IS THE ENVIRONMENTAL CITIZEN SUIT DEAD? AN EXAMINATION OF THE EROSION OF STANDARDS OF JUSTICIABILITY FOR ENVIRONMENTAL CITIZEN SUITS

CASSANDRA STUBBS*

I.
INTRODUCTION

Under a haze of air pollution and growing public activism, Congress passed the Clean Air Act of 1970 (CAA).[1] Congress included in this Act the country's first environmental citizen suit provision. The provision had the potential to improve significantly the capacity of environmentally-concerned citizens and groups to hold polluting industries accountable. The environmental citizen suit provision authorizes any citizen to bring suit against a private defendant for violating the CAA or against the relevant administrative agency for failing to perform a nondiscretionary CAA duty.[2] This provision has served as an important model: every major environmental statute now includes a similar citizen suit provision.[3]

---

* Law Clerk to the Honorable Harry Pregerson, U.S. Court of Appeals for the Ninth Circuit. J.D., 2000, N.Y.U. School of Law. I would like to thank Richard Revesz and the staff of *N.Y.U. Review of Law & Social Change* for their help in developing and editing this article. Special thanks to Lenore Anderson for managing the whole process, Jen Simon for moral support and helpful critique, and Alex Reinert for suggesting that I look into the standing problems of environmental citizen litigants.

1. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1705 (1970); *see* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 844–45 (1985) (describing time period in which CAA passed as "environmental awakening"—pollution became serious national political issue with activists harshly criticizing government for ignoring problem).

2. Under the 1970 amendments to the CAA, "any person may commence a civil action on his own behalf (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission 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." Clean Air Act § 304 (a), 42 U.S.C. § 7604(a) (1994).

3. The following sixteen statutes contain citizen suit provisions: Act to Prevent Pollution of Ships § 11, 33 U.S.C. § 1910 (1994); Clean Air Act § 304, 42 U.S.C. § 7604 (1994) [hereinafter CAA]; Clean Water Act § 505, 33 U.S.C. § 1365 (1994) [hereinafter CWA]; Comprehensive Environmental Response, Compensation and Liability Act § 310, 42 U.S.C. § 9659 (1994) [hereinafter CERCLA]; Emergency Planning and Community Right to Know

Initially, the citizen suit provision was neglected. The provision's subsection that authorizes citizens to sue private defendants was difficult to utilize because environmental organizations and citizens lacked the expertise and resources needed to bring complicated enforcement suits. Over time, however, this subsection developed into an important enforcement tool as environmental organizations became increasingly sophisticated in the skills needed to successfully pursue these cases in the courts.[4]

At first, federal courts greeted these new suits with generous standing rules;[5] however, as environmental citizen suits proved effective means of enforcement, judicial resistance began to mount. Courts developed a complex overlay of jurisdictional and standing requirements for environmental citizen suits, often dismissing the suits despite strong arguments for liability.

This article explores this erosion of justiciability for environmental citizen suits. It will examine the deterioration of jurisdiction in federal courts for environmental citizen suits over the past twenty years, as well as new signs of a reemergence. The courts' failure to give deference to the legislature, analytic confusion in the lower courts, and normative decision making by judges have all contributed the hobbling of citizen suit litigation. At the same time, the confusion and number of questions left open by Supreme Court cases have allowed lower courts to soften some of the more stringent rulings by the Court. The viability of environmental citizen suits is further complicated by signs that the Supreme Court itself may be relaxing some of the justiciability requirements for citizen suits.

Part II will briefly sketch the history and basic characteristics of environmental citizen suits. Part III will analyze the four major doctrinal areas in which the justiciability of citizen suits has been attacked: (1) the ongoing controversy requirement, (2) the injury-in-fact requirement, (3) the redressability requirement, and (4) the doctrine of mootness. Finally, Part

---

Act § 326, 42 U.S.C. § 11046 (1994) [hereinafter EPCRA]; Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1994 & Supp. IV 1998) [hereinafter ESA]; Energy Policy and Conservation Act § 335, 42 U.S.C. § 6305 (1994) [hereinafter EPCA]; Deepwater Port Act § 16, 33 U.S.C. § 1515 (1994); Marine Protection Research and Sanctuaries Act (Ocean Dumping) § 105, 33 U.S.C. § 1415 (1994); Noise Control Act § 12, 42 U.S.C. § 4911 (1994) [hereinafter NCA]; Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349 (1994) [hereinafter OCSLA]; Powerplant and Industrial Fuel Act § 725, 42 U.S.C. § 8435 (1994); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (1994) [hereinafter RCRA]; Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (1994, Supp. II 1996 & Supp. III 1997) [hereinafter SDWA]; Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270 (1994) [hereinafter SMCRA]; Toxic Substance Control Act § 20, 15 U.S.C. § 2619 (1994) [hereinafter TOSCA].

4. *See* David Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1619–20 (1995).

5. *See* Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 933 (1998).

IV will consider what is left for environmental citizen suits and recommend future directions.

II.
THE HEYDAY OF THE ENVIRONMENTAL CITIZEN SUIT

Congress adopted in 1970 the first environmental citizen suit provision against a backdrop of weak environmental laws, lax enforcement, and the popularity of agency capture theory.[6] Agency capture theory describes the government as an agency whose enforcement powers are vulnerable to influence by privately regulated groups.[7] Advocates promoted citizen suits as a way to invigorate enforcement of environmental regulations and "motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."[8] Citizen suits were an attractive solution to the problem created by the discrepancy between sweeping environmental laws and limited agency capacity for enforcement.[9] Given the widespread support for the environmental movement, citizen suits were difficult to oppose politically.[10] The Senate Committee adopted the provisions with strong supporting language, stating that "[i]t is the Committee's intent that enforcement of these control provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them."[11]

The first citizen suit provision, adopted in section 304 of the CAA, authorized "any citizen" to sue either a private defendant for a violation of the CAA or the Environmental Protection Agency Administrator for failure to perform any non-discretionary duty or act.[12] Virtually every major environmental statute now contains a citizen suit provision modeled after the CAA provision.[13] Citizen suits are limited in multiple ways: they are only available for enforcement of administrative regulations and cannot be used to gain judicial review of related common law principles; monetary fines awarded must be paid to the U.S. Treasury; and the provisions do not

6. *See* Boyer & Meidinger, *supra* note 1, at 843.

7. *See* Cass Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 183–84 (1992).

8. S. REP. No. 91-1196, at 37 (1970); *see also* Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311, 316 (1998) (describing congressional interest in citizen suits as based implicitly on belief that citizens would be particularly motivated and effective advocates).

9. *See* Boyer & Medinger, *supra* note 1, at 837; Jefferson D. Reynolds, *Defanging Environmental Law: Extracting Citizen Suit Provisions Under* Seminole Tribe v. Florida, 12 J. NAT. RESOURCES & ENVTL. L. 71, 74 (1997); Snook, *supra*, note 8.

10. *See* JEFFREY G. MILLER, ENVTL. LAW INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 4–5 (1987).

11. S. REP. No. 91-1196, at 37 (1970).

12. *See* 42 U.S.C. § 7604 (1988 & Supp. V 1994).

13. *See supra* note 3. The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136a–136y (1994 & Supp. V 1999) [hereinafter FIFRA], is the sole notable exception. *See* MILLER, *supra* note 10, at 6.

establish private rights of action or per se negligence in private common law suits.[14] Remedies available in citizen suits vary among the statutes, but most include injunctive relief and civil penalties.[15] The plaintiffs cannot themselves receive cash payments from the defendants; however, plaintiffs are encouraged to bring suit by a provision that awards litigation costs and attorneys' fees when appropriate.[16]

Citizen suits provide two mechanisms to ensure that private citizens do not preempt the government from bringing an enforcement action. First, plaintiffs are required to send notice of intent to file suit to the defendant and the appropriate government body sixty days before filing the complaint.[17] Second, citizens are prevented from bringing suit if the government is "diligently prosecuting" an enforcement action.[18] The theory that private citizens supplement or complement government action rather than replace it underlies these mechanisms.[19]

Environmental citizen suits were rarely utilized during their first decade of existence.[20] Prior to 1982, environmental citizen suits were brought almost exclusively against the government for failure to regulate.[21] In response to the Reagan administration's lack of enforcement, environmental organizations turned to citizen suit provisions to sue private defendants. Reagan slashed funding for the Environmental Protection Agency (EPA) in the early 1980s, resulting in a marked drop in the level of government enforcement of environmental laws.[22] Environmental organizations introduced national enforcement campaigns of major environmental laws and brought a slew of cases against private defendants in response to the crisis

14. *See* Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L & TECH. J. 55, 70 (1989).

15. *See* Boyer & Meidinger, *supra* note 1, at 850. For an example of a statute authorizing injunctive relief only, see the Noise Control Act § 12, 42 U.S.C. § 4911 (1994).

16. *See* Boyer & Meidinger, *supra* note 1, at 851. The Clean Air Act is notable for changes in 1990 that provide discretion to the trial judge to approve usage of a limited amount of the civil penalties for a local mitigation fund. *See* Clean Air Act § 304, 42 U.S.C. § 7604(g)(2) (1998).

17. *See* Boyer & Meidinger, *supra* note 1, at 849. For one of the citizen suit provisions authorized by RCRA, the plaintiff must send notice ninety days in advance. *See* RCRA § 7002, 42 U.S.C. § 6972(b)(2)(A) (1994).

