

## CRITIQUING *LAIDLAW*: CONGRESSIONAL POWER TO CONFER STANDING AND THE IRRELEVANCE OF MOOTNESS DOCTRINE TO CIVIL PENALTIES

JOHN D. ECHEVERRIA\*

The Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*<sup>1</sup> has been described accurately as a victory for citizens seeking access to federal court to enforce the Clean Water Act.<sup>2</sup> The decision makes the "standing" inquiry a mildly burdensome hurdle for litigants, but not an absolute bar to litigation in most cases. As Justice Scalia stated, "[i]f there are permit violations, and a member of the plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today's lenient standard."<sup>3</sup> This "sea change"<sup>4</sup> produced by *Laidlaw* undoubtedly will attract a good deal of scholarly comment.

But there are several aspects of the Court's decision that make it less than an unalloyed victory for environmental advocates. Despite the environmentalist "win" in *Laidlaw*, the decision created new uncertainties about the scope of citizen standing to sue to enforce the Clean Water Act. Without minimizing the significance of *Laidlaw*'s affirmation of citizen standing to sue, this Article focuses on the new uncertainties generated by the Court's decision.

This Article addresses two issues. The first is whether Article III limits the kinds of cases that can be presented in federal court pursuant to federal legislation creating a cause of action to enforce a federal statutory right. Prior to *Laidlaw*, Justice Scalia, speaking on behalf of a majority of the Court, had articulated a coherent, if flawed, theory that appeared to provide little or no room for Congress to con-

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\* Director, Environmental Policy Project and Adjunct Professor of Law, Georgetown University Law Center.

1. 528 U.S. 167 (2000).

2. See Editorial, *Suing on Nature's Behalf*, N.Y. TIMES, Jan. 15, 2000; Editorial, *Win for the Environment*, WASH. POST, Jan. 16, 2000.

3. *Laidlaw*, 528 U.S. at 201 (Scalia, J., dissenting).

4. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 164 (4th Cir. 2000) (en banc) (Niemeyer, J., concurring).

fer standing. In *Laidlaw*, a majority of the Court rejected Justice Scalia's approach. However, the Court failed to articulate a new theory of standing to replace Justice Scalia's theory. The 7 to 2 decision in *Laidlaw* suggests that the outcome is neither aberrational nor likely to be short-lived. But the long-term legitimacy of this new approach depends on the majority's ability in future cases to articulate a coherent theory of standing to support its ruling. In my view, such a theory should rest on the recognition that Article III is no bar to the assertion of legal claims affirmatively authorized by Congress. The *Laidlaw* decision arguably represents movement in that direction, but the decision leaves the issue in considerable confusion.

The second issue relates to mootness. Prior to *Laidlaw*, every federal appeals court that addressed the issue concluded that an otherwise valid claim for civil penalties does not become moot simply because the defendant comes into compliance with the law following the filing of the complaint. The Fourth Circuit's *Laidlaw* decision took a radically different approach.<sup>5</sup> Ostensibly based on the Supreme Court's 1998 ruling in *Steel Company v. Citizens for a Better Environment*,<sup>6</sup> the appeals court concluded that civil penalties payable to the government cannot serve as a form of "redress," one of the key requirements to establish standing under Article III. Accordingly, the court said, if at any stage of a case claims for injunctive or declaratory relief become moot because the defendant has come into compliance, and all that remains is a claim for civil penalties, the case as a whole automatically becomes moot. The Supreme Court reversed, stating that civil penalties can provide redress and that a suit seeking civil penalties alone is not necessarily moot. In the process, however, the Court used language that can be read to cast doubt on the rule in the circuit courts that a civil penalty claim is *never* mooted by after-the-fact compliance. Following *Laidlaw*, some Clean Water Act defendants have relied upon this language to argue for dismissal of citizen enforcement actions.

Upon analysis, *Laidlaw* should not be interpreted as altering the established rule. While some portions of the Supreme Court's opinion suggest that civil penalty claims might be mooted by after-the-fact compliance, those statements are *dicta*. Furthermore, an examination starting from first principles demonstrates that the established rule not only properly reflects the congressional design in adopting the

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5. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 149 F.3d 303 (4th Cir. 1998).

6. 523 U.S. 83 (1998).

Clean Water Act but also is consistent with Article III principles and precedents.

### I. IN SEARCH OF SOLID GROUND TO STAND ON: TOWARDS A THEORY OF LEGISLATIVELY CREATED STANDING

Prior to *Laidlaw*, Justice Scalia had literally written the book on standing in the Supreme Court. More specifically, Justice Scalia persuaded a majority of the Court to adopt the view that Article III permits Congress little if any room to define the scope of citizen standing to sue. The result and analysis in *Laidlaw* clearly undo much of what Justice Scalia accomplished over the previous decade. The question for the present, however, is where standing doctrine is headed after *Laidlaw*.

#### A. Justice Scalia's Theory of Standing

In 1983, then Judge Scalia published a law review article proposing an aggressive program for revising the law of standing in environmental cases.<sup>7</sup> He started with the premise that the courts had engaged in an improper “love affair with environmental litigation” which opened the courthouse doors to too many environmental law claims.<sup>8</sup> According to Judge Scalia’s view, the courts had exceeded their limited role within our system of separated powers and had been “converted into political forums” by routine judicial challenges to governmental actions affecting the environment.<sup>9</sup> Standing doctrine, he said, needed to be reformed to “restrict courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and [to] exclud[e] them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.”<sup>10</sup>

Judge Scalia argued that when a claim is brought by a firm or individual who is “the very *object* of a law’s requirement or prohibition,” then the plaintiff will “always” have standing.<sup>11</sup> In that circumstance, the claim presents “a classic case of the law bearing down upon the individual himself, and the court will not pause to inquire

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7. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

8. See *id.* at 884.

9. See *id.* at 892.

10. *Id.* at 894-95.

11. See *id.* at 894.

whether the grievance is a ‘generalized’ one.”<sup>12</sup> On the other hand, when the plaintiff “is complaining of an agency’s unlawful *failure* to impose a requirement or prohibition upon *someone else*,” standing should be much more difficult to establish.<sup>13</sup> A legal challenge based on non-enforcement asserts an essentially majoritarian interest that should ordinarily be addressed not by the courts, but by the majoritarian branches—the Congress or the executive branch. In that circumstance a plaintiff should be recognized as having standing only if he can demonstrate that the government’s failure to regulate resulted in some special and distinctive harm to him.<sup>14</sup>

Judge Scalia made explicit that representatives of majoritarian interests should generally lack standing even in the face of a congressional enactment designed to confer standing. He said that a necessary corollary of his theory was “that not all ‘concrete injury’ directly flowing from governmental action or inaction would be capable of supporting a congressional conferral of standing.”<sup>15</sup> He continued:

One can conceive of such a concrete injury so widely shared that a congressional specification that the statute at issue was meant to preclude precisely that injury would nevertheless not suffice to mark out a subgroup of the body politic requiring judicial protection. For example, allegedly wrongful governmental action that affects ‘all who breathe.’ There is surely no reason to believe that an alleged governmental default of such general impact would not receive fair consideration in the normal political process.<sup>16</sup>

This viewpoint leads to the conclusion that virtually any citizen enforcement mechanism implementing clean air legislation would be declared unconstitutional under Article III.

Judge Scalia’s theory obviously had disastrous implications for environmental advocates. Timber companies, mining firms, and utilities—the objects of environmental regulation—would routinely be granted standing to challenge regulatory requirements. On the other hand, environmental groups, which commonly complain about inadequate regulation resulting in widespread harms, would routinely be denied standing. The goal of this theory was a dramatic redefinition of the role of the federal judiciary in environmental disputes that would benefit those who are subject to (and sometimes object to) environmental standards, and disadvantage those seeking to enforce en-

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12. *Id.*

13. *See id.*

14. *See id.*

15. *Id.* at 895.

16. *Id.* at 895-96.

vironmental standards. Moreover, according to Scalia, the courts should work toward this redefinition of citizen standing even if it contradicts congressional legislation seeking to confer standing to enforce environmental laws.

On its face, Judge Scalia's theory ignores both the practical realities and contemporary academic analysis of the American political process. It is almost a commonplace observation that, contrary to Judge Scalia's simplistic view, widely shared but diffuse public interests tend to get lost rather than vindicated in the political branches.<sup>17</sup> In the environmental field, collective action and free-rider problems make environmental interests relatively difficult to organize into an effective political force.<sup>18</sup> By contrast, narrower and more easily organized economic interests, the types of minority interests that Judge Scalia thought should have preferred access to the courts, can often be much more effective politically than larger but diffuse interests, not only in the legislative arena but also in the administrative process, where agency capture by regulated interests is a pervasive problem.<sup>19</sup> Thus, Judge Scalia's theory of standing, rather than expanding judicial access for politically weak minorities, actually confers broader standing on interests that already have an advantage in the political process.

