987); see also David G. Savage, *Rehnquist Sworn In as Chief Justice: Scalia Also Takes Oath; Reagan Urges ‘Judicial Restraint’*, L.A. TIMES, Sept. 27, 1986, at A2.

126. See ECHEVERRIA & ZEIDLER, *supra* note 2, at 2 (noting that since his appointment, Scalia has “demonstrated an extraordinary commitment to this issue”).

127. Justice Scalia has authored the majority opinion in all of the Court’s major environmental standing decisions since 1986. See *id.*

128. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 108-09 (1998) (refusing to grant injunctive relief where respondent sought only to deter future violations).

129. See *id.* at 106 (“There being no controversy over whether petitioner [violated the law], . . . the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world.” (citing *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479 (1990))).

130. See *id.* at 106-07 (finding that penalties payable to the government do not serve as a reimbursement to the plaintiff for the costs of the harm, but rather serve to vindicate the public interest in the proper execution of the law and are thus insufficient to satisfy the cases and controversies requirement of Article III).

131. See *id.* at 107-08 (“[A] plaintiff cannot achieve standing to litigate a

*B. Justice Ginsburg's Liberal View of the Standing Doctrine*

Although the Supreme Court's standing doctrine in the 1980s and 1990s painted a bleak picture for the future of environmental litigation, the confirmation of Ruth Bader Ginsburg as a Supreme Court Justice in 1993 was the first step toward a return to the Court's receptive attitude toward environmental plaintiffs.<sup>132</sup> While a member of the Circuit Court of Appeals for the District of Columbia, then Judge Ginsburg articulated a broad view of the standing doctrine in environmental cases. For example, in a concurring opinion Judge Ginsburg agreed that a "fairly traceable" line of causation between harm to the plaintiff and the challenged action was sufficient to show an injury-in-fact.<sup>133</sup> The future Supreme Court Justice also recognized that standing inquiries sometimes involve factual questions that extend beyond the realm of judicial expertise.<sup>134</sup> Judge Ginsburg reasoned that the judiciary must defer to Congress when the legislature has concluded that a certain remedy will reach a given result.<sup>135</sup> Additionally, she expounded on the level of specificity necessary to establish redressability, opining that the plaintiff must only show a mere likelihood that a favorable result will redress the underlying injury.<sup>136</sup>

The views Justice Ginsburg advanced during her tenure on the D.C. Circuit illustrate her willingness to grant standing in cases where the injury is amorphous and the harm remote.<sup>137</sup> In *Steel Co.*, the Court denied standing to an environmental group suing for damages arising out of past violations of the Emergency

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substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself.").

132. See Abraham, *supra* note 115, at 307 (stating that Justice Ginsburg "provid[ed] a ray of hope for a more enlightened approach to allowing environmental plaintiffs to seek judicial review of agency decisions").

133. See *City of Los Angeles v. NHTSA*, 912 F.2d 478, 504 (D.C. Cir. 1990) (Ginsburg, J., concurring) (agreeing with the majority's recognition of standing where the aggrieved party "asserts a bona fide environmental interest and is within the geographical area where the suspected impact is likely to occur") (quoting *Public Citizen v. NHTSA*, 848 F.2d 256, 269 n.2 (D.C. Cir. 1988) (Silberman, J., dissenting in part)), *overruled by* *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996).

134. See *Dellums v. United States Nuclear Regulatory Comm'n*, 863 F.2d 968, 984 (D.C. Cir. 1988) (Ginsburg, J., dissenting as to standing) (urging judicial deference to legislation in areas falling outside a court's expertise).

135. See *id.* (Ginsburg, J., dissenting as to standing).

136. See *id.* at 986 (Ginsburg, J., dissenting as to standing).

137. Refer to notes 132-36 *supra* and accompanying text (discussing Justice Ginsburg's liberal view of standing expressed during her time as a judge on the United States Court of Appeals for the District of Columbia).