18. *See, e.g.*, CWA § 505(b)(1)(B), 1365, 33 U.S.C. § 1365(b)(1)(B) (1989). For a fuller discussion of government preclusion, see generally Derek Dickinson, *Is 'Diligent Prosecution of an Action in a Court' Required to Preempt Citizen Suits Under the Major Federal Environmental Statutes?*, 38 WM. & MARY L. REV. 1545 (1997).

19. *See* S. REP. NO. 91-1196, at 37 (1970); Boyer & Meidinger, *supra* note 1, at 849.

20. *See* Adeeb Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 23 HARV. ENVTL. L. REV. 2334–35 (1985).

21. *See* Boyer & Meidinger, *supra* note 1, at 852.

22. *See* William L. Andreen, *Do Citizen Suits Seeking Civil Penalties Become Moot When Pollution Violations Are Cured?* 1 PREVIEW U.S. SUP. CT. CAS. 7 (Sept. 13, 1999); Stephen Fotis, Comment, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U. L. REV 127, 130 n.15 (1985).

in enforcement.[23] The number of sixty-day notices sent for environmental citizen suits swelled from 6 in 1981, to 178 in 1984, and to 200–300 in the early 1990's.[24]

The majority of citizen suits were initially brought under the Clean Water Act (CWA) because of the ease of detection and prosecution.[25] The CWA imposes a regulatory scheme that requires facilities to obtain National Pollutant Discharge Elimination System (NPDES) permits for all point source discharges into a body of water.[26] The NPDES permits define discharge limits and require the facility to monitor levels of discharge and report its compliance data.[27] Because the permits and monitoring data are available to the public, citizen groups can investigate violations of the CWA for any given facility quickly and inexpensively.[28] The availability of the defendant's own data reporting violations allows plaintiffs to demonstrate liability easily.[29] In contrast, early enforcement of the CAA via citizen suits was encumbered by difficulties in collecting reliable data for evidence.[30] Since the CAA was amended in 1990 to institute a system of required monitoring and filing similar to those of the Clean Water Act, the opportunities to use citizen suits to enforce the CAA has grown.[31]

Although the Supreme Court did not decide an environmental citizen suit case until the late 1980s, the Court was generous to environmental cases brought under judicial review provisions of the Administrative Procedure Act (APA) during the 1970s and early 1980s.[32] These environmental cases were decided in a context of judicial support for expansion of access

23. *See*; Andreen, *supra* note 22; Boyer & Meidinger, *supra* note 1, at 852; Fadil, *supra* note 20, at 31; John M. Moore, *Private Suits Flood Companies Under Clean Water Provision*, LEGAL TIMES, May 7, 1984, at 1 (describing rising number of citizen suits in early 1980s as result of concerted campaigns by environmental organizations and predicting standing as central defense for corporations in future).

24. *See generally* Jeannette L. Austin, Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220 (1987); Boyer & Meidinger, *supra* note 1; Fadil, *supra* note 20, at 29–35; Hodas, *supra* note 4.

25. *See* Fadil, *supra* note 20; Marcia R. Gelpe & Janis L. Barnes, *Penalties in Settlements of Citizens Suit Enforcement Actions Under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1025, 1031 (1990); Eileen Guana, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 46–47 (1995); Barry Meier, *Citizen Suits Become a Popular Weapon in the Fight Against Industrial Polluters*, WALL ST. J., Apr. 17, 1987.

26. *See* Guana, *supra* note 25, at 47; Hodas, *supra* note 4, at 1564.

27. *See* Fotis, *supra* note 22, at 162–63; Guana, *supra* note 25, at 47.

28. *See* Fadil, *supra* note 20, at 37; Guana, *supra* note 25, at 47.

29. *See* Guana, *supra* note 25, at 47.

30. *See* Fotis, *supra* note 22, at 159.

31. *See* Randall S. Abate, *Rethinking Citizen Suits for Past Violations of Federal Environmental Laws: Recommendations for the Next Decade of Applying the* Gwaltney *Standard*, 16 TEMP. ENVTL. L & TECH. J. 1, 18 (1997).

32. *See* Carlson, *supra* note 5, at 933. The Administrative Procedure Act authorizes judicial review for individuals who allege that final agency action adversely affected them or caused them to suffer a legal wrong. *See* 5 U.S.C. §§ 701–706 (1994).

to the courts for the purpose of enforcing public law.[33] In 1972, in *Sierra Club v. Morton*, the Supreme Court recognized environmental and aesthetic injuries as sufficient to meet the injury-in-fact standing requirement.[34] One year later, the Supreme Court decided *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States* and accepted the student organization's argument of injury based on the fact that a railroad freight surcharge would have increased the cost of recycled materials.[35] Again, under the APA, the Court recognized that the injury requirement was fulfilled despite the widespread nature of the alleged injury.[36] More than ten years later, the Supreme Court relegated the injury analysis to a footnote in *Japan Whaling Ass'n v. American Cetacean Society*,[37] concluding that the plaintiffs' interest in observing and studying whales was "undoubtedly" sufficient to fulfill the standing test of injury.[38]

III.
AREAS OF EROSION

The initial period of expansive interpretation of standing and jurisdiction for environmental and administrative review did not last.[39] Over the past ten years, critics have accused the courts of instigating a "backlash,"[40]

33. *See* Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 98 (1996) (discussing this expanded view of standing as product of "instrumentalist court era").

34. Sierra Club v. Morton, 405 U.S. 727, 734 (1972). The *Sierra Club* plaintiffs challenged a development project, arguing that the Forest Service and Department of Interior violated various federal regulations in issuing the permit. *See id.* at 730–31.

35. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 685 (1973). In addition to the original parties, the Environmental Defense Fund, National Parks and Conservation Association, and Izaak Walton League of America intervened as plaintiffs, and a group of railroad organizations intervened on the side of the defendants. *Id.* at 680. *See also* Philip Weinberg, *Are Standing Requirements Becoming A Great Barrier Reef Against Environmental Actions?*, 7 N.Y.U. ENVTL. L.J. 1, 3 (discussing *SCRAP* as case with broadest recognition of environmental standing).

36. *SCRAP*, 412 U.S. at 686–87. The students challenged the Interstate Commerce Commission for alleged noncompliance with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370e (1994 & Supp. IV 1998). *SCRAP*, 412 U.S. at 678–79.

37. 478 U.S. 221 (1986).

38. *Id.* at 231 n.4.

39. For a discussion of the accompanying drop in number of environmental citizen suits, see Andreen, *supra* note 22. *See generally* William Glaverson, *Novel Anti-Pollution Tool Is Being Upset by Courts*, N.Y. TIMES, June 5, 1999, at A1; John Echeverria & Jon T. Zeidler, *Barely Standing: The Erosion of Citizen "Standing" to Sue and Enforce Environmental Law*, Environmental Policy Project, *at* http://www.envpoly.org/papers/pbarely.htm (June 1999).

40. Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After* Lujan v. Defenders of Wildlife, 12 UCLA J. ENVTL. L. & POL'Y 345, 347 (1994).

a "severe blow to environmental activism,"[41] and a "slash and burn expedition through the law of environmental standing."[42] This section considers the shifts in jurisdiction and standing law for environmental citizen suits resulting from the four major Supreme Court cases, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*,[43] *Lujan v. Defenders of Wildlife*,[44] *Steel Co. v. Citizens for a Better Environment*,[45] and *Friends of the Earth v. Laidlaw*.[46] *Gwaltney* raised the question of whether citizen suits brought under the CAA are justiciable if they allege violations based on events that occurred entirely in the past. The other three cases, *Lujan*, *Steel Co.*, and *Laidlaw*, addressed questions related to standing.

Article III, Section 2 of the Constitution limits the exercise of judicial power to "Cases" and "Controversies." Although the origins of standing doctrine and their relation to Article III are the subject of debate,[47] the current constitutional standing inquiry asks whether the plaintiff has alleged an injury traceable to the defendant and likely to be redressed by the requested relief.[48] As we shall see, in *Lujan* and *Steel Co.*, the Court fashioned restrictive views of the injury and redressability requirements, and then tempered those requirements in *Laidlaw*. Finally, *Laidlaw* determined the critical issue of whether the strict views of standing should be imported directly into a mootness analysis, another Article III doctrine.

Two themes emerge from this section's analysis of the erosion of justiciability for environmental citizen suits. First, Supreme Court cases, when read together, provide a picture of the ebb and flow of constitutional justiciability doctrines in the area of environmental citizen cases. Second, examination of each of the topical areas demonstrates that, even while the Supreme Court is undoubtedly narrowing jurisdiction, the effects in the lower courts are more textured. Finally, a holistic approach to the separate doctrines provides an opportunity to consider some of the theoretical tensions that cut across the doctrines in the Court's current jurisprudence.

41. Harold Feld, *Saving the Citizen Suit: The Effect of* Lujan v. Defenders of Wildlife *and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141 (1994).

42. Lujan v. Defenders of Wildlife, 504 U.S. 555, 606 (Blackmun J., dissenting) (1992).

43. 484 U.S. 49 (1987).

44. 504 U.S. 555 (1992).

45. 523 U.S. 83 (1998).

46. 528 U.S. 167 (2000).