Beyond fostering unequal access to justice, Judge Scalia's theory appeared designed to promote an administrative system that would not deal evenhandedly with all members of the public.<sup>20</sup> Everything else being equal, administrative agencies can be expected to pay relatively greater attention to those participants in the administrative process likely to have standing to sue the agencies, and relatively less attention to those unlikely to have standing. Thus, ultimately, Judge Scalia's skewed theory of standing would lead to skewed administrative process.<sup>21</sup>

In the most remarkable passage of his 1983 law review article, Judge Scalia acknowledged that his theory would lead to less effective law enforcement. He asked rhetorically: "Does what I have to say

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17. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

18. See Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 60-61 (1992); E. Donald Eliot, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 315-16 (1985).

19. See ROGER G. NOLL & BRUCE M. OWEN, *THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS* 41-53 (1983).

20. See Farber, *supra* note 18, at 77.

21. See William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763 (1997).

mean that, so long as no minority interests are affected, ‘important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast halls of the federal bureaucracy?’”<sup>22</sup> And he answered: “[o]f course it does—and a good thing, too.”<sup>23</sup> At least absent some special injury to individuals or minorities, he said, there is no harm done when legislative mandates “get lost or misdirected.”<sup>24</sup> Indeed, “[t]he ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative.”<sup>25</sup> In short, according to Judge Scalia, standing requirements should be demanding in order to *encourage* executive branch disregard of congressional mandates.

These striking remarks were a response to Judge Skelly Wright’s opinion in *Calvert Cliffs Coordinating Commission v. United States Atomic Energy Commission*,<sup>26</sup> one of the first federal appellate decisions interpreting the National Environmental Policy Act<sup>27</sup> (NEPA). After observing that the enactment of NEPA and other new environmental laws “attest[ed] to the commitment of the Government to control, at long last, the destructive engine of material ‘progress,’” Judge Wright wrote that “it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role.”<sup>28</sup> He concluded that “our duty . . . is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”<sup>29</sup> Judge Scalia, obviously, believed just the opposite.

### B. *The Supreme Court Adopts Scalia’s View*

While it is uncertain whether a majority of the individual justices ever fully subscribed to the opinions expressed in Scalia’s 1983 article, his carefully elaborated views unquestionably drove the Court’s decision-making in environmental standing cases from the day he was appointed to the Court. Justice Scalia authored every majority opinion on environmental standing from his appointment until the Court de-

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22. Scalia, *supra* note 7, at 897.

23. *Id.* (emphasis in original).

24. *See id.*

25. *Id.*

26. 449 F.2d 1109 (D.C. Cir. 1971).

27. 42 U.S.C. § 4321 (1994).

28. *Calvert Cliffs*, 449 F.2d at 1111.

29. *Id.*

cided *Laidlaw*.<sup>30</sup> Environmental litigants lost every one of these cases, and in the process the Court significantly ratcheted up the standing requirements for environmental advocates.<sup>31</sup> At the same time, consistent with Justice Scalia's theory of the distinction between the objects and beneficiaries of regulation, the Court liberalized standing requirements for regulated entities complaining about excessive environmental regulation.<sup>32</sup> For environmental advocates, the evolution of standing doctrine during the decade prior to *Laidlaw* was a case of "heads we lose, tails they win."

In a series of decisions, the Court significantly tightened the two key parts of its standing inquiry: injury and redressability. The Court emphasized that a plaintiff had to demonstrate injury that was "concrete and particularized" as well as "actual or imminent, not 'conjectural' or 'hypothetical.'"<sup>33</sup> As employed by the Scalia-led majority, this standard consistently led the Court to reject environmental litigants' standing. Taking the lead from the Supreme Court, lower federal courts also began to apply the injury requirement strictly in order to bar access to the courts.<sup>34</sup> With respect to redressability, the Court in *Steel Co.* seemed to conclude that a claim for civil penalties based on violations of an environmental regulation could never redress the plaintiff's injuries if the penalties were payable to the U.S. Treasury

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30. See *infra* notes 31 & 32.

31. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (denying standing to environmental group seeking to enforce the Emergency Planning and Community Right to Know Act); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (denying standing to environmental organization to challenge implementation of Endangered Species Act and effectively declaring ESA citizen-suit provision unconstitutional); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990) (denying standing to environmental organization to challenge a decision of the Bureau of Land Management to review the classification of federal lands and open them to various kinds of resource development).

32. See *Bennett v. Spear*, 520 U.S. 154 (1997) (upholding standing of ranchers and irrigation districts to challenge proposed modifications of Bureau of Reclamation water project to comply with the ESA).

33. See, e.g., *Steel Co.*, 523 U.S. at 103; *Bennett*, 520 U.S. at 167; *Lujan*, 504 U.S. at 560.

34. See, e.g., *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997) (holding that an environmental group lacked standing to sue a firm for illegal discharges of a chemical that allegedly caused fish contamination and adverse human health effects, because plaintiffs failed to produce evidence of "demonstrable harm" to the water body); *Ogden Prods., Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863 (E.D. Pa. 1996) (stating that individuals who lived in vicinity of facility lacked standing to challenge illegal air emissions for lack of evidence of how their health, environmental or recreational interests were affected). But see *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (en banc) (vacating panel decision that plaintiffs lacked standing in Clean Water Act suit for lack of specific proof of how violations adversely affected plaintiffs).

and not to the plaintiff.<sup>35</sup> All of these rulings implemented the view that advocates of majoritarian environmental interests should have, at best, limited access to the courts.

In *Lujan v. Defenders of Wildlife*, the Court embraced Justice Scalia's view that this narrow vision of Article III should trump legislation attempting to grant standing to environmental advocates.<sup>36</sup> "[T]here is absolutely no basis," Justice Scalia wrote for the Court, "for making the Article III inquiry turn on the source of the asserted right."<sup>37</sup> He continued, "[w]hether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch."<sup>38</sup> Justice Scalia apparently recognized that judicial implementation of a litigation right specifically authorized by Congress cannot logically be viewed as infringing on legislative authority, but focused instead on how such legislation would impact the executive branch. He noted that,

[t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.<sup>39</sup>

### C. *The Laidlaw Counter-Revolution*

In law, as in many other realms of endeavor, the exertion of strong pressure in one direction inevitably seems to generate equal pressure in the opposite direction. Such was the case in *Laidlaw*.

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35. See 523 U.S. at 84-85.

36. See *Lujan*, 504 U.S. at 555.

37. *Id.* at 576.

38. *Id.*

39. *Id.* at 577. While Justice Scalia's language suggests that his concerns about standing doctrine are ultimately rooted in Article II rather than Article III, he repudiated this suggestion in *Steel Co.*, 523 U.S. 83. In responding to Justice Stevens' argument that the Court's ruling was motivated by a misplaced solicitude for preserving executive branch power, Justice Scalia rejected this characterization of the basis for standing doctrine:

The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches. This case calls for nothing more than a straightforward application of our standing jurisprudence, which, though it may sometimes have an impact on presidential powers, derives from Article III and not Article II.

*Steel Co.*, 523 U.S. at 102 n.4.



First, the Court adopted a new, substantially more forgiving standard for actual injury. A citizen has standing, the Court said, if he or she can make a good faith allegation that the defendant's illegal pollution gives rise to a "reasonable concern" which in turn affects the plaintiff's economic, aesthetic, or recreational interests in the affected water body. The Court ruled that, contrary to Justice Scalia's view, the plaintiff was not required to demonstrate that the defendant's illegal pollution produced a demonstrable harm to the environment and that this harm in turn adversely affected the plaintiff.<sup>40</sup> That view, Justice Ginsburg said, would "raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with [a Clean Water Act] permit."<sup>41</sup> While the Court did not overturn its rulings on actual injury from the previous decade, it essentially explained them away as narrow cases involving rare and extreme circumstances.<sup>42</sup>

Even more dramatically, the Court announced a virtual about-face on the issue of redressability. Whereas in *Steel Co.* the Court appeared to adopt a categorical rule that civil penalties could never serve to redress a plaintiff's injuries, the Court said just the opposite in *Laidlaw*. Without expressly overruling *Steel Co.*, the Court said that civil penalties provide redress because, at a minimum, in the context of a suit alleging ongoing or threatened pollution, the imposition of civil penalties deters illegal conduct and therefore helps redress the injury about which the plaintiff is complaining.<sup>43</sup> The holding in *Steel Co.*, the Court explained in *Laidlaw*, is confined to the circumstance where the plaintiff is complaining about "wholly past" violations.<sup>44</sup>

Finally, the Court repudiated Justice Scalia's view that there is "absolutely no basis" for thinking the Article III standing inquiry

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40. See *Laidlaw*, 528 U.S. at 169.