Planning and Community Right-To-Know Act (EPCRA).<sup>138</sup> Justice Ginsburg concurred in the Court's judgment because the plaintiff was suing for violations that had subsided before the litigation commenced.<sup>139</sup> She reasoned that the plaintiff in *Steel Co.* did not have standing because Congress had not intended for the EPCRA to address "wholly past violations[.]"<sup>140</sup> Although Justice Ginsburg agreed that the plaintiff could not bring an action under EPCRA, her reasoning was nonetheless in harmony with the liberal view of standing espoused during her tenure on the circuit court.<sup>141</sup> Justice Ginsburg based her concurrence in *Steel Co.* entirely upon the congressional intent behind EPCRA, thus illustrating her commitment to strong judicial deference in standing cases.<sup>142</sup> Indeed, by authoring the *Laidlaw* decision, Justice Ginsburg continues to demonstrate her liberal view of standing and her willingness to entertain the claims of environmental plaintiffs seeking congressionally mandated remedies.<sup>143</sup>

## V. ANALYSIS OF LAIDLAW

### A. *The Obvious Results of the Laidlaw Decision*

When the Supreme Court granted the petition for certiorari in *Laidlaw*, many scholars recognized the potential for a shift in the Court's trend of denying environmentalists' standing in citizen suit cases.<sup>144</sup> Still others feared that the Court might continue its acceptance of Justice Scalia's standing theory and eliminate a remedy that Congress authorized for all environmentally-related citizen suits by affirming the Fourth Circuit's harsh decision.<sup>145</sup>

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138. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109-10 (1998).

139. See *id.* at 134 (Ginsburg, J., concurring in the judgment).

140. See *id.* (Ginsburg, J., concurring in the judgment).

141. Refer to notes 142-44 *infra* and accompanying text (reviewing Justice Ginsburg's deference to congressional findings in standing cases).

142. See *Steel Co.*, 523 U.S. at 134 (Ginsburg, J., concurring) (answering the question of whether EPCRA authorized citizen suits for wholly past violations by focusing on the Act "as Congress designed it").

143. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. 693, 706-07 (2000) (recognizing that civil penalties satisfy the redressability prong of the standing inquiry because Congress intended the penalties to act as a deterrent).

144. See ECHEVERRIA & ZEIDLER, *supra* note 2, at 3 ("The Court's decision to review [*Laidlaw*] may be a signal of the Court's willingness to halt, or even possibly reverse, the erosion of citizen standing to sue.")

145. See *Environmental Groups Urge U.S. Supreme Court to Review Citizen Suit Case, Business Groups Seek Affirmation*, 12 NO. 9 MEALEY'S LITIG. REP.: SUPERFUND, June 11, 1999, at 16 (discussing the concerns of the National Resources

In the aftermath of *Laidlaw*, it is clear that (although perhaps not quite “mov[ing] the world” as Justice Scalia feared)<sup>146</sup> the Justice Ginsburg-led Supreme Court has dramatically shifted its attitude toward environmental citizen suit plaintiffs.<sup>147</sup>

1. *Concrete Individual Concern Plus Proof of Violations Equals Injury-in-Fact.* The decision in *Laidlaw* clearly held that a plaintiff’s standing is not to be determined by a showing of injury to the environment.<sup>148</sup> Rather, the Court indicated that injury to the individual is the relevant inquiry.<sup>149</sup> After all, trees cannot sue.<sup>150</sup> Thus, to show an injury-in-fact in a citizen suit, litigants must show that they have suffered some concrete harm, rather than merely revealing harm to the environment.<sup>151</sup>

The Court’s decision should relieve the concerns of environmentalists who know that the expense incurred in showing harm to the environment often amounts to more than a private citizen or interest group can afford.<sup>152</sup> Moreover, the decision allows citizens to follow the will of the legislature in enforcing environmental regulations.<sup>153</sup>

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Defense Council and several other public interest groups that filed amici briefs in support of Friends of the Earth).

146. See *Laidlaw*, 120 S. Ct. at 717 (Scalia, J., dissenting) (opposing the majority’s approval of “scattershot” redress and allowance of “[a] claim of particularized future injury” to become a “vehicle for pursuing generalized penalties for past violations”).

147. Refer to note 5 *supra* and accompanying text (characterizing *Laidlaw* as a monumental victory for environmentalists).

148. See *Laidlaw*, 120 S. Ct. at 704 (cautioning that to insist that the plaintiff show an injury to the environment would raise the required showing for standing higher than the necessary showing for success on the merits in a case alleging NPDES “noncompliance”).