47. *See, e.g.*, Sunstein, *supra* note 7, at 168–86 (arguing that much of Supreme Court's "irreducible minimum" definition of standing was devised whole cloth in the last third of this century and has little basis in common law or Constitution: "One might well ask: what was the source of the injury-in-fact test? Did the Supreme Court just make it up? The answer is basically yes.").

48. *See* Allen v. Wright, 468 U.S. 737, 751 (1984).

A. *Imposition of the "Ongoing Violation" Requirement*

1. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation

In 1987, the Supreme Court entered the area of jurisdiction of environmental citizen suits for the first time in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation.*[49] The defendant-petitioner, a meat packing plant, had discharged numerous pollutants, including fecal coliform, chlorine, and total Kjeldahl nitrogen (TKN) into Virginia's Pagan River, in violation of its discharge permit.[50] By the time the plaintiffs had sent notice of intent to sue under the CWA, the defendant had violated its permit in more than a hundred instances over the course of three years.[51] After receiving the notice, the defendant installed new technologies to address the pollution violations. However, the defendant's violations continued through the sixty-day notice period, with the last reported violation occurring just two weeks before the plaintiffs filed their complaint.[52] Since the defendant had come into compliance after receiving notice but before the complaint had been filed, the Court considered whether the language of the CWA, "to be in violation of," authorized jurisdiction over suits for past violations only.[53]

In the lower court opinion, the Fourth Circuit adopted Chesapeake Bay's argument that the scope of the statute language "to be in violation" included past violations because of the similarity of the citizen suit provision to the provision that authorizes enforcement by the EPA.[54] The CWA authorizes action by the EPA when "any person is in violation."[55] Since the government's ability to bring suit for wholly past violations under the present-tense language is uncontested, the Fourth Circuit found that the present-tense language of the citizen suit provision also should be read to include past violations.[56]

The Supreme Court disagreed with the Fourth Circuit. The Court concluded that the CWA does not authorize suits for wholly past violations and held that plaintiffs must make a good faith allegation of continuous or

49. 484 U.S. 49 (1987); *see* Snook, *supra* note 8, at 321 ("The starting point for judicial interpretation of citizen suits is the United States Supreme Court's ruling in *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*").

50. *Gwaltney,* 484 U.S. at 53.

51. *Id.* at 53–54.

52. *Id.* at 54–55.

53. *Id.* at 52.

54. *Id.* at 58; *see* James M. Hecker, *The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both?* 8 NAT. RESOURCES & ENV'T 31, 32 (Spring 1994).

55. CWA § 505, 33 U.S.C. § 1319(a)(1) (1994).

56. *See* Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 309 (4th Cir. 1986). For discussion of this issue after *Gwaltney*, see Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part II*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10063 (1988).

intermittent violations to maintain jurisdiction.[57] While the Court acknowledged that the language of the statute is ambiguous, it concluded that the "most natural reading"[58] of the phrase "to be in violation of" excludes suits for entirely past violations.[59]

Looking at the legislative history, the Court reasoned that Congress intended defendants to have an opportunity to come into compliance because the CWA requires citizens to give notice to defendants sixty days before filing suit.[60] The Court's analysis of the notice requirement rested on two contestable premises. First, the Court assumed that the only purpose for providing notice to the defendant is to invite compliance. Yet the Court ignored other possibilities. For example, notice provisions may be included to encourage settlement. Second, the Court assumed that intent to encourage compliance must preclude suits for civil penalties. However, Congress could have intended to create an incentive for defendants to comply as soon as possible while still requiring payment of the appropriate fines as a punitive and deterrent measure.

In addition to looking at the statute's legislative history, the Supreme Court also examined pre-complaint compliance by using a statutory interpretation analysis. The Court framed the ongoing violation requirement as a jurisdictional one, reasoning that if the action were outside the scope of the statutory grant, the Court would not have jurisdiction to hear the case.[61] However, the question would have been more properly framed as whether a cause of action existed under the congressional grant for past violations.[62] Ironically, eleven years later the Court itself reframed the issue and moved away from a jurisdiction analysis. In a subsequent environmental citizen suit standing case, Justice Scalia, writing for the majority, recast the *Gwaltney* discussion as pertaining to whether a cause of action existed—not whether the court had jurisdiction.[63]

Since the Court did not interpret the statute as authorizing suits for wholly past violations, it did not have to address the question of standing. However, foreshadowing the Court's future analysis of standing, the *Gwaltney* petitioner did bring the issue of standing to the Court's attention in its brief. In a footnote in the petitioner's brief,[64] the petitioner argued that citizen suits for wholly past violations would fail the injury-in-fact and redressability standing requirements, basing its position on then-Judge

57. *Gwaltney*, 484 U.S. at 64.
58. *Id.* at 56–57.
59. *Id.* at 57.
60. *Id.* at 60.
61. *Id.* at 52.
62. *See* 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1350 (2d ed. Supp. 1998).
63. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).
64. *See* Petitioner's Brief, n.48, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) (No. 86-473) (LEXIS, U.S. Supreme Court Briefs File). The Supreme Court did not address this point.

Scalia's theory of standing and separation of powers advanced in a 1983 law review article.[65] Justice Scalia's concurrence in *Gwaltney* argued that standing would bar suits for past violations, signaling the shift towards the restrictive view of standing that lay ahead.[66]

2. Public Reaction and Application in the Lower Courts

Both the petitioner and respondents proclaimed *Gwaltney* a victory, in part because of the ambiguous nature of the decision.[67] The Court clearly decided that suits for wholly past violations would not be maintained but did not define a wholly past violation.[68] Industry claimed gains because of the protective shield of the ability to come into compliance and avoid paying penalties.[69] Environmentalists took solace in the fact that the majority allowed suit for good faith claims of continuous or intermittent violations.[70] Nevertheless, environmentalists criticized the decision for creating more litigation issues for defendants to raise (thereby prolonging litigation),[71] for reducing the deterrent effects of the statute by not imposing civil penalties on parties who had clearly violated the statute,[72] and for decreasing incentives for industry to comply with the Clean Water Act.[73]

The criticism of *Gwaltney* prompted a Congressional response.[74] In 1990, Congress amended the Clean Air Act to allow citizen suits against defendants for past violations "if there is evidence that the violation is repeated."[75] However, it is not entirely clear from the legislative history that

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

66. *See Gwaltney*, 484 U.S. at 70 (Scalia, J., concurring).

67. *See* Al Kamen, *Ruling on 'Moment of Silence' Avoided; Court Also Curtails Environmental Suits Under Clean Water Act*, WASH. POST, Dec. 2, 1987, at A4 (describing decision as "major victory for business groups"); Stuart Taylor, Jr., *Supreme Court Roundup; Citizens' Suits in Pollution Cases Are Limited*, N.Y. TIMES, Dec. 2, 1987, at A24 (quoting declarations of victory by both parties); Leah R. Young, *Environmentalists Lose Clean Water Suit*, J. COM., Dec. 2, 1987 (coming to similar conclusions); *see also* Ann Powers, *A Citizen's View of* Gwaltney, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10119 ("On a practical level, neither side won or lost the case.").

68. *See* Scott B. Garrison, *Subject Matter Jurisdiction, Standing, and Citizen Suits: The Effect of* Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 48 MD. L. REV. 403, 428 (1989); Lance L. Shea, Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.: *Balancing Interests Under the Clean Water Act*, 25 SAN DIEGO L. REV. 857, 871 (1988).

69. *See* Taylor, *supra* note 67.

70. *See id.*; Jeffrey G. Miller, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.: *Invitation to the Dance of Litigation*, 18 Envtl. L. Rep (Envtl. L. Inst.) 10098 (1998).

71. *See* Miller, *supra* note 70.

72. *See id.*

73. *See* Beverly McQueary Smith, *The Viability of Citizens' Suits Under the Clean Water Act After* Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 40 CASE W. RES. L. REV. 1, 6 (1990).

74. *See id.* at 73–74 (calling for a congressional response); *see also* Roger A. Greenbaum & Anne S. Peterson, *The Clean Air Act Amendments of 1990: Citizen Suits and How They Work*, 2 FORDHAM ENVTL. L.J. 79, 100–02 (1991).

75. 42 U.S.C. § 7604(a)(1) (1994).

Congress agreed that these changes to the CAA reflected a departure from *Gwaltney*. For example, one senator viewed the new language as conforming with the Supreme Court's decision in *Gwaltney*.[76] President Bush also stated that the changes reflected adherence to *Gwaltney* when he signed the amendments into law.[77] One court relied on this statement to interpret the new language of the CAA as merely codifying the holding in *Gwaltney* and applied the ongoing violations requirement to the CAA.[78] However, the majority of courts rejected this interpretation in favor of following the explicit language of the statute and permitted suits for wholly past violations under the CAA when plaintiffs alleged more than one violation.[79]

Despite Congress's alteration of the language of the CAA, courts continued to apply the *Gwaltney* standard in citizen suits brought under other environmental statutes.[80] Litigation shifted from contesting the interpretation of "to be in violation" to debating the meaning of the *Gwaltney* language defining an ongoing violation as a "continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future."[81] On remand, the Fourth Circuit in *Gwaltney* held that, in order to maintain jurisdiction, the plaintiff must (1) prove violations that continue on or after the complaint is filed, or (2) present evidence "from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations."[82] The Fourth Circuit further refined the second prong by holding that a continuing likelihood will be presumed unless there is no real likelihood of repetition.[83] The Fourth Circuit two prong standard was widely adopted by other circuits.[84]

---

76. *See* Abate, *supra* note 31, at 19.