41. *Id.*

42. The *Laidlaw* Court described *Lujan v. National Wildlife Federation* as containing "general averments" and "conclusory allegations" stating only that "one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." *Id.* at 183 (quoting *Lujan*, 497 U.S. at 888-89). "In contrast," the Court said, "the affidavits and testimony presented by FOE in this case assert that *Laidlaw's* discharge, and the affiant members' reasonable concerns about the effects of these discharges, directly affected those affiants' recreational, aesthetic, and economic interests." *Id.* at 183-184. "Nor," the Court said, could the plaintiffs' allegations "be equated with the speculative 'some day' intentions to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife*." *Id.* at 184 (quoting *Lujan*, 504 U.S. at 564).

43. See *id.* at 169.

44. See *id.*

turns on the source of the litigation right.<sup>45</sup> In several different ways, the Court signaled that Congress' language and intentions are relevant in standing analysis. First, as noted, Justice Ginsburg rejected the defendant's proposed injury standard because it would "raise the standing hurdle higher" than the standard for demonstrating a violation of the Clean Water Act itself.<sup>46</sup> The premise of this observation, of course, is that it is relevant for standing analysis whether a particular standing rule would frustrate Congress' legislative objective. Second, in determining that the imposition of civil penalties payable to the government could meet the redressability requirement, Justice Ginsburg pointed to the fact that "Congress has found that civil penalties. . . deter future violations."<sup>47</sup> This congressional determination, she said, "warrants judicial attention and respect."<sup>48</sup> Again, this suggests that Congress' policy judgments should affect the courts' analysis of the Article III standing issue.

#### D. *Groping Toward a New Theory of Standing*

The Court has changed course, but the important question remains: what new theory of standing will guide the Court's decision-making in the future? More specifically, and of particular importance in the context of citizen enforcement of the federal environmental laws, what is the extent of Congress' authority to confer standing by defining new legal rights and creating new causes of action? Unfortunately, the *Laidlaw* opinion provides few definitive answers to these questions.

As discussed, the Court's opinion clearly gives greater weight to congressional enactments than was allowed under Justice Scalia's approach. But the Court's statements related to this issue are ambiguous and do not amount to a coherent description of the scope of Congress' authority to create standing consistent with Article III. It is self-evidently true that, as Justice Ginsburg recognized, a demanding standing requirement could undermine the effectiveness of Clean Water Act enforcement. But why is that relevant for Article III purposes? Justice Ginsburg does not explain. Further, Congress obviously is entitled to its opinion on whether an assessment of civil penalties would provide redress to citizens complaining about pollution

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45. *See id.* at 181.

46. *See id.*

47. *See id.* at 185.

48. *See id.*

in their community, but again what relevance and weight does that judgment have when it comes to judicial interpretation of Article III?

The Court's ambivalence about the place of legislative enactments in standing analysis is reflected in Justice Ginsburg's description of the standing standard. While the Court's "reasonable concern" standard is relatively expansive, it clearly excludes some individuals from suing over a Clean Water Act violation, including persons whose interests are so geographically remote that they could not present a credible claim of "reasonable concern" based on the violation. The Court, in drawing this uncertain line, placed no particular weight on the Clean Water Act's language authorizing suit by "a person or persons having an interest which is or may be adversely affected,"<sup>49</sup> nor did it discuss whether or how this statutory standard differed from the constitutional standing test.

The Court's opinion raises the possibility that standing might be denied in other circumstances, despite Congress' contrary intent. For example, in *Lujan*, the Supreme Court held that the expansive citizen-suit provision of the Endangered Species Act<sup>50</sup> was, in effect, unconstitutional because it conferred standing more broadly than authorized by Article III.<sup>51</sup> The ESA citizen-suit provision likely remains insufficient to support standing after *Laidlaw*, at least absent some particularized proof of actual or threatened injury. To return to the example used by Judge Scalia in his 1983 law review article, would a citizen-suit provision in clean air legislation fail under Article III, at least in the absence of a demonstration of how air pollution causes some specific injury to the plaintiff?<sup>52</sup> Again, quite possibly. Thus, for example, would no one have standing to challenge a violation that contributed to widespread violations of ambient air quality standards across a large region, on the theory that no individual could demonstrate a sufficient geographic nexus to the violation?

What is most remarkable about the Court's opinion in *Laidlaw* is the Court's unwillingness to come to grips with Justice Scalia's anti-

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49. Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1365(a), (g) (1994).

50. Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1)(A) (1994) ("[A]ny person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.").

51. See *Lujan*, 504 U.S. at 572.

52. See, e.g., *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000) (upholding standing of local citizens and environmental organization to sue operator of oil refinery for violations of the Clean Air Act that produced "sulfurous odors [that were] overpowering and capable of inducing physical discomfort").

majoritarian theory of standing or to explain and defend the significance of Congress' determination that independent citizen enforcement serves legitimate legislative objectives. In his dissent, Justice Scalia criticized the majority's ruling on the ground that it had "grave implications for democratic governance,"<sup>53</sup> echoing a theme from his 1983 law review article, because it would transfer to the unelected courts issues he believed should be addressed by the political branches. While Justice Ginsburg disputed that the Court's decision undermined "democratic governance," she did so on the narrowest possible grounds. She pointed out that the executive branch did not share Justice Scalia's concern, as evidenced by the fact that the Department of Justice had submitted briefs in support of Friends of the Earth at each level in the federal court system.<sup>54</sup> In reply, Justice Scalia retorted with some force that the actions by a single administration in a single case do "not deserve passing mention" as an argument in favor of the constitutionality of the citizen enforcement suit.<sup>55</sup> Justice Ginsburg's opinion fails to address how citizen suits may serve to reinforce and defend the political judgments reflected in the Clean Water Act by helping ensure even-handed enforcement of the law. Absent any discussion of Congress' larger purposes in including direct citizen enforcement in the Clean Water Act, and the relevance of those purposes to constitutional standing analysis, Justice Scalia's critique of citizen suits remains essentially un rebutted.

In the end, the difficulty with the majority's standing theory in *Laidlaw* is that it represents half a loaf. The Court should complete the process started by *Laidlaw* by recognizing that Article III does not stand as a legitimate barrier to Congress' authority to create new rights of action to serve otherwise legitimate legislative purposes.

The starting place is to recognize that, contrary to the view expressed by Justice Scalia in *Lujan*, it makes all the difference in the world whether Congress specifically authorized bringing suit. Standing doctrine was erected upon the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere."<sup>56</sup> As the Court expressed the point in *Warth v.*

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53. See *Laidlaw*, 528 U.S. at 202 (Scalia, J., dissenting).

54. See *id.* at 188 n.4. Justice Ginsburg also pointed out that the federal government retains power over this type of litigation as a result of its authority to preempt citizen enforcement by filing its own action or to intervene as of right in a citizen suit. See *id.*

55. See *id.* at 210 n.3 (Scalia, J., dissenting).

56. *Raines v. Byrd*, 521 U.S. 811, 820 (1997).

*Seldin*,<sup>57</sup> standing doctrine “is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”<sup>58</sup> While this concern can plausibly justify judicial restraint when constitutional standing is asserted, logic suggests that the analysis should be quite different when a standing defense draws into question the constitutionality of a legislative enactment conferring standing. Indeed, when the political branches have approved legislation granting citizen standing to sue, the “overriding and time-honored concern” about respect for the other branches suggests that the courts should uphold citizen standing.

The principal defect in the Court’s latest discussion of standing is that it continues to rely, like Justice Scalia’s approach, on a private law model of standing to assess the validity of public law enactments. The Court’s opinion in *Laidlaw* evinces increased regard for the objectives and judgment of Congress. But ultimately the Court’s revised standing analysis rests on the idea that the basic elements of the standing inquiry—such as whether the plaintiff has established injury, or whether particular relief supplies “redress”—should be determined by a set of judge-made standards that are entirely external to the legislative process. As numerous scholars have recognized, this conception of standing doctrine has no basis in the language or history of Article III, and is contradicted by congressional practice in the nation’s early years.<sup>59</sup> Article III, properly interpreted, is no barrier to the implementation of legislation conferring a right of action on members of the public to achieve an otherwise legitimate legislative purpose.

Especially when considered in historical perspective, this argument hardly calls for a major alteration in the Court’s approach. *Lujan*, decided less than a decade ago, apparently represents the first case in which the Court held that an explicit congressional grant of a right to sue was insufficient to satisfy Article III. Moreover, *Lujan* hardly established this principle with much force. Justice Kennedy’s concurring opinion (joined by Justice Souter) arguably converts Justice Scalia’s opinion for the Court into a plurality opinion on this specific issue.<sup>60</sup> He wrote that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or con-

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57. 422 U.S. 490 (1975).

58. *Id.* at 498.