149. See *id.* (noting that the “relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff”).

150. Under the citizen suit provision of the Clean Water Act, only a “citizen” can sue. See 33 U.S.C. § 1365(a) (1994). “Citizen” is defined as “a person or persons having an interest which is or may be adversely affected.” See *id.* at § 1365(g). Obviously, the environment itself is not a citizen under this definition. See *id.*

151. See *Laidlaw*, 120 S. Ct. at 704.

152. See France, *supra* note 34, at 36. (reporting that FOE’s counsel, Bruce Terris, declared that the task of showing that a defendant caused actual harm to the environment would be “prohibitively expensive”).

153. Legislative histories of citizen suit provisions indicate that Congress intended the provisions to encourage proper executive branch enforcement of the laws and to confer broad standing to monitor that enforcement. Senator Muskie, one of the most ardent supporters of the Clean Water Act, illustrated this intent:

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

Justice Scalia's fervent dissent wrongly accuses the Court of allowing citizen suit plaintiffs to base their injuries entirely on mere allegations of concern.<sup>154</sup> Unfortunately, the dissent fails to recognize that the plaintiffs in this case accompanied their allegations with proof of violations.<sup>155</sup> The majority did not hold that a simple claim of injury will satisfy standing, but that plaintiffs will meet the standard for showing a threshold injury-in-fact only when they present proof of environmental violations and demonstrate reasonable personal concerns about the effects of those violations.<sup>156</sup>

*Laidlaw* plainly supports the aim of environmental regulation—identifying and abating environmental hazards.<sup>157</sup> The Court clearly recognized the sound reasoning underlying citizen suits; if Congress and environmental enforcement agencies find an activity sufficiently repugnant to warrant legislative regulation, then an individual's reasonable concerns about the activity's impact on him warrants judicial deliberation.<sup>158</sup>

2. *Civil Penalties Paid to the Government Can Redress Ongoing or Impending Violations.* With *Laidlaw*, the Court took a dramatic step forward from where it stood on the redressability issue in 1998 when Justice Scalia's majority opinion in *Steel Co.* declared that civil penalties payable to the United States Treasury do not redress a private plaintiff's injury.<sup>159</sup> Justice Scalia wrote:

[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that

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location of the waterway and regardless of the issue involved.

ENV'TL. POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. DOC. NO. 93-1, at 221 (1973).

154. See *Laidlaw*, 120 S. Ct. at 714 (Scalia, J., dissenting) (declaring that the plaintiffs have not attempted to show their injury, but have instead "rel[ie]d entirely upon . . . affidavit allegations of 'concern'").

155. See *id.* at 701-02 (describing *Laidlaw*'s illegal dumping of mercury into the North Tyger River and repeated noncompliance with its NPDES permit).

156. See *id.* at 705 (characterizing the affidavits and testimony offered by FOE as "more than . . . mere 'general averments'").

157. See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 317-18 (2d ed. 1998).

158. See *Laidlaw*, 120 S. Ct. at 705-06 (recognizing the probability that *Laidlaw*'s illegal activities harmed the plaintiffs as well as the environment and urging judicial deference to legislative intent).

159. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998) (opining that civil penalties might serve as redress if they were payable to the private party bringing the action).

the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.<sup>160</sup>

Despite this statement, seven justices agreed that civil penalties satisfy the redressability requirement in cases alleging ongoing or threatened violations because fines (or the threat of fines) deter violations.<sup>161</sup>

*Laidlaw's* mandate is clear: suing for statutory civil penalties when violations are ongoing or when there is a threatened violation will clear the redressability hurdle and pave the way to establishing standing.<sup>162</sup> The mandate's environmental law applications are immense because "activists frequently [use] citizen suits as a means to enforce environmental laws—often winning court victories that go beyond the positions that government agencies have been willing to pursue."<sup>163</sup>

### B. *Subtle Implications About the Future*

1. *A Ruling on the Availability of Attorneys' Fees in a Case of Voluntary Cessation.* One issue is left unresolved after *Laidlaw*: may a party be denied attorneys' fees when a defendant voluntarily complies with a statute in response to pending litigation?<sup>164</sup> Although the Court declined to rule on the question, the issue merits attention. Indeed, there is a strong indication that the Court is willing to decide the question if the issue is properly before it.<sup>165</sup> Significantly, Justice Ginsburg never suggested the attorneys' fees issue was not ripe; she merely noted that jurisprudence mandated that the issue be developed in the lower courts first.<sup>166</sup> Thus, observers can look with anticipation for a decision on the issue in the future.