77. *See id.*

78. *See* Satterfield v. J.M. Huber Corp., 888 F. Supp. 1561, 1564 (N.D. Ga. 1994).

79. *See* Patton v. Gen. Signal Corp., 984 F. Supp. 666 (W.D.N.Y. 1997); Fried v. Sungard Recovery Servs., Inc., 916 F. Supp. 465 (E.D. Pa. 1996); Adair v. Troy State Univ. of Montgomery, 892 F. Supp. 1401 (M.D. Ala. 1995); Glazer v. Am. Ecology Envtl. Servs. Corp., 894 F. Supp. 1029 (E.D. Tex. 1995).

80. The federal courts applied the *Gwaltney* standard to other environmental statutes including the Clean Air Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act, and the Emergency Planning and Community Right-to-Know Act. *See* Abate, *supra* note 31, at 2.

81. *Gwaltney*, 484 U.S. at 57; *see* Abate, *supra* note 31, at 2; Robert Wiygul, Gwaltney *Eight Years Later: Proving Jurisdiction and Article III Standing in Clean Water Act Citizen Suits*, 8 TUL. ENVTL. L. J. 435, 443 (1995).

82. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 693 (4th Cir. 1987).

83. *See id.*

84. *See* Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 501–02 (3d Cir. 1993); Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1062 (5th Cir. 1991); Sierra Club v. Union Oil Co. of Cal., 853 F.2d 667, 671 (9th Cir. 1988); Allen County Citizens for the Env't, Inc. v. BP Oil Co., 762 F. Supp. 733, 739 (N.D. Ohio 1991).

The Fourth Circuit's generally accepted definition of proof has raised new disagreements. Courts have struggled with the first prong, attempting to define what constitutes a violation that occurs on or after the complaint is filed. For example, one thorny issue involves dumping or discharge of materials. The court in *North Carolina Wildlife Federation v. Woodbury*[85] held that failure to correct the negative consequences of the discharge constitutes a violation after the complaint is filed, even though the discharge occurred prior to the complaint.[86] In contrast, the Second Circuit Court of Appeals dismissed a claim brought under the Clean Water Act and the Resource Conservation and Recovery Act for lead deposits in the Long Island Sound. The court rejected the plaintiff's argument that the lead's continued decomposition constituted an ongoing violation.[87]

Permit violations are another area of disagreement among lower courts.[88] For the statutory regimes that require permits, such as the NPDES permits under the Clean Water Act,[89] a defendant may violate one parameter of the permit before the complaint is filed and a different parameter afterwards. Courts disagree as to whether this constitutes an ongoing violation or a new violation since a different pollutant is involved. The courts have split between requiring a likelihood of violation of the exact parameter,[90] any parameter,[91] and a hybrid of the two that requires a violation of the same source of violation, even if manifested by a different parameter.[92]

Commentators are divided over the significance and consistency of the lower courts' decisions. One commentator points to the lower courts as proof that the impact of *Gwaltney* has been minimal,[93] while another commentator suggests that the lower courts produced confused and variable

85. No. 87-584, 1989 WL 106517 (E.D.N.C. Apr. 25, 1989).

86. *See id.* at *2.

87. *See* Conn. Coastal Fishermen's Ass'n v. Remington Arms, Co., 989 F.2d 1305, 1313 (2d Cir. 1993).

88. *See* Wiygul, *supra* note 81, at 446.

89. *See supra* text accompanying notes 25–28.

90. *See* Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 697 (4th Cir. 1989); Allen County Citizens for the Env't, Inc. v. BP Oil Co., 762 F. Supp. 733 (N.D. Ohio 1991); Natural Res. Def. Council, Inc. v. Gould, Inc., 733 F. Supp. 8, 10 (D. Mass. 1990); Northwest Envtl. Def. Ctr. v. Washington County, 30 Env't Rep. Cas. (BNA) 1117 (D. Or. 1989).

91. *See* Pub. Interest Res. Group of N.J. v. ELF Atochem N. Am., Inc., 817 F. Supp. 1164, 1175 (D.N.J. 1993); Natural Res. Def. Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801, 813 (N.D. Ill. 1988); Sierra Club v. Port Townsend Paper Corp., 28 Env't Rep. Cas. (BNA) 1676 (W.D. Wash. 1988).

92. *See* Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg. Inc., 2 F.3d 493, 499 (3d Cir. 1993); *see also* Abate, *supra* note 31, at 15 (describing Third Circuit's "modified by parameter" approach).

93. *See* Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 ECOLOGY L.Q. 723, 764 (1996) ("A major reason why *Gwaltney* has been less damaging than originally expected is lower courts' broad interpretation of the continuing violations doctrine." (citation omitted)).

results under *Gwaltney*.[94] *Gwaltney* seems to have had the uniform effect of creating another layer of dispute in citizen suit litigation, but the differences among courts appear mainly to be technical variations. The only exception has been information violation suits.

3. *The Special Problem of Information Violations*

One of the most contentious issues left open after *Gwaltney* was whether the prohibition on citizen suits for wholly past violations should extend to information violations under the Emergency Planning and Community Right-To-Know Act (EPCRA).[95] Some commentators argued strenuously that the nature of the statute required different treatment.[96] Unlike a clean air or water statute, EPCRA does not involve a scheme of self-monitoring of pollution levels.[97] The statute, part of a broader series of laws aimed at increasing public access to information, requires that parties report information on their storage and use of toxic chemicals.[98] If the defendant company files its back paperwork, the plaintiff would have to wait until the next paperwork deadline to show an ongoing violation.[99]

While the bulk of environmental statutes authorize suit against a defendant alleged "to be in violation of" the statute, EPCRA authorizes suit against parties for "failure to . . . complete and submit."[100] The lower

94. *See* Abate, *supra* note 31, at 1 ("Ten years after the Supreme Court issued its decision in *Gwaltney*, federal courts continue to struggle to ascertain the scope and applicability of the *Gwaltney* standard.").

95. EPCRA § 346(a)(1), 42 U.S.C. § 11046(a)(1) (1994).

96. *See* Abate, *supra* note 31, at 25–27; Jim Hecker, *Citizen Standing to Sue for Past EPCRA Violations*, 27 Envtl. L. Rep. (Envtl. L. Inst.) 10561, 10562–63 (1997); Jim Scott, *Permissibility of Citizen Suits Under EPCRA for Wholly Past Violations in the Seventh Circuit:* Citizens for a Better Environment v. Steel Co., 4 WIS. ENVTL. L.J. 215, 240–41 (1997).

97. *See* Jim Hecker, *EPCRA Citizen Suits After* Steel Co. v. Citizens for a Better Environment, 28 Envtl. L. Rep. (Envtl. L. Inst.) 10306, 10307 (1998).

98. *See* EPRCA § 346, 42 U.S.C. §§ 11021–11023 (1994); Abate & Myers, *supra* note 40, at 374.

99. *See* Hecker, *supra* note 97, at 10307.

100. Contrast the language authorizing citizen suits in the Clean Air Act, *supra* note 2, with the language authorizing EPCRA suits:

> [A]ny person may commence a civil action on his own behalf against the following:
> (A) An owner or operator of a facility for failure to do any of the following:
> (i) Submit a follow-up emergency notice under section 11004(c) of this title.
> (ii) Submit a material safety data sheet or a list under section 11021(a) of this title.
> (iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.
> (iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

EPCRA § 326(a)(1), 42 U.S.C. § 11046(a)(1) (1994).

courts have divided over whether this difference in language should be interpreted as authorizing EPCRA suits for wholly past violations.[101] In *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.*,[102] a district court held that the EPCRA language does grant jurisdiction for suits for past information violations.[103] The court reasoned that the alternative interpretation would strip the congressional deadlines of meaning, since a defendant could avoid litigation by filing late.[104] The Sixth Circuit, however, reached the opposite conclusion in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*[105] by directly following *Gwaltney*'s analysis.[106]

In *Steel Co. v. Citizens for a Better Environment*, the Seventh Circuit permitted a suit for past violations, concluding that EPCRA required a different analysis than that used in *Gwaltney*,[107] and the plaintiffs appealed to the Supreme Court. The Supreme Court, however, declined to address the question of past information violations and decided *Steel Co.* on standing grounds alone.[108] The Court's holding that the plaintiffs lacked a redressable injury, discussed below in detail, effectively closed the door to EPCRA suits for wholly past violations. Thus the issue of how to deal with EPCRA citizen suits for delinquent information violations remains unsettled.

The issue of information violations arises in the context of other statutes as well. In a remarkable decision, *City of Toledo v. Beazer Materials & Services, Inc.*,[109] a district court found that it lacked jurisdiction over a claim under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).[110] The plaintiff, the municipality of Toledo, brought suit against the former owners of a Coca-Cola plant for multiple claims, including the failure to report to the EPA the storage, treatment, and disposal of hazardous substances in violation of CERCLA.[111] The city sought injunctive relief, civil penalties, and litigation costs.[112] The city maintained that since the defendants had not complied with the reporting requirement at any point, their failure to file constituted an on-going violation. The court rejected this analysis and instead accepted the defendants'

101. *See* Scott, *supra* note 96, at 221–24.

102. 772 F. Supp. 745 (W.D.N.Y. 1991).

103. *See id.* at 753.

104. *See id.* at 750–51.