59. See, e.g., Richard J. Pierce, Jr., *Is Standing Law or Politics?* 77 N.C. L. REV. 1741 (1999); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

60. See *Lujan*, 504 U.S. at 579 (Kennedy, J., dissenting).

troverly where none existed before, and I do not read the Court's opinion to suggest a contrary view."<sup>61</sup> This thinking appears to provide the first piece of a solid foundation for citizen enforcement suits.

While the Court's pre-*Lujan* decisions sometimes point in different directions,<sup>62</sup> they too offer support for the conclusion that Article III does not limit Congress' power to create new remedies to further its legitimate objectives. Thus, in *Havens Realty Corp. v. Coleman*,<sup>63</sup> the Court upheld the standing of housing testers—who had no actual interest in renting or buying a home—to sue the owner of an apartment complex for alleged discrimination in violation of the federal Fair Housing Act. “The congressional intention cannot be overlooked in determining whether testers have standing to sue,” the Court stated.<sup>64</sup> “As we have previously recognized,” the Court continued, “the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.”<sup>65</sup> In addition, in *Linda R. S. v. Richard D.*,<sup>66</sup> the Court, though ruling that the plaintiffs lacked standing to bring their constitutional claim, recognized that “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”<sup>67</sup>

Finally, the Court's recent decision in *Federal Election Commission v. Akins*,<sup>68</sup> which postdates *Lujan*, appears to embrace a broad view of Congress' power to confer standing. The Court upheld the standing of a non-profit organization to sue the Federal Election Commission (FEC) pursuant to a citizen-suit provision for improperly failing to categorize a group as a “political” organization. The plaintiffs alleged that the FEC's decision denied them access to information about the financial supporters of the group's political activities. The Court rejected the contention “that Congress lacks the constitu-

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61. *Id.* at 580.

62. *Cf. Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979):

Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise would be barred by prudential standing rules . . . [i]n no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted. (internal quotations omitted).

63. 455 U.S. 363 (1982).

64. *Id.* at 373.

65. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (internal quotations omitted)).

66. 410 U.S. 614 (1973).

67. *Id.* at 617 n.3 (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring)); *see also Hardin v. Kentucky Utils. Co.*, 390 U.S. 1 (1968).

68. 524 U.S. 11 (1998).

tional power to authorize federal courts to adjudicate the lawsuit.”<sup>69</sup> The Court ruled that the plaintiffs satisfied the injury requirement because they alleged their inability to obtain information “that, on [plaintiffs’] view of the law, the statute requires that the [FEC] make available.”<sup>70</sup> In other words, standing turned on Congress’ establishment of legal rights, the invasion of which creates standing, even though no injury would exist without the statute. Though the Court’s decision arguably turns in part on the character of the injury at issue, as well as on the importance of information disclosure to the proper functioning of the political process,<sup>71</sup> the reasoning in *Akins* supports recognition of Congress’ power to confer standing in other contexts.

In sum, *Laidlaw* is an important development in the law of standing. However, future decisions will hopefully reveal that *Laidlaw* may represent only a transitional step toward a more predictable law of standing that better conforms to the founders’ original design.

## II. THE ESTABLISHED RULE THAT A CIVIL PENALTY CLAIM CANNOT BE MOOTED BY POST-COMPLAINT COMPLIANCE EFFORTS SHOULD SURVIVE LAIDLAW

Prior to the Supreme Court’s decision in *Laidlaw*, it was firmly established that a defendant’s post-complaint compliance efforts could not moot an otherwise valid claim for civil penalties. As Justice Stevens stated in his concurring opinion in *Laidlaw*, “the Courts of Appeal . . . have *uniformly* concluded [that]. . . a polluter’s voluntary post-complaint cessation of an alleged violation will not moot a citizen-suit claim for civil penalties even it is sufficient to moot a related claim for injunctive or declaratory relief.”<sup>72</sup> This conclusion has apparently been embraced by the second,<sup>73</sup> third,<sup>74</sup> seventh,<sup>75</sup> eighth,<sup>76</sup> and eleventh<sup>77</sup> circuits.<sup>78</sup>

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69. *Id.* at 20.

70. *See id.* at 21.

71. *See id.* at 24-25.

72. 528 U.S. at 196 (Stevens, J., concurring) (emphasis added).

73. *See Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020-21 (2d Cir. 1993) (“We hold therefore that a defendant’s ability to show, after suit is filed but before judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil penalties moot.”).

74. *See Natural Resources Defense Council v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 502-03 (3d Cir. 1993) (“We . . . hold that claims for damages are not moot because an intervening NPDES permit eliminates any reasonable possibility that [the defendant] will continue to violate specified parameters.”).

75. *See Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997), *cert. denied*, 522 U.S. 981 (1997) (“If the violation is cured at some point while the

In the immediate aftermath of *Laidlaw*, some defendants in Clean Water Act citizen enforcement suits asserted that the Court's decision altered the established rule, making claims for civil penalties subject to dismissal for mootness on the same basis as claims for injunctive relief.<sup>79</sup> This argument is based on language in the Court's opinion indicating that the issue of mootness required further ventilation on remand, based not only on the company's record of substantial compliance following the filing of the complaint, but also on the defendant's decision to close and dismantle the facility. The Court said:

The facility closure, like Laidlaw's earlier achievement of substantial compliance with its permit requirements, might moot the case, but—we once more reiterate—only if one or the other of these events made it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur.<sup>80</sup>

In support of this statement the Court cited *United States v. Concentrated Phosphate Export Ass'n*,<sup>81</sup> which the Court quoted as standing for the proposition that “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>82</sup> The Court's strong suggestion that the *Laidlaw* suit might not be moot despite the company's record of substantial compliance, and even the closure of its facility, demonstrates that a Clean Water Act claim for civil penalties

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suit is pending, which for all we know may have occurred in this case, the [claim for civil penalties] nevertheless does not become moot.”).

76. See *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998) (“When there is no agency enforcement action in the picture, a polluter should not be able to avoid the otherwise appropriate civil penalties by dragging the citizen-suit plaintiff into costly litigation and then coming into compliance before the lawsuit can be resolved.”).

77. See *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990) (“[T]he mooting of injunctive relief will not moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed.”).

78. See also *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1065 n.9 (5th Cir. 1991) (stating in *dictum* that “[e]ven had [defendant's post-complaint] improvements mooted the plaintiffs' action for injunctive relief, it would not necessarily have mooted the plaintiffs' action for civil penalties”).

79. See, e.g., Cargill's Brief in Reply and in Response to Cross-Appeal, San Francisco Baykeeper v. Cargill Salt Div. (9th Cir. 1997) (No. 99-16032); Letter brief for Hercules, Inc., Public Interest Research Group of New Jersey, Inc. v. Hercules Inc., 970 F. Supp. 363 (D.N.J. 1997) (No. 89-2291) (incorporated in support of Respondent in *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.* 528 U.S. 167 (2000) (No. 98-822)). See also Stuart H. Newberger, Statements at the Georgetown Environmental Policy Project Forum on *Laidlaw* Decision (January 21, 2000).

80. *Laidlaw*, 528 U.S. at 193.

81. 393 U.S. 199, 203 (1968).

82. *Laidlaw*, 528 U.S. at 189.



cannot be declared moot either easily or routinely. On the other hand, if the decision establishes that a civil penalty claim based on past violations can *sometimes* be rendered moot by post-complaint compliance efforts, that alone would represent a major change in the law.

This post-*Laidlaw* defense argument should be rejected. First, *Laidlaw* cannot fairly be read as containing any binding guidance that alters the established rule. Second, as a matter of first principles, the Clean Water Act clearly provides for the imposition of civil penalties for past violations and nothing in the Supreme Court's current Article III jurisprudence stands as an obstacle to the implementation of the law as Congress intended. Therefore, the courts should continue to abide by the established rule.

#### A. *Laidlaw Does Not Disturb the Established Rule*

For several independent reasons, *Laidlaw* cannot properly be read as having altered the established rule that a claim for civil penalties cannot be mooted by after-the-fact compliance.