2. *A Ruling on the Constitutionality of Citizen Suit Provisions.* Hidden in the nooks and crannies of *Laidlaw* is an

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160. *Id.* at 107.

161. *See Laidlaw*, 120 S. Ct. at 706-07. Justices Stevens, O'Connor, Kennedy, Souter, Breyer, and Chief Justice Rehnquist all joined the opinion of the Court. *See id.* at 699-700.

162. *See id.* at 706-08.

163. Weinstein, *supra* note 5, at A3.

164. *See Laidlaw*, 120 S. Ct. at 711-12 (declining to address the issue of attorneys' fees because the question had not been litigated before the district court).

165. *See id.* (stressing that it would be "premature" for the Court to discuss the issue of attorneys' fees).

166. *See id.* at 711.

interesting clue into the Court's future direction on citizen suit issues. The implications are intriguing and warrant mention here. Specifically, Justice Kennedy's concurrence served only to highlight the important question raised by citizen suit cases: whether they are constitutional under the Article II prohibition against unlawful delegation of power by the executive branch.<sup>167</sup> Exercising prudence, Justice Kennedy rightly left the question for a more appropriate case, but he imparted a not-so-subtle hint of his willingness to tackle the issue in the future.<sup>168</sup>

Additionally, Justice Scalia included in his dissent a one-sentence reference to the serious Article II questions raised by citizen suits.<sup>169</sup> Like Justice Kennedy, Justice Scalia chose not to elaborate on these issues, saving them for another day.<sup>170</sup> Noting that at least two justices appear ready to confront the constitutionality of citizen suit provisions, one might wonder what will result. It is obvious from the *Laidlaw* decision that Justice Scalia is very close to declaring citizen suits unconstitutional.<sup>171</sup> In fact, he clearly stated that placing the power to "enforce the public laws in private hands" is "undesirable and unconstitutional."<sup>172</sup>

Justice Kennedy's conclusion on the constitutionality of citizen suit provisions is more difficult to predict because he has not indicated how he would answer the question.<sup>173</sup> It is uncertain whether the Court will accept a case challenging the constitutionality of citizen suits and, if so, whether the eight other justices will resist Justice Scalia's effort to end what he considers the federal "judiciary's long love affair with environmental litigation."<sup>174</sup>

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167. See *id.* at 713 (Kennedy, J., concurring) (noting that essential questions are "raised when [the Court asks] whether exaction of public fines by private litigants, and the delegation of Executive power, which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States").

168. See *id.* (Kennedy, J., concurring) (observing that the parties did not devote specific attention to the constitutionality of citizen suits under Article II).

169. See *id.* at 719 (Scalia, J., dissenting) (commenting that Article II of the Constitution empowers the President to "take Care that the Laws be faithfully executed" (quoting U.S. CONST. art. II, § 3)).

170. See *id.* (Scalia, J., dissenting) (observing that the Article II questions were not argued by the parties in *Laidlaw*).

171. See *id.* at 722 (Scalia, J., dissenting) (asserting that "the Court has turned the Article III requirement . . . into a 'mere pleading requirement'").

172. *Id.* (Scalia, J., dissenting).

173. See *id.* at 713 (Kennedy, J., concurring) (indicating that "these matters are best reserved for a later case").

174. Scalia, *supra* note 1, at 884 (quoting the Court's discussion of its duty to uphold legislative purposes behind environmental regulations in *Calvert Cliffs*

## VI. CONCLUSION

The Supreme Court has finally affirmed the original intent of the standing doctrine to “insulate democratic institutions from activist, politically unaccountable judges” who oppose the preferences expressed by the people.<sup>175</sup> The Court has, for now, shown itself to be independent of Justice Scalia’s ill-founded theories of anti-majoritarian unequal standing. Undoubtedly, the liberal view of standing espoused by Justice Ginsburg influenced the Court to advance a more receptive attitude toward citizen suits. Although the *Laidlaw* decision applies only to citizen suits involving violations ongoing at the time litigation commences, the Court has certainly halted its trend of denying the rights of environmental plaintiffs. It remains to be seen whether the Court will continue making overtures towards citizens with environmental concerns. Perhaps the “love affair with environmental litigation”<sup>176</sup> has been revived.

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*Coordinating Comm’n v. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971).

175. Pierce, *supra* note 97, at 1767.

176. Scalia, *supra* note 1, at 884.