105. 61 F.3d 473 (6th Cir. 1995).

106. *See id.* at 477.

107. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 86 (1998).

108. *Id.* at 109–10.

109. 833 F. Supp. 646 (N.D. Ohio 1993).

110. *Id.* at 661.

111. *Id.* at 658–59 (alleging violations under Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) § 107, 42 U.S.C. § 9607 (1994)).

112. *Id.* at 659.

argument that CERCLA imposes only a one-time notice reporting requirement—thus any violation was wholly past.[113]

By framing the question as whether failure to provide notice constitutes an ongoing violation, both the plaintiff and the court missed the crux of *Gwaltney*. *Gwaltney* was concerned with a citizen plaintiff seeking access to the courts for civil penalties for wholly past violations. The defendants had come into compliance, and injunctive relief was no longer available when the suit had been commenced, leaving open only the option of civil penalties. In *Beazer*, however, the court could have ordered injunctive relief and required the defendant to file the requisite information. Taken to its logical conclusion, the court's analysis would mean that a party could never be sued for failure to violate the CERCLA notice requirement: during the first ninety days the party would still be within the deadline, and on the ninety-first day, the violation would be "wholly past."

Similarly, three years earlier, a Pennsylvania district court in *Lutz v. Chromatex*[114] relied upon *Gwaltney*'s emphasis on the sixty-day notice requirement to deny jurisdiction over a claim that the defendant had failed to file notice as required by CERCLA.[115] The court found that allowing suit for the past failure to file "would render incomprehensible the notice provision of [the citizen suit provision]."[116] The court's logic presents something of a paradox: on the one hand, it considers an information violation as occurring at a single point in the past, yet, on the other hand, it wants to encourage defendant compliance. However, if the defendant's single past failure is nonjusticiable, there is no fear of court sanction and no incentive for compliance. The court's notice argument presumes a sanction if the defendant does not comply within the notice period. Neither defendant in *Lutz* nor *Beazer* responded to the notice of intent to file suit by submitting the requisite information on storage and handling of toxic materials to the EPA. *Lutz* and *Beazer* are striking examples of the analytical tensions under *Gwaltney* and the questions left open by *Steel Co.*

B. Narrowing Cognizable Harm to "Injury-in-Fact"

After *Gwaltney*, the next major Supreme Court decision in the area of environmental citizen suits, *Lujan v. Defenders of Wildlife*,[117] further constrained such suits with a strict interpretation of the constitutional law of standing. At the time *Lujan* was decided, courts considered standing doctrine to consist of three constitutional requirements: injury, causation, and redressability. The doctrine incorporates prudential considerations as well,

113. *Id.* at 661.
114. 718 F. Supp. 413 (M.D. Pa. 1989).
115. *Id.* at 421; *see* CERCLA § 107, 42 U.S.C. § 9607 (1994).
116. *Lutz*, 718 F. Supp. at 421.
117. 504 U.S. 555 (1992).

such as the bar against cases presenting generalized grievances and a requirement that the interests the complainant seeks to protect fall within the zone of interests of the applicable source of law.[118] The Court's decision in *Lujan* eroded standing for environmental citizen suit plaintiffs in several ways: it raised the bar for injury-in-fact, it tightened the definition of "redressable," it treated the bar against generalized grievances as constitutional rather than prudential, and it limited Congress's role in defining what constitutes a legal injury.[119]

1. Lujan v. Defenders of Wildlife *and the Requirements of Standing*

The *Lujan* plaintiffs brought suit under the Endangered Species Act (ESA) to challenge a Department of Interior declaration about the geographic scope of the ESA.[120] The plaintiffs argued that the ESA applied to the activities of U.S. citizens in foreign countries, an interpretation that could require the Department of Interior to consult about the effects on endangered species of U.S. projects abroad.[121] The majority opinion, authored by Justice Scalia, held that the plaintiffs lacked standing and reversed the Eighth Circuit's decision for the plaintiffs.[122] The majority considered the three "irreducible constitutional minimum" standing requirements—injury-in-fact, causation, and redressability—and found that the plaintiffs failed to meet the injury-in-fact prong.[123] A plurality of the Court also found that the plaintiffs failed to meet the redressability prong.[124]

The majority held that the injury-in-fact prong requirement not met because their injury was insufficiently concrete and insufficiently imminent.[125] The Court acknowledged the holding in *Sierra Club v. Morton* that environmental and aesthetic injury is cognizable,[126] but found that the plaintiffs' alleged interest in observing endangered species fell short of an actual or imminent injury.[127] For the Court, the plaintiffs' failure to buy plane tickets demonstrated a lack of concrete intent to return to foreign habitats and reduced their interest to a distant "some day" intention.[128] A

118. 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 13 FEDERAL PRACTICE AND PROCEDURE § 3531.1 (1984).

119. *See* Carlson, *supra* note 5, at 948–50.

120. *See Lujan*, 504 U.S. at 559.

121. *Id.* at 558–59.

122. *Id.* at 578.

123. *Id.* at 560–61.

124. *Id.* at 568. For a critique of the redressability analysis, see Weinberg, *supra* note 35, at 7.

125. *See Lujan*, 504 U.S. at 563–64.

126. *Id.* at 562–63.

127. *Id.* at 564.

128. *Id.* at 564. As noted on the same page of the decision, the plaintiff was not certain of a return date for another visit to the region because of the country's civil war. It is unclear if the Court would have been satisfied by the purchase of a ticket under such circumstances. *Id.*

plurality also found that the plaintiffs failed to meet the redressability requirement since the agencies required to consult about the development project were not parties and because the project was primarily funded by other countries, thus reducing the certainty that a withdrawal of U.S. funding would affect the project.[129]

Using a separation of powers analysis, Justice Scalia concluded that citizens seeking judicial review would have greater difficulty demonstrating standing when the suit challenged government action.[130] In now familiar language, he wrote that when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."[131] One interpretation of this statement is that all citizen suits will face tougher standing hurdles because they implicitly challenge the lack of enforcement by the government. When a citizen brings suit against a private party, however, the injury arises from the private defendant's failure to comply with the government statute. This suggests that the strict analysis of injury and redressability of *Lujan* should be limited specifically to citizen suits against the government. This interpretation is further supported by the Court's careful wording in *Lujan*: "it is clear that in suits against the government, at least, the concrete injury requirement must remain." [132]

Perhaps the most sweeping, and most criticized, part of the decision was the Court's conclusion that Congress could not confer standing or create injury by statute.[133] In ambiguous and contradictory language the Court held that Congress cannot create undifferentiated rights, but concluded that "[n]othing in this decision contradicts the principle that '[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'"[134] Commentators often trace the majority's view to a 1983 law review article written by Justice Scalia in which he theorizes that the judicial branch, as the least democratic branch, should avoid interfering with the executive and legislative branches.[135] The *Lujan* Court concluded that Congress cannot grant

129. *See id.* at 568, 571.

130. *See* Carlson, *supra* note 5, at 950. For a discussion and critique of separation of powers as a guiding principle of Supreme Court standing cases in the 1970s and 1980s, see Cass Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1459–74 (1988).

131. *Lujan*, 504 U.S. at 562 (original emphasis).

132. *Id.* at 578; *see* Karl Coplan, *Refracting the Spectrum of Clean Water Standing in Light of* Lujan v. Defenders of Wildlife, 22 COLUM. J. ENVTL. L. 169, 196 (quoting *Lujan* and discussing meaning of limitation to suits against government).

133. *See* Feld, *supra* note 41, at 155–56.

134. *Lujan*, 504 U.S. at 578 (citation omitted).

135. *See* Scalia, *supra* note 65.

standing for citizen suits and force the judicial branch to interfere with the executive's enforcement power.[136]

2. *Theoretical Tensions from* Lujan

a. *Congressional Power to Define Injury and Confer Standing*

Lujan's holding that Congress cannot confer standing or create injury by statute prompted a critical response. Commentators warned that *Lujan*'s unprecedented holding was dangerous because it could extend to all cases that depended on congressional grants of standing.[137] They pointed out that *Lujan* was the first case in which the Court had rejected a claim on standing grounds despite Congress's explicit conferral of standing.[138] Although the Supreme Court did not adopt this approach, courts could treat cases involving judicial review of legislative decisions differently when such review is authorized by Congress itself.[139] Contrary to the concerns raised when the court hears a challenge to the legislature, in a citizen suit the court is hearing a case following the mandate of the legislature.[140] Hearing the case achieves a more democratic result because the citizen standing is authorized by the elected Congress.

In his influential article, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III,* Professor Cass Sunstein traces the power of Congress to define injury and grant standing by contrasting the historical model of standing with the modern one.[141] Courts historically treated standing as a requirement that a source of law grant the plaintiff the right to bring suit.[142] Since Congress clearly can create a cause of action by delineating what constitutes an invasion of rights, Congress has the power to

136. *See Lujan*, 504 U.S. at 577 ("To 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.'" (quoting U.S. CONST. art. II, § 3)).

137. *See* Feld, *supra* note 41, at 160–61; Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142–43 (1993); Sunstein, *supra* note 7, at 166.

138. *See* Nichol, *supra* note 137, at 1146–47. Prior to *Lujan*, the power of Congress to confer standing to citizens was generally accepted. *See* HENRY HART & HERBERT WECHSLER, HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 170 (Richard H. Fallon, Daniel J. Meltzer & David Shapiro, eds., 4th ed. 1996). The Court recognized this power in competitor standing cases in the 1940s in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942), wherein the Court allowed radio stations to challenge the award of licenses to competitors based on the congressionally authorized citizen suit provision. *See* HART & WECHLSER, *supra*.