First, the language quoted above is, strictly speaking, *dictum*. The Fourth Circuit ruled that the case *automatically* became moot once the plaintiffs abandoned their request for injunctive relief and only continued to pursue civil penalties. Relying on *Steel Company*, the appeals court ruled that civil penalties, which are payable to the federal government, could not redress the plaintiffs' injuries as a matter of law. Because civil penalties could not redress the plaintiffs' injuries, and civil penalties were the only remaining relief requested, the court of appeals reasoned, the case necessarily had to be dismissed as moot. The Supreme Court reversed, stating that the appellate court "erred in concluding that a citizen suitor's claim for civil penalties *must* be dismissed as moot when the defendant, after the commencement of the litigation, has come into compliance . . . ."<sup>83</sup>

To resolve the mootness issue, the only question the Court had to decide was whether the Fourth Circuit was wrong to think that a suit to enforce the Clean Water Act *automatically* becomes moot if the defendant's after-the-fact compliance makes an injunction unnecessary. The Court had no reason to address, and certainly did not resolve, whether a civil penalty claim can *ever* become moot as a result of a defendant's post-complaint compliance efforts. Stated differently, the Court's analysis does not preclude the view that the asser-

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83. *Id.* at 168 (emphasis added).

tion of an otherwise viable civil penalty claim may mean that the suit *never* becomes moot. Apart from the conclusion that a civil penalty claim is not automatically mooted when there is no longer any pending claim for injunctive relief, *Laidlaw* contains no rule of decision related to mootness doctrine that is binding on the lower federal courts.<sup>84</sup>

The issue presented for the lower courts following *Laidlaw* is much the same as the issue presented following the Supreme Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*<sup>85</sup> In *Gwaltney*, the defendant argued that a mere good faith allegation of ongoing violations at the time the suit was filed should not be sufficient to vest the court with jurisdiction. The defendant was concerned that this construction of the Clean Water Act would permit plaintiffs, "if their allegations of ongoing noncompliance become false at some later point in the litigation because the defendant begins to comply with the Act, to continue nonetheless to press their suit to conclusion."<sup>86</sup> The Court's response was that "longstanding principles of mootness. . . prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.'"<sup>87</sup> To support this statement, the Court cited, among other decisions, *United States v. Phosphate Export Assn.*,<sup>88</sup> the decision principally relied upon by the *Laidlaw* Court in describing mootness doctrine. The *Gwaltney* Court concluded, "[m]ootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'"<sup>89</sup>

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84. This reading of the majority opinion is supported, in a backhanded way, by Justice Scalia's statement in his dissenting opinion that "the opinion of the Court *appears* to recognize that a claim for civil penalties is moot when it is clear that no future injury to the plaintiff at the hands of the defendant can occur." *See id.* at 211 n.5 (emphasis added). Justice Scalia expressly disapproved of Justice Stevens' view, expressed in his concurring opinion, that civil penalty claims "cannot be mooted by the absence of threatening injury," but apparently believed the majority only "appear[ed]" to adopt a different view. *See id.* Thus, Justice Scalia read the majority as being at least potentially open to Stevens' view.

85. 484 U.S. 49 (1987).

86. *Id.* at 66.

87. *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

88. 393 U.S. 199 (1968).

89. 484 U.S. at 66-67 (quoting *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952)).

While the language in the *Gwaltney* decision is ambiguous,<sup>90</sup> it suggests the argument that any Clean Water Act citizen suit, including a claim for civil penalties, could be rendered moot once it becomes “absolutely clear” that the illegal conduct will not recur. Nonetheless, every appellate court that addressed the issue following *Gwaltney* concluded either that the Court’s language could not properly be read as addressing civil penalty claims (as opposed to claims for injunctive relief) or that it was simply *dictum*.<sup>91</sup> In any event, following *Gwaltney* the appellate courts that addressed the issue uniformly concluded that a claim for civil penalties cannot be mooted by post-complaint compliance efforts.

The ambiguous language in *Laidlaw* should be read in the same fashion as the similarly ambiguous language in *Gwaltney*. To be sure, the descriptions of the general rules of mootness doctrine in each case could be read to support the view that civil penalty claims can be found to be moot under the same standards as requests for injunctive relief. But neither case directly confronted the issue of whether civil penalty claims can be mooted by post-complaint compliance efforts. In fact, neither case decides the issue.

Second, Justice Stevens’ separate concurring opinion provides additional grounds for believing that *Laidlaw* does not alter the established rule that a claim for civil penalties cannot become moot as a result of after-the-fact compliance. Justice Stevens wrote that the majority had identified a “sufficient reason for rejecting the Court of Appeals’ mootness determination,” that is, that the Fourth Circuit was wrong to think that a pending claim including only a civil penalty claim is automatically moot.<sup>92</sup> But, Justice Stevens said, “it is important also to note that the case would not be moot even if it were absolutely clear that respondent had gone out of business and posed no threat of future permit violations.”<sup>93</sup> He argued that, on the facts of

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90. It is unclear from the decision exactly how mootness doctrine would provide protection against liability based on “violations wholly unconnected to any present or future wrongdoing.” The Court appears to be referring to liability for pre-complaint violations, but it is difficult to see how assurances of non-liability for certain past violations are responsive to the defendant’s concern about liability based on violations that “become false,” presumably because of a company’s post-complaint efforts to comply with the law. Moreover, the Court’s assurance that a defendant could not be held liable “based *solely* on violations wholly unconnected to any present or future wrongdoing” suggests that liability can properly be imposed for certain wholly past violations that are connected to present or ongoing violations, which of course suggests that at least certain civil penalty claims cannot in fact be rendered moot.

91. *See supra* notes 73-78 (collecting cases).

92. *See Laidlaw*, 528 U.S. at 195.

93. *Id.* at 195-196.

this case, the defendant's post-complaint compliance efforts could not "retroactively invalidate" the district court's judgment imposing civil penalties.<sup>94</sup> Second, and of more general significance, Justice Stevens concluded that "petitioners' claim for civil penalties would not be moot even if it were absolutely clear that respondent's violations could not reasonably be expected to recur because respondent achieved substantial compliance with its permit requirements after the petitioners filed their complaint but before the District Court entered judgment."<sup>95</sup>

There is no reason to conclude, based on the Court's opinion, that other justices do not share Justice Stevens' view on this latter point. Justice Stevens apparently felt compelled to write separately because the majority opinion did not explicitly embrace his views. On the other hand, there is no indication that the rest of the majority rejected Justice Stevens' position. Furthermore, Justice Stevens joined in Justice Ginsburg's opinion and merely filed a concurring—not a dissenting—opinion, a strong indication that Justice Stevens himself believed that there was nothing in the Court's opinion that precludes his view. Certainly Justice Stevens believed that, after the decision in *Laidlaw*, the lower federal courts would be free to continue to apply the established rule that a civil penalty claim cannot be rendered moot by post-complaint compliance efforts.

Third, it is implausible that the Supreme Court, without saying so and without directly commenting on the issue, would have overturned the rule uniformly followed by the courts of appeal. As the Supreme Court framed the issue in *Laidlaw*, the case presented a conflict between the Fourth Circuit ruling and the "decisions of several other Courts of Appeals, which have held that a defendant's compliance with its permit after the commencement of litigation does not moot claims for civil penalties under the Act."<sup>96</sup> The cases cited by the Court include most of the leading appeals court decisions holding that after-the-fact compliance cannot moot a penalty claim and rejecting the notion that the mootness standards for injunctive relief and civil penalties are the same. Especially given that Justice Stevens' opinion highlighted the issue, the majority could not have been unaware of

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94. *See id.* at 196. The rest of the majority appeared to agree that at least some of the company's mootness arguments arose only after the entry of the trial court judgment imposing civil penalties, and that this sequence provided an additional potential ground for rejecting the argument that the claim for penalties had become moot. *See id.* at 194 n.6 (citing *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994)).

95. *Id.* at 196.

96. *Id.* at 180.

these rulings. The Court resolved the conflict between the Fourth Circuit's *Laidlaw* decision and the other court of appeals rulings by overturning the *Laidlaw* ruling. It is difficult to conclude that the Court simultaneously repudiated the rule set forth in the decisions the Court was ostensibly defending by rejecting the Fourth Circuit's aberrant ruling.

B. *The Prevailing Circuit Rule Should Be Reaffirmed*

Assuming now that the Supreme Court's ruling in *Laidlaw* has not disabled the lower federal courts from continuing to follow the established rule, the question remains: should they? Is the pre-*Laidlaw* rule that a civil penalty claim can never be mooted by after-the-fact compliance consistent with the limitations on federal court jurisdiction imposed by Article III of the Constitution?

The basic argument for why civil penalty claims in citizen suits should be regarded as capable of becoming moot is straightforward, if overly simplistic. It can be argued that deterring violations of the Clean Water Act is the only function of civil penalties relevant to the Article III redressability requirement. If it is absolutely clear at the time of final judgment that the defendant will commit no future violations, then there is no reason to impose penalties in order to achieve deterrence as it has already been accomplished. According to this view, the continued viability of a claim for civil penalties should be measured by the same standard as claims for injunctive relief. If it is absolutely clear that the defendant will not commit any future violations, and a request for injunctive relief has become moot, then a claim for civil penalties is moot as well.