139. *See* Sunstein, *supra* note 7, at 221.

140. *Id.*

141. *See* Sunstein, *supra* note 7, at 168–19; *see also* Feld, *supra* note 41, at 158–60.

142. *See* Sunstein, *supra* note 7, at 177–79.

confer standing.[143] In other words, Congress has the power to define injury.[144]

Under modern standing doctrine, the injury requirement involves a separate constitutional inquiry. In *Lujan,* Justice Scalia unequivocally rejected the view that Congress could define a set of public rights for which an invasion would give rise to standing, even when the Court considered the injury insufficiently concrete.[145] For Justice Scalia, the doctrine of standing in conjunction with the constitutional separation of powers doctrine limits a court's ability to adjudicate questions best resolved by the political process through the executive and legislative branches.[146] In the case of citizen suits, the injury-in-fact requirement prevents the legislative branch from delegating executive enforcement duties to the judicial branch.[147]

The sharp divergence in views about the constitutionality of citizen suits stems in part from confusion regarding the standing doctrine itself. Although the Court has consistently reiterated that congressional power to create standing is limited by Article III, it has also upheld Congress's Article I power to define injury by creating legal rights and judicial remedies.[148] *Lujan* did not clarify this confusion,[149] as evidenced by the Court's failure to reach a majority over the question of the legislature's power to create a cause of action. Justice Kennedy, joined by Justice Souter, concurred in the plurality's analysis of congressional power and citizen suits, but wrote separately to clarify his belief that the decision left intact the ability of Congress to create justiciable rights.[150] He expressed sympathy with the courts' need to avoid narrow construction of forms of judicial action, a sentiment that

143. *See id.* at 176–77; *cf.* Richard H. Fallon, Jr., *Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurisprudence of Lyons,* 59 N.Y.U. L. REV. 1, 34 (1984) (citing Supreme Court cases in which congressional decisions that altered justiciability doctrines—like Declaratory Judgment Act and class action rules—were upheld as constitutional).

144. *See* Sunstein, supra note 7, at 178 (concluding that "there is absolutely no affirmative evidence that Article III was intending to limit congressional power to create standing").

145. *See* Nichol, *supra* note 137, at 1142.

146. Feld, *supra* note 41, at 158 (describing Scalia's opinion that judicial branch, as most undemocratic of three branches of government, "must remain entirely out of the dialogue between the two political branches"); Nichol, *supra* note 137, at 1163 (describing Scalia's opinion that Congress has no power to hand enforcement duties exclusively held by executive branch over to judicial branch through creation of citizen suits).

147. *See* Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution,* 49 ADMIN. L. REV. 179 (1997) (describing how stringent protection of executive branch under Article II transfers unprecedented power to President); Feld, *supra* note 41, at 158; Stanley Rice, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in* Lujan v. Defenders of Wildlife, 38 ST. LOUIS L.J. 199, 227 (1993).

148. *See* Nichol, *supra* note 137, at 1147.

149. *See* Coplan, *supra* note 132, at 170.

150. *Lujan,* 504 U.S. at 580 (Kennedy, J., concurring).

lends support to the view that the Court needs to recognize a role for judicial review and citizen suits in an administrative state.[151] Justices Stevens, Blackmun and O'Connor all rejected the Court's standing analysis and the limitation it placed on Congress with respect to citizen suits.[152]

b. Concrete Injury-in-Fact Analysis

In *Lujan,* the Court further constricted the definition of injury-in-fact and introduced the possibility of new barriers for suits based on environmental injuries. By stressing the need for the injury to be concrete, personalized, and imminent, the Court applied a more stringent standard of environmental harm.[153] The decision suggests that a plaintiff needs to demonstrate a "perceptible effect" of the environmental harm on the plaintiff and show more than the aesthetic injury deemed sufficient in *Sierra Club v. Morton.*[154] Nonetheless, even under the strict language of the decision, it can be argued that the plaintiffs in *Lujan* should have met the injury definition: the plaintiffs alleged that they travel the world to observe and study endangered species, and they alleged that they intend to return to the sites in question.[155]

Part of Professor Sunstein's critique is that the Court erred in thinking it could replace the legal injury test with an objective injury-in-fact test.[156] Any injury-in-fact inquiry inescapably requires the court to make a normative judgment about the merits of the case by asking whether the injury should be judicially cognizable.[157] Indeed this point had been made before. Five years before *Lujan* was decided, Professor William Fletcher observed that, "there can be no practical significance to the Court's 'injury-in-fact' test because all people sincerely claiming injury automatically satisfy it."[158]

c. Generalized Grievance

One of the grounds the Court offered in *Lujan* for rejecting a congressional delegation of standing under the citizen suit provision was the generalized nature of the grievance. The Court was unwilling to accept that

151. *Id.*

152. *Lujan*, 504 U.S. at 581; *id.* at 582 (Stevens, J., concurring); *id.* at 589 (Blackmun, J., dissenting).

153. *Lujan*, 504 U.S. at 556; *see* Carlson, *supra* note 5, at 950.

154. *See* Coplan, *supra* note 132, at 192.

155. *See* Rice, *supra* note 147, at 222.

156. *See* Sunstein, *supra* note 7, at 188.

157. *See id.* at 189; Nichol, *supra* note 137, at 1155.

158. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231 (1988).

Congress could provide a cognizable interest in law enforcement to all citizens.[159] The importance of the Court's analysis lies in the distinction between constitutional and prudential standing requirements.[160] The three core requirements—injury, causation, and redressability—were well entrenched as constitutional requirements in modern standing law prior to *Lujan*.[161] Additionally, the Court had imposed prudential standing restraints. For example, in *Allen v. Wright*, a 1984 standing case challenging the lack of enforcement of a policy prohibiting the use of tax revenues by segregated schools, the Court referred to its usual policy of prohibiting suits involving generalized grievances as an example of a prudential standing doctrine.[162] Notably, prior to *Lujan* it was well established that prudential limitations could be overcome by congressional statutes.[163]

Justice Scalia's opinion in *Lujan* criticizing the plaintiffs' claims as generalized grievances—and thus falling short of the Article III injury-in-fact requirement—appeared to shift the prohibition on generalized grievances from a basis in prudential principals to constitutional grounds. This newly created ambiguity over whether the bar on generalized grievances was constitutional or prudential was addressed six years later in *Federal Election Commission v. Akins*.[164] In *Akins*, the Court retreated from the broad language disavowing standing for widespread grievances.[165] The Court's retreat was not without protest; Justice Scalia offered a strong dissent based on his view of separation of powers.[166]

The *Akins* majority distinguished widespread interests from abstract ones and held that a widely shared grievance may be justiciable if sufficiently concrete.[167] The majority differentiated general grievances into those constitutionally barred because of their abstract and indefinite nature, and those prudentially barred when injury is concrete but widely shared.[168] While at first this proposition may appear unremarkable, the facts of *Akins* suggest a stronger shift afoot in Supreme Court standing

159. *Lujan*, 504 U.S. at 577.

160. *See* Bennet v. Spear, 520 U.S. 154, 162 (1997) ("The question of standing 'involves both constitutional limits on federal-court jurisdiction and prudential limitations on its exercise.'" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

161. *See* Allen v. Wright 468 U.S. 737, 751 (1984); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 41–42 (1976).

162. *Allen*, 468 U.S. at 751, 753.

163. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975), *discussed in* Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 770–71 (1994).

164. 524 U.S. 11 (1998); *see also* William Funk, *Supreme Court News*, 24 ADMIN. & REG. L. NEWS 1, 15 (1998) (describing *Akins* as clarifying "generalized grievance" prong of standing doctrine by separating "generalized grievance" into two subsets, one constitutionally based and one prudentially based).

165. *Akins*, 524 U.S. at 24.

166. *Id.* at 29–37 (Scalia, J., dissenting).

167. *Id.* at 24–25.

168. *Id.*; *see also* Funk, *supra* note 164, at 15.

jurisprudence in the area of citizen suits. The plaintiffs, a group of voters, brought suit under the Federal Election Campaign Act citizen suit provision[169] to challenge a Federal Election Commission (FEC) determination that the American Israel Public Affairs Committee (AIPAC) fell outside of the Act's definition of a political committee.[170] If determined to be a political committee, AIPAC would have been required to report financial information, including the names of contributors and donors.[171] The plaintiffs alleged that they were harmed by the lack of donor and campaign information because the information would assist them as voters.

In finding that the plaintiffs had standing, the Court necessarily recognized that the harm alleged by the voters could have been alleged by any voter. In keeping with its other recent decisions, the Court acknowledged that the political system may provide a channel for such broad and potentially widely-held injuries, but then went on to decide that this availability does not defeat a claim for jurisdiction. The decision suggests that the Court is shifting towards Justice Kennedy's concurring opinion in *Lujan* and towards giving more deference to congressionally defined injury.[172]

3. *Current Developments*

Despite its sweeping language, *Lujan* has not dramatically changed the adjudication of the injury-in-fact requirements.[173] The majority of courts have responded to the Court's explanation of injury-in-fact by emphasizing the personal stake requirement. This approach requires the plaintiff to plead a personal connection. The most common method pleaded, and accepted by the courts, is what Professor Karl Coplan calls the "resource-based" approach.[174] The plaintiff achieves standing by demonstrating a personal use, often recreational, of the natural resource affected by the defendant's activity.[175] For example, under the Endangered Species Act, courts have found standing where plaintiffs alleged interest in observing local species[176] or having "direct contact" with the threatened environmental species.[177] Under the Clean Water and Clean Air Acts, courts have

169. *Akins*, 524 U.S. at 19; *see* Federal Election Campaign Act § 504, 2 U.S.C. § 437(g)(a)(1) (1994) ("[a]ny person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission"); *id.* § 437(g)(a)(8)(A) ("[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition").

170. *Akins* at 13–14.

171. *Id.* at 14–15.

172. *The Supreme Court, 1997 Term—Leading Cases,* 112 HARV. L. REV. 122, 259 n.67 (1998).

173. Coplan, *supra* note 132, at 210 (describing similar range of case law before and after *Lujan*).

174. *Id.* at 207.

175. *Id.* at 208.

176. *See, e.g.,* Wyo. Farm Bureau Fed'n v. Babbit, 987 F. Supp. 1349, 1360 (D. Wyo. 1997), *rev'd on other grounds,* 199 F.3d 1224 (10th Cir. 2000).

177. *See, e.g.,* Idaho Farm Bureau Fed'n v. Babbit, 58 F.3d 1392, 1398 (9th Cir. 1995).

accepted complaints based on the use of bodies of water for fishing or environmental enjoyment,[178] recreational interest in mountains,[179] scenery and wildlife,[180] and proximity to a recreational area.[181] In one case, complaints of bad odors and annoyance were sufficient to demonstrate injury-in-fact.[182] Some courts have applied this approach more stringently by requiring a demonstration of use of the area in order to claim an injury-in-fact.[183]

Collectively the cases reflect continued acceptance of the pre-*Lujan* doctrines that the injury can be small—an "identifiable trifle"—and that environmental and aesthetic harms qualify as injury.[184] The cases also indicate that environmental groups have conformed their pleadings to *Lujan* by refocusing statements of harm to include the impacts on humans.[185] In a recent article, Ann Carlson suggests that environmental groups would benefit from personalizing the harm to the environmental resource by focusing trial testimony on the affected resource rather focusing only on the defendant's behavior.[186] By drawing attention to the impact of degraded environmental resources on people's lives, environmental groups can gain important persuasive authority.

There are signs that environmental groups are building compelling records of the widespread effects of alleged environmental harm. *Sierra Club v. Babbit*,[187] a case brought under the Endangered Species Act, is illustrative. The plaintiffs challenged the Department of the Interior, alleging that permits issued by the government for housing construction would destroy the habitat of the Alabama beach mouse.[188] In addition to general claims of enjoyment of observing biological species including the mouse,

178. *See, e.g.*, Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 556 (5th Cir. 1996); Citizens for a Better Env't v. Caterpillar, Inc., 30 F. Supp. 2d 1053, 1070 (C.D. Ill. 1998); Natural Res. Def. Council, Inc. v. NVF Co., 1998 WL 372299 at *2, *9 (D. Del. 1998); Citizens for a Better Env't v. Union Oil of Cal., 996 F. Supp. 934, 937–38. (N.D. Cal. 1997); Sierra Club v. U.S. Army Corps of Eng'rs, 935 F. Supp. 1556, 1569 (S.D. Ala. 1996); Hudson Riverkeeper Fund, Inc. v. Yorktown Heights Sewer Dist., 949 F. Supp. 210, 212 (S.D.N.Y. 1996).

179. *See, e.g.*, Dubois v. United States Dep't of Agric. 102 F.3d 1273, 1282–83 (1st Cir. 1996).

180. *See, e.g.*, Sierra Club v. Tri-State Generation and Transmission Ass'n, 173 F.R.D. 275, 280 (D. Colo. 1997).

181. *See, e.g.*, Or. Natural Desert Ass'n v. Thomas, 940 F. Supp. 1534, 1538 (D. Or. 1996); Heart of Am. Northwest v. Westinghouse Hanford Co., 820 F. Supp. 1265, 1270–71 (E.D. Wash. 1993).

182. Concerned Area Residents for the Env't v. Southview Farm, 834 F. Supp. 1410, 1414 (W.D.N.Y. 1993).

183. *See, e.g.*, Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 435 (D.C. Cir. 1998) ("[P]laintiffs must establish that they have actually used or plan to use the allegedly degraded environmental area in question.").

184. Sierra Club v. Babbit, 15 F. Supp. 2d 1274, 1276 (S.D. Ala. 1998) (quoting United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973)).

185. *See* Carlson, *supra* note 5, at 959.

186. *Id.* at 995.

187. 15 F. Supp. 2d 1274.

188. *Id.* at 1275.

three members of the Sierra Club submitted individual affidavits outlining their interest in the mouse's protection.[189] The plaintiffs were able to describe specific consequences of the mouse's endangerment: the mouse scatters sea oat seeds necessary for dune protection and is therefore important for preventing erosion of the beach and property.[190] The plaintiffs' affidavits explained the mouse's role in coastal protection and then detailed their individual interests in hiking along the beach and in property values.[191] Based on this detailed pleading, the court held that the plaintiffs had standing to pursue the suit.[192]

A handful of lower court decisions applying stringent interpretations of injury-in-fact stand out against the broad trend of accepting pleadings of a personal stake in environmental resources. These decisions are notable both for their departure from the majority approach and their potential consequences. Because *Lujan* itself presented an unusual and detailed fact pattern, its relevance for future cases has been limited primarily to the Court's general language about standing.

One misdirected effort by a district court to utilize the fact-specific analysis of *Lujan* came in *Pape v. Lake States Wood Preserving*.[193] The pro se plaintiff brought suit for an alleged Resource Conservation and Recovery Act violation that involved dumping of hazardous waste near a recreational area that resulted in wildlife death.[194] The court quoted extensively from a list in the plaintiff's affidavit of activities impaired by the dumped waste and subsequent death of wildlife, including photography, canoeing, hunting, and fishing.[195] The court noted that the plaintiff claimed he "ha[d] been using the area on a regular basis since 1962 to present," but could no longer recreate in the area due to its contamination.[196] Finally, the plaintiff noted that he lived approximately 150 miles south of the affected lake region.[197] The court dismissed the suit for lack of jurisdiction on the grounds that the plaintiff had "not shown on the face of his pleadings that he intends to visit and use the area for the alleged purposes"[198] and quoted *Lujan* for the proposition that the plaintiff must show concrete future plans.[199]

Unfortunately this reliance on *Lujan* is misplaced. In *Lujan,* the plaintiffs alleged that current government action would lead to the destruction

189. *Id.* at 1277.
190. *Id.*
191. *Id.*
192. *Id.* The court also found for the plaintiffs on the merits of the claim and ordered the Fish and Wildlife Service to reconsider the development permits. *Id.* at 1282.
193. 948 F. Supp. 697 (W.D. Mich. 1995).
194. *Id.* at 699.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 700.
199. *Id.*

of habitat for endangered species in the future, and that the harm stemmed from their future inability to visit and observe the species. In *Pape,* the injury had already occurred. The resource destruction was underway, and the plaintiff's injury was so acute that he no longer visited the recreational area. The court suggested that the injury was not sufficiently "imminent" and overlooked the fact that the injury had already occurred and was ongoing.[200] The court's analysis reveals the pitfalls of applying fact-specific analysis from *Lujan.*

Even more damaging, some cases require that the plaintiffs prove that the activity prohibited or restricted by Congress is harmful. In 1996, the court in *Ogden Projects, Inc. v. New Morgan Landfill Co.*[201] dismissed the citizen plaintiffs on the ground that they had failed to introduce sufficient proof of injury from the alleged increased air emissions.[202] The plaintiffs had brought suit against the landfill for failure to obtain a required Clean Air Act permit. The effect of bypassing the permit was that the landfill avoided obtaining an offsetting emission reduction.[203] Despite expert witness testimony that increased air emissions would reduce overall air quality and could affect the plaintiffs' health and the health of the nearby national wildlife refuge, the court concluded that the plaintiffs did not adequately demonstrate the level of ozone production by the defendant's plant or demonstrate that this increased level of ozone would be harmful to the plaintiffs' health or well-being.[204]

In *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.,*[205] the plaintiffs alleged that the defendant polluted a stream that fed into two rivers. Plaintiffs described in detail their personal uses of the rivers in order to demonstrate standing.[206] The defendant stipulated to over 100 permit violations. The lower court found additional violations, raising the number of permit violations to 150, including violations for discharges of total dissolved solids, sodium, temperature, oil, and Total Organic Carbon (TOC).[207] The lower court awarded a permanent injunction against future permit violations, a civil penalty of $2,625,000, and attorneys' fees.[208] On appeal, the Third Circuit relied upon the lower court's factual findings at the penalty phase that the violations did not have serious effects on the stream, and dismissed the judgment and injunction on the grounds that the plaintiffs had failed to prove actual injury to the stream by the

200. *Id.*

201. 911 F. Supp. 863 (E.D. Pa. 1996).

202. *Id.* at 870.

203. *Id.* at 869.

204. *Id.* at 869–70.