There are at least three independent reasons to reject this view. Regardless of whether it is absolutely clear that a defendant will not commit any future violations, an otherwise valid claim for civil penalties is not moot. The standards for determining the mootness of civil penalty claims and requests for injunctive relief are different.<sup>97</sup>

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97. Apart from the strictly legal arguments for concluding that an accrued claim for civil penalties cannot generally be mooted by the defendant's after-the-fact compliance, it is striking that the Supreme Court, despite arguably suggesting that a civil penalty claim could become moot in some circumstances, strongly suggested that the *Laidlaw* case was not moot, notwithstanding the fact that the defendant had been in substantial compliance for several years and had even closed the facility at issue. The Court's reluctance to conclude that a Clean Water Act case could become moot even under these circumstances arguably reflects intuitive discomfort with the possibility that a civil penalty claim could become moot under any circumstances.

### 1. A Penalty Deters at the Time of the Violation

First, contrary to the argument outlined above, assuming deterrence were the only relevant function of a Clean Water Act civil penalty, a penalty claim should not be mooted by after-the-fact compliance. Under the Clean Water Act, liability for a penalty attaches at the time of the violation. The Clean Water Act states that “[a]ny person who violates [a permit] shall be subject to a civil penalty. . . .”<sup>98</sup> As one federal appeals court has observed, this language indicates that “civil penalties attach as of the date a permit violation occurs.”<sup>99</sup> This understanding of how and when liability for a penalty attaches explains how penalties deliver specific deterrence: the imposition of liability for a violation at the time it is occurring discourages its continuation as well as its potential recurrence.

The *dictum* in *Laidlaw* suggesting that mootness doctrine might apply in the same fashion to claims for penalties and for injunctive relief ignores the differing deterrent effects of these two forms of relief. Both penalties and injunctions provide specific deterrence. But an injunction is an entirely forward-looking remedy. A civil penalty is partly backward-looking. This difference logically leads to the conclusion that mootness doctrine should apply differently to these two forms of relief.

An injunction serves a specific deterrent function by prohibiting a defendant, on penalty of contempt, from violating the Clean Water Act in the future. Civil penalties, on the other hand, serve a deterrent function only if the violator knows that penalties will be imposed, or at least there is a risk they will be imposed, at the time the violation is occurring. As Justice Scalia accurately points out, “[s]trictly speaking, no polluter is deterred by a penalty for past pollution; he is deterred by the *fear* of a penalty for a *future* violation.”<sup>100</sup> As a practical matter, a court can only impose penalties once the violations have occurred, that is, once they are in the past. In other words, the only violations for which a court can actually assess penalties are those violations that are inherently incapable of being deterred at that point in time because they are already in the past. If civil penalties actually deter, as the majority believed in *Laidlaw*, and as Congress quite clearly intended, it must be because liability attaches at the time of the violation.

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98. 33 U.S.C. § 1319(d) (1994).

99. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 696 (4th Cir. 1989).

100. *Laidlaw*, 528 U.S. at 207-208 (Scalia, J., dissenting).

This understanding of how civil penalties operate to achieve deterrence leads to the conclusion that civil penalties cannot be mooted by the defendant's after-the-fact compliance. If civil penalties attach when and as violations occur, it is simply beside the point whether, at the time of entry of final judgment, there is no likelihood that the defendant will commit any future violations. The civil penalties the defendant accrued already operated to deter violation of the law as the violations occurred. There is nothing moot about penalties which already have attached based on past violations, regardless of whether any additional relief may be necessary to deter other violations.<sup>101</sup> In this sense, a claim for civil penalties is incapable of becoming moot after the fact in the same way that claims for damages for a tort or a contract violation are incapable of becoming moot.

The *Laidlaw* Court's discussion of how civil penalties provide deterrence is consistent with this analysis. "To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones," the Court said, "they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct."<sup>102</sup> Applying this analysis in *Laidlaw*, the Court noted that "the civil penalties sought by FOE carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries by abating *current* violations and preventing *future ones*."<sup>103</sup> Because the violations had long ceased by the time the case reached the Supreme Court, the Court was obviously describing how the imposition of liability for penalties effected deterrence while the violations were ongoing. Implicit in these statements is a recognition that liability attaches—and specific deterrence occurs—at the time of the violation. Justice Stevens, in his concurring opinion, made the point more explicitly: "the Clean Water Act . . . attaches liability for civil penalties at the time a permit violation occurs."<sup>104</sup>

If there is conflict between this understanding of how civil penalties operate and the Court's analysis in *Laidlaw*, and it is ultimately

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101. Cf. *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1201 (11th Cir. 1997):

This [mootness] argument fails because, for purposes of civil money penalties, a tribunal looks to the employer's status at the time of the violation, not at the time of trial . . . [T]he Commission's view of mootness would mean the existence of a 'case or controversy' is dependent on an employer's post-violation acts as well as the date a tribunal sets for a hearing . . . (citation omitted).

102. *Laidlaw*, 528 U.S. at 186.

103. *Id.* at 187 (emphasis added).

104. *Id.* at 196.

not a major point, it lies in the Court's apparent conclusion that the ruling in *Steel Company* survives *Laidlaw*. While *Steel Company* involved a suit under the Emergency Planning and Community Right to Know Act, the Court in *Laidlaw* assumed that the reasoning was fully transferable to the Clean Water Act. "*Steel Co*[mpany] established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of the suit," the Court said, "but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred."<sup>105</sup> In the Clean Water Act context, the narrow Article III ruling in *Steel Company* (as reinterpreted by *Laidlaw*) presents a rather abstract issue. In light of the Court's decision in *Gwaltney*,<sup>106</sup> it is clear that, apart from what Article III might or might not permit, the Clean Water Act itself does not grant federal courts jurisdiction to hear citizen suits based on wholly past violations. Thus, even if such suits are barred by Article III under *Steel Company*, they are also independently barred by the Clean Water Act itself under *Gwaltney*. On the other hand, if it is correct that civil penalties attach as of the time the violation occurs, then logically there should be no Article III bar to the enforcement of accrued claims, regardless of whether the claims accrued prior to the filing of the complaint or continued to accrue after the complaint was filed. In short, the reasoning in *Steel Company* arguably conflicts with my argument that civil penalty claims cannot be mooted by after-the-fact compliance.

The answer may be that *Steel Company* does not in fact survive *Laidlaw*. This is hardly a remarkable suggestion. The opinion in *Steel Company* quite clearly articulated the notion that civil penalties can never provide redress, because the penalties are payable to the government. *Laidlaw* ruled just the opposite. While the Court in *Laidlaw* could appropriately distinguish *Steel Company*, which involved different facts, *Laidlaw* arguably destroys the analytic foundation for the ruling in *Steel Company*.

In addition, even if *Steel Company* remains a valid interpretation of how Article III applies when all relevant violations occurred prior to the filing of the complaint, it is still possible to conclude that liability attaches to violations as and when they occur following the filing of a complaint. *Steel Company* only addresses violations that occur

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105. *Id.*

106. 484 U.S. 49 (1987).



prior to the initiation of an action. Nothing in *Steel Company* is inconsistent with the theory that, once an appropriate Clean Water Act suit has been commenced in accordance with *Steel Company* and *Gwaltney*, liability for at least ongoing and future violations attaches as of the date they occur. Once liability attaches, at least with respect to these violations, the claims cannot be mooted by after-the-fact compliance. Thus, even if *Steel Company* remains a controlling authority, there is no reason to conclude that accrued civil penalties in a properly commenced Clean Water Act suit based on ongoing violations can be mooted by after-the-fact compliance.

## 2. Civil Penalties Constitute Punishment

The second reason civil penalty claims cannot be mooted by after-the-fact compliance is that penalties in a citizen suit are designed, in addition to deterring violations, to impose punishment on the polluter for breaking the law. Justice Stevens expressed the view that, “for the purposes of mootness analysis, [civil penalties] should be equated with punitive damages rather than with injunctive or declaratory relief.”<sup>107</sup> Justice Ginsburg, in her opinion for the Court, apparently agreed that punishment is a legitimate function of a penalty in a Clean Water Act citizen suit. While discussing whether civil penalties can redress a plaintiff’s injuries for the purpose of Article III standing analysis, the Court quoted *Tull v. United States*,<sup>108</sup> which stated that “[t]he 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.”<sup>109</sup> Congress’ intent that the courts consider the punitive effects of civil penalties is also supported by several of the criteria the Act directs courts to consider in fixing the size of a civil penalty. These include “the seriousness of the violation or violations, . . . any history of such violations, any good faith efforts to comply with the applicable requirements, . . . and such other matters as justice may require.”<sup>110</sup>

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107. *Laidlaw*, 528 U.S. at 197 (Stevens, J., concurring).

108. 481 U.S. 412 (1987).

109. 528 U.S. at 185 (citing *Tull*, 481 U.S. at 422-23). Arguing against this reading of *Laidlaw* is the fact that the Court did not discuss this function of a civil penalty in any detail. This can be explained in part based on the fact that the district court specifically based its imposition of a civil penalty on a finding that the penalty in this case would serve a deterrent function. Furthermore, focusing on the deterrent function of civil penalties was sufficient to support the conclusion that the Fourth Circuit had erred in concluding that a suit automatically becomes moot when the only surviving claim is a request for civil penalties.

110. Clean Water Act, 33 U.S.C. § 1319(d) (1994); *see also* Clean Water Act, 33 U.S.C. § 1365 (1994) (“The district courts shall have jurisdiction, without regard to the amount in contro-

If punishment represents one of the legitimate functions of a civil penalty claim, then a civil penalty claim obviously cannot be mooted by post-complaint compliance. Commitments to future compliance, no matter how credible, do not address the public interest in imposing punishment for the violations that have occurred. Repentance and reform might well influence the appropriate size of a penalty, but they cannot moot a request for punishment in the form of penalties.

Despite these indications that Congress intended civil penalties to serve as punishment, and that the Court believes this function is permissible under Article III, there likely will be the objection that punishment, as distinguished from deterrence, is an illegitimate function of statutorily-authorized private actions under Article III. The strongest support for this argument is the idea that Article III bars a private suit in federal court to enforce “the undifferentiated public interest” in enforcing the law. This ostensible limitation,<sup>111</sup> articulated most forcefully by Justice Scalia, is based on the concern that allowing private citizens to vindicate the broad public interest in law enforcement would lead courts to expand their authority beyond their proper bounds in our divided system of government. While this argument has been advanced with some force,<sup>112</sup> it is ultimately not persuasive.

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versy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.”). It is noteworthy that when Congress amended the Clean Air Act in 1990 to authorize citizen suits to seek civil penalties, Congress stated that “[t]he assessment of civil penalties for violation of the Act is necessary for deterrence, restitution, and retribution.” S. REP. NO. 101-228, at 373 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3756.

111. While this argument raises an independent question of whether this type of statutory remedy would violate the “take care” clause, the focus here is on whether Article III of the Constitution prohibits redress in the form of punishment. *See Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring) (observing that the *Laidlaw* case raised an article II issue that was not squarely raised or briefed in the case).

112. *See* Brief Amicus Curiae of the United States in Support of Petitioners 11, in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000) (No. 98-822). The United States asserted in its brief that a civil penalty does affect punishment in a Clean Water Act enforcement suit brought by the United States, but that a civil penalty in a suit brought by a private party does not serve the same function. The brief asserted that both deterrence and punishment are “proper government objectives.” *See id.* (citing *Tull*, 481 U.S. at 422-23). However, the United States argued, “Congress’ authorization of civil penalties in citizen suits. . . is properly viewed as limited to the ‘forward looking’ objective of deterring the defendant from further non-compliance.” *See id.* (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)). That position is untenable, especially after *Laidlaw*. As discussed, the Court specifically embraced *Tull*’s description of the purposes of civil penalties in *Laidlaw*, indicating that the Court believes that punishment is served equally well regardless of the identity of the plaintiff. Moreover, the quoted passage from *Gwaltney* does not support the position that civil penalties are exclusively forward looking. The *Gwaltney* Court stated that the citizen-suit

First, it is doubtful whether a majority of the Court joins in Justice Scalia's sweeping condemnation of the notion that Congress can authorize private suits to help enforce the law. In *Lujan* itself, Justice Kennedy (joined by Justice Souter) accepted the principle that "it would exceed [Article III] limitations if, at the behest of Congress and in the absence of any concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."<sup>113</sup> But, as discussed, he wrote separately to emphasize, "[a]s Government programs and politics become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our-common law tradition."<sup>114</sup> He continued, "[i]n my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."<sup>115</sup> Even more to the point, in 1998, in *Federal Election Commission v. Akins*,<sup>116</sup> a majority of the Court upheld citizens' standing to sue to compel the FEC to enforce an information-disclosure requirement, despite Justice Scalia's objection that the suit allowed the plaintiff to enforce a generalized interest in enforcement of federal election laws.

Moreover, in the context of a Clean Water Act citizen suit, it is not accurate to characterize a request for punishment in the form of civil penalties as advancing an "undifferentiated" interest in law enforcement. Under *Laidlaw*, before a court even gets to the penalty issue, the plaintiff must demonstrate "injury in fact," that is, that the plaintiff has suffered some objective harm to its economic, aesthetic, or recreational interests.<sup>117</sup> Furthermore, to satisfy the second prong of standing doctrine, the alleged injury must be "fairly traceable" to

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provision "supports our conclusion that [a] . . . citizen suit is also an action for compliance, rather than an action *solely* for civil penalties for past, nonrecurring violations," see 484 U.S. at 60 n.7 (emphasis added); rather than supporting the position of the United States, this language indicates that the *Gwaltney* Court believed that a citizen suit, in addition to achieving future compliance, also provides retrospective relief by imposing "penalties for past, nonrecurring violations." Finally, nothing in the statutory language supports the conclusion that Congress believed that civil penalties imposed in a private suit serve a different set of functions than in a suit brought by the government. See Clean Water Act, 33 U.S.C. § 1365 (1994) ("The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under section 1319(d) of this Act.").

113. *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring).

114. *Id.* at 580.

115. *Id.*

116. 524 U.S. 11 (1998).

117. See 528 U.S. at 180-181.

the defendant's actions.<sup>118</sup> Finally, under *Gwaltney*, the Clean Water Act itself permits the suit to proceed only if the plaintiff had a good faith basis for alleging that the defendant was continuing to violate the act at the time the suit was filed.<sup>119</sup> In short, the plaintiff in an otherwise viable Clean Water Act suit has an interest in imposing punishment on the defendant that is directly related to the defendant's conduct and to the effects of that conduct on the plaintiff. That particularized interest distinguishes the plaintiff in a Clean Water Act citizen suit from the population at large.

The Court's analysis in *Gwaltney* is consistent with the conclusion that Article III authorizes the bringing of private civil penalty claims for the purpose of imposing punishment. The central holding in that case was that the citizen-suit provision of the Clean Water Act does not authorize suit for "wholly past" violations. In order to assert a viable Clean Water Act enforcement suit, the Court concluded, a plaintiff must make a good faith allegation of ongoing violations of the Act. Most significant for present purposes, however, is the Court's implicit recognition, which lower federal courts have subsequently confirmed,<sup>120</sup> that the relief available under the Act is not prospective only. So long as a plaintiff presents a claim of an ongoing violation that satisfies the Act's jurisdictional requirements, a plaintiff is entitled to seek imposition of civil penalties for past violations within the applicable five-year statute of limitations. In *Gwaltney* itself, since all the violations had in fact preceded the filing of the lawsuit, the only purpose for which the civil penalties could have been imposed was for past violations. Thus, as construed in *Gwaltney*, the Clean Water Act is "primarily forward-looking" in the sense that, in order to establish jurisdiction, the plaintiff must be able to make a good faith allegation of continuing violations. But the Act is obviously not entirely "forward-looking." The Court described the citizen-suit provision as aimed in part at "compliance," but also recognized that it could be invoked to remedy "past, non-recurring violations." This strongly suggests that the citizen-suit provision is designed in part to serve the function of retribution, as well as compliance.<sup>121</sup>

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118. *See id.*

119. *See Gwaltney*, 484 U.S. at 65.

120. *See, e.g., Public Interest Research Group of N.J., Inc. v. Carter-Wallace, Inc.*, 684 F. Supp. 115 (D.N.J. 1988).

121. There is no contradiction between the argument that civil penalties serve, at least in part, as a form of punishment, and the 60-day notice provision, which allows a prospective defendant the chance to escape penalties altogether if it can eliminate all violations by the end of

The Court's decision in *Steel Company* (as reinterpreted by *Laidlaw*) again presents a somewhat more difficult analytic puzzle. However, upon careful analysis, *Steel Company* (again assuming that the holding survives *Laidlaw*) is also consistent with the view that civil penalties can serve as a form of punishment consistent with Article III.

In *Steel Company* the Court held that the plaintiff lacked standing to seek civil penalties, specifically rejecting the theories that the penalty provided redress either as a form of punishment or to deter future violations. Because the penalties were payable to the government, the Court said, the plaintiff "seeks not remediation of its own injury . . . but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution" of the law.<sup>122</sup> While the case involved a claim for penalties (and other relief) based on violations that preceded the filing of the complaint, Justice Scalia's sweeping language seemed to indicate that civil penalties could not supply redress under any circumstances. What is the significance of what (if anything) remains of *Steel Company* for mootness analysis and, more particularly, for the view that civil penalties serve as a form of punishment and therefore a suit seeking penalties cannot be rendered moot by a defendant's belated compliance efforts?

Read most broadly, *Steel Company*, as reinterpreted in *Laidlaw*, could be seen as supporting the proposition that a civil penalty designed to serve a punitive function can never independently satisfy Article III's redressability requirement. According to this interpretation, *Steel Company* disallowed civil penalties in a case where all violations ceased prior to the filing of the complaint because the only basis for imposing civil penalties in that circumstance would be punishment. Thus, *Steel Company* arguably stands for the proposition that a plaintiff seeking only to impose punishment lacks Article III standing because punishment alone cannot redress the plaintiff's injury. If a request for punishment is insufficient to support initial standing, the argument continues, then the punitive function of civil

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the 60-day period. While the operation of the 60-day notice provision might allow some polluters to escape punishment altogether (at least through a private enforcement action), Congress could well have concluded that sacrificing the punitive (and deterrent) function of citizen suits was worthwhile because of the added incentive it provided polluters to bring their operations into compliance with the law. The fact that polluters escape punishment under the statutory scheme in certain circumstances does not affect the reasoning that, when penalties actually are imposed, they serve at least in part as a form of punishment.

122. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998) (quoting *Lujan*, 504 U.S. at 577).

penalties should likewise be of no consequence for mootness purposes even if the suit was originally properly commenced. In other words, if and when the defendant comes into compliance with the law and establishes that it is absolutely clear that no future violations will occur, and any claim for relief for deterrence purposes becomes moot, a claim for civil penalties based only on the need for punishment cannot prevent dismissal on mootness grounds. According to this view of *Steel Company*, if civil penalties no longer serve a deterrent function, but only serve a punitive function, there is no longer any viable suit under Article III.

The first potential response to this interpretation, as discussed above, is that *Steel Company* may not in fact survive *Laidlaw*. But even if *Steel Co.* (following *Laidlaw*) does represent an absolute Article III bar to claims for wholly past violations, that does preclude the possibility that, in a suit commenced to address ongoing violations, civil penalties that serve a punitive function can provide a form of redress. The issue of the prerequisites for establishing court jurisdiction over a Clean Water Act enforcement suit is different from the issue of the scope of relief properly awarded in a case once commenced. Thus, in *Warth v. Seldin*,<sup>123</sup> the Court said that so long as the injury requirement is satisfied, “persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.”<sup>124</sup> According to this view, even if a claim for civil penalties for punishment alone were insufficient to support standing as an initial matter, once a claim is initiated in accordance with Article III, there is no barrier to authorizing the plaintiff to seek to vindicate the “general public interest.” Thus, for example, in *Laidlaw*, the suit was properly commenced under Article III (and *Gwaltney*), because the lawsuit sought to halt ongoing violations that were injuring the plaintiff’s interests. But once the lawsuit was commenced, there should be no Article III barrier to continuing to prosecute a claim for civil penalties for the purpose of punishing the defendant and vindicating the “general public interest” in enforcing the Clean Water Act.

The courts have relied upon analogous reasoning in interpreting the scope of relief available under the Clean Water Act. Following the Court’s decision in *Gwaltney* and its ruling that the Clean Water

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123. 422 U.S. 490 (1975).

124. *Id.* at 501.

Act does not authorize citizen suits for wholly past violations, defendants in subsequent cases raised the argument that this decision barred an assessment of penalties for past violations altogether. Courts rejected this argument, concluding that “[w]hen a citizen suit is properly commenced. . . , *Gwaltney* does not limit the relief which section 1319(d) affords the citizen group to only present and prospective penalties.”<sup>125</sup> While based on statute rather than Article III, these decisions demonstrate that in Clean Water Act cases the courts already have drawn the distinction between the prerequisites for jurisdiction and the permissible scope of relief.

### 3. Sound Public Policy Argues Against Mootness

The third reason civil penalty claims should not be capable of being avoided based on a mootness defense is that this result would seriously weaken the effectiveness of the citizen-suit provision, undermining Congress’ basic objective in including a citizen enforcement mechanism in the Clean Water Act in the first place. Congress created citizen enforcement because it was concerned that the collective action problem and the phenomenon of agency capture would skew the agencies’ ability to implement the Clean Water Act in an evenhanded way.<sup>126</sup> In other words, in addition to creating a mechanism for imposing specific deterrence and inflicting punishment, Congress’ intent in drafting the Clean Water Act was to establish a regime of general deterrence. To the extent mootness doctrine thwarts citizens’ ability to obtain penalties, the overall deterrent objective of the Clean Water Act is undermined.

Pre-*Laidlaw* decisions following the rule that a civil penalty claim cannot be rendered moot after the fact emphasize the importance of this rule to the effective implementation of the Clean Water Act. First, and most obviously, they recognize that “if penalties can be rendered moot, citizens will have less incentive to file” enforcement actions, for the simple reason that the possibility of mootness makes filing suit a less certain method for controlling pollution.<sup>127</sup> They also recognize that polluters will be deterred less if they know they can escape liability through post-filing compliance efforts.<sup>128</sup>

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125. See, e.g., *Carter-Wallace*, 684 F. Supp. at 119.

126. See ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY 181 (2d ed. 1996); Sunstein, *supra* note 59, at 192-93.

127. See *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1136-37 (11th Cir. 1990).

128. See *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493 (3d Cir. 1993). See generally *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 231

Second, and arguably “most dangerous,”<sup>129</sup> “mooting an entire suit based on post-complaint compliance would weaken the deterrent effect of the Act . . . by encouraging defendants to use dilatory tactics to delay litigation.”<sup>130</sup> As one court observed, “dischargers could intentionally violate the Clean Water Act until they are sued and then obtain a stay while continuing their violations until they eventually are in compliance with the law. At this point, the case would be dismissed and they would have escaped all penalties.”<sup>131</sup> This understanding of mootness doctrine, the court concluded, “reads the civil penalties provision out of the Clean Water Act.”<sup>132</sup>

These consequences have significance under Article III because Congress’ goals and objectives are relevant to the analysis of the standing issue. In *Akins*, for example, the Court recognized private citizens’ standing to compel the FEC to collect information from a political committee because Congress had specifically created a public right to this information in order to help open up campaign financing to public scrutiny. While the Court has typically focused on Congress’ authority to define what constitutes an injury under Article III, it is no stretch to suggest that Congress also has power to define what constitutes redress for purposes of Article III. Indeed, at bottom, the issue of whether a particular remedy provides redress is merely a reformulation of the question of whether the plaintiff has suffered an injury in fact. If Congress prescribes a particular form of redress for certain actions, it is because Congress wishes to create a private interest in protection against the consequences of those actions.

Certainly this approach makes sense in the context of the Clean Water Act. As part of a comprehensive regulatory program, Congress provided for direct citizen enforcement because it believed that

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(1975) (stating “the detrimental effect to the public and the advantage to the violator [of ignoring the law] continue and increase over a period of time, and the violator could eliminate the effects of the violation if it were motivated to do so,” and accumulating daily penalties can provide that motivation).

129. See *Tyson Foods*, 897 F.2d at 1137.

130. See *Atlantic States Legal Found. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993).

131. See *Tyson Foods*, 897 F.2d at 1137.

132. *Id.* One additional concern identified by the courts is the unfairness inherent in the idea that whether or not a suit is mooted, and whether or not a defendant completely escapes liability for civil penalties, will depend upon “when the district court happens to set the case down for trial or rule on summary judgment motions.” See *id.* It could be added that it would make the stringency of enforcement of the Clean Water Act in different parts of the country depend upon the arbitrary factor of the degree of congestion in the different federal district court dockets.



this mechanism would bolster the overall effectiveness of the Act. The Clean Water Act established broad new public rights to a clean environment. In order to ensure that these rights were vindicated, Congress enlisted citizens as independent enforcement agents to bolster and supplement government enforcers. Just as the standing issue cannot properly be addressed without considering the objectives that Congress sought to further, so too the narrower issue of whether civil penalties satisfy the redressability requirement cannot be addressed without considering the goals Congress intended to accomplish by authorizing citizens to seek civil penalties. In addition to providing citizens an opportunity to abate ongoing and potential future violations that threaten their personal interests, the citizen-suit provision serves the instrumental purpose of strengthening water pollution abatement efforts in general. Article III does not require the courts to ignore this larger purpose.

#### CONCLUSION

*Laidlaw* was undoubtedly a big win for the environment. However, the Court's decision is hardly a definitive resolution of the issues surrounding standing doctrine, and in some ways the Court's decision makes matters more confused than they were before the Court's ruling. Standing doctrine remains a work in progress.

In particular, the Court's analysis of the standing issue creates uncertainty about the theory of standing upon which the decision rests. Furthermore, while the Court overturned the lower court ruling that the case had become moot, the Court's decision can be read as making it easier for defendants to escape liability on mootness grounds in the general run of cases. The Court should resolve the theoretical issue by recognizing Congress' broad authority to create new legal rights and to empower citizens to sue to enforce those rights. The lower federal courts should read *Laidlaw* as not disturbing the established rule in the federal circuit courts that a claim for civil penalties cannot generally be mooted by after-the-fact compliance efforts.