205. 34 Env't Rep. Cas. (BNA) 2077, 1992 WL 16314 (D.N.J. 1992), *rev'd and vacated by* 123 F.3d 111 (3d Cir. 1997).

206. *Id.* at 2080.

207. *Id.* at 2079, 2085.

208. *Pub. Interest Research Group,* 123 F.3d at 115–16.

pollution.[209] At the penalty phase, the defendant had introduced technical data concluding that the excessive salt and TOC discharges actually aided the waterway and that the temperature and oil violations were minor. Reviewing the plaintiff's injury, the Court of Appeals summarized, "[h]ere, we have no doubt that PIRG's members use the Delaware River. On the other hand, we are less confident that [the defendant's] discharges have or will cause any injury to that waterway."[210] The appellate decision indicated that, although the permit had been flagrantly violated on numerous occasions, the harm was minor, and thus the case should be dismissed for lack of standing.[211]

One year later, the court in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*[212] relied upon *Magnesium* to dismiss the plaintiffs' case on standing grounds.[213] Similar to *Magnesium*, the *Gaston Copper* plaintiffs alleged Clean Water Act permit violations.[214] The court found that the plaintiffs fell short of demonstrating injury-in-fact, in part because "no evidence was presented concerning the chemical content of the waterways affected by the defendant's facility."[215]

Ogden, *Magnesium*, and *Gaston Copper* illustrate the danger of a strict injury-in-fact inquiry completely disjoined from the congressional definition.[216] The plaintiffs in *Lujan* failed to meet the injury-in-fact requirement because they could not show personalized harm from the potential destruction of an endangered species habitat. The Supreme Court did not suggest that the destruction of a species protected by the Endangered Species Act is an uncognizable harm, but merely that the plaintiffs in the case were not sufficiently connected to the harm. However, the *Ogden, Magnesium*, and *Gaston Copper* courts questioned whether decreased air and water quality was a harm sufficiently substantial to warrant protection, despite the fact that the legislature itself found injury sufficient to warrant legislative restrictions. In all three cases, the plaintiffs alleged pollution violations and

209. *Id.* at 119–25.

210. *Id.* at 120.

211. *See* Michael I. Krauthamer, Public Interest Research Group v. Magnesium Elektron, Inc.: *Undetectable Injury, A Loophole in Citizen Suit Standing*, 50 ADMIN. L. REV. 837, 856–57 (1998) (criticizing the court's analysis for failure to recognize cumulative effects of pollution).

212. 9 F. Supp. 2d 589 (D.S.C. 1998).

213. *Id.* at 600.

214. *Id.* at 590.

215. *Id. at* 600.

216. *See* Coplan, *supra* note 132, at 215–16 (criticizing the *Ogden* decision). The legislative history of the Clean Air Act reveals the clear intent of the Senate that the courts would merely inquire whether the defendant violated a standard: "An alleged violation of an emission control standard, emission requirement, or a provision in an implementation plan, would not require reanalysis of technological or other considerations at the enforcement stage. These matters would have been settled in the administrative procedure leading to an implementation plan or emission control provision." SENATE COMM. ON PUB. WORKS, REPORT ON THE NATIONAL AIR QUALITY STANDARDS ACT OF 1970, S. REP. NO. 1196, at 36 (1970).

explained their relationship to the resource polluted. In each case, the court found that the harm fell short of a true injury, and thus it inappropriately substituted its own subjective opinion of what level of pollution is harmful, despite the fact that Congress had passed legislation to regulate this harm.

In addition to intruding on Congress's power to define causes of action, the courts' analyses are flawed from a policy perspective. Courts are not in a better position than Congress to decide appropriate levels of environmental protection. A court decides complicated ecological issues based on the limited testimony available from plaintiffs' and defendants' witnesses whereas Congress has considerably greater scientific and investigatory resources.

By considering injury-in-fact challenges where Congress has created legal injury, the courts are ultimately taking the position that defendants can challenge federal statutes.[217] Even if the defendant violates federal law and the plaintiff shows a direct personal effect of that violation, the defendant may escape liability under the guise of standing by persuading a court that the activity prohibited by Congress is not harmful after all. Some courts have recognized that a strict injury-in-fact analysis in environmental citizen suits poses the risk of seriously undermining environmental laws.[218] In *Magnesium*, for example, the defendant lost on every liability issue, but avoided fines and an injunction under the stricter standing requirements. One district court summarized the consequence:

> Defendant asks the court to find that the company's effluents do not cause actual harm even though the court may later determine that such effluents violate defendant's permit, and so, the Clean Water Act. Consequently, defendant would have the court apply a stricter test for standing than for liability itself.[219]

Another effect of courts' willingness to consider challenges to what constitutes an injury is an increase in litigation costs. Instead of relying upon the conclusions of Congress and the EPA regarding the level of pollutants, the plaintiffs must find and pay for scientific data. Since the plaintiffs are unlikely to recover costs if they do not actually reach the liability phase,

---

217. *See* Boyer & Meidinger, *supra* note 1, at 939:
Since standing focuses on harm to the plaintiff's interest, it provides a useful doctrinal vehicle for suggesting to the court that the discharges in question actually caused little or no harm to the recreational uses of the resource, even though the pollution may have technically violated the permit. Standing may thus open the door for defendants to raise the question of whether it is legitimate for the courts in particular or the government in general to be interfering with the dischargers' activities at all.
Id.

218. *See, e.g.*, Natural Res. Def. Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801 (N.D. Ill. 1988).

219. Student Pub. Interest Research Group, Inc. v. Ga.-Pac. Corp., 615 F. Supp. 1419, 1424 (D.N.J. 1985).

bringing environmental citizen suits carries a considerable financial gamble even in cases involving a clear violation.

The Supreme Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, rejects the analysis in *Magnesium* and *Gaston Copper*. Although the bulk of the decision in *Laidlaw* revolved around other Article III issues, the Court first considered whether the plaintiffs had sufficiently alleged injury-in-fact.[220] The defendant-respondent argued that since the plaintiffs had not demonstrated actual environmental damage to the river, the plaintiffs could not have been injured by the chemical discharges.[221] The Court observed that such an interpretation of injury would erect a more stringent standard for establishing standing than for prevailing on the merits and reiterated the more generous standing language from *Morton* that aesthetic and recreational injuries are sufficient.[222]

The impact of *Laidlaw* on lower courts promises to be significant. Shortly after the *Laidlaw* decision, the Fourth Circuit en banc reversed the panel and lower court decisions in *Gaston Copper* in light of *Laidlaw*.[223] Although the en banc decision relies on arguments that were presumably available prior to *Laidlaw*—including the observation that requiring an evidentiary showing of injury to the body of water raises the requirement for standing far above the level necessary to win on the merits[224]—the concurring judges' opinion makes clear that, for at least some members of the Fourth Circuit, the change was predicated on the Supreme Court's dictation.[225] The concurring opinions of Justices Luttig, Niemeyer, and Hamilton suggest that *Laidlaw* itself was a "sea change"[226] that rendered "standing inquiry 'a sham.'"[227] For the lower courts that have moved in the direction of applying more stringent requirements of injury-in-fact than countenanced by *Lujan*, *Laidlaw* may represent such a sea change. For the majority of courts, however, it seems that *Laidlaw* merely confirms their approach.

Lujan critics' fears that citizen suits would be dismissed for inadequate showing of injury-in-fact have for the most part gone unrealized. The majority of cases continue to assess injury-in-fact in a similar way to cases before *Lujan*. Plaintiff organizations have adapted their pleadings to demonstrate with specificity the personal effects of the injury to the natural

220. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–82 (2000).

221. *Id.* at 180.

222. *Id.*

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

224. *Id.* at 160–61.

225. *Id.* at 164–65 (concurring opinions of Niemeyer, Luttig, and Hamilton, JJ.).

226. *Id.* at 164 (Niemeyer, J., concurring).

227. *Id.* at 165 (Hamilton, J., concurring) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 203 (2000) (Scalia, J., dissenting)).

resource on members' lives. The Supreme Court in *Laidlaw* significantly undermined the analyses contained in the small strand of cases adopting a stricter definition of injury-in-fact.

C. *Resurrection of the Redressability Prong*

In *Steel Co. v. Citizens for a Better Environment*, Justice Scalia devastated environmental citizen suits brought under the Emergency Prevention Community Resource Act and wrote a new chapter in standing doctrine. Writing for the majority, Scalia held that the plaintiffs failed to meet the redressability requirement imposed by Article III standing.[228] In order to appreciate *Steel Co.*'s sharp departure from earlier redressability and standing decisions, this section first briefly reviews the origins and development of the redressability prong. The section also provides an overview of the EPCRA statute and factual background to *Steel Co.* and considers the *Steel Co.* decision itself and its implications for citizen suits and standing. This section concludes with an examination of the degree to which *Friends of the Earth v. Laidlaw*, briefed primarily as a mootness case, undermined the redressability analysis of *Steel Co.*

1. *Early Case Law*

Before *Steel Co.* the Supreme Court's jurisprudence in the area of redressability focused on what I describe as the "too speculative" test. Beginning in the 1970s, the Court considered claims to be deficient under the redressability prong of standing if the Court deemed the possibility of relief too tentative. In *Linda R. S. v. Richard D.*, the appellant challenged a law that criminalized failure to pay child support because the Texas state courts did not interpret the law as applicable to unwed fathers.[229] The Supreme Court found that the appellant lacked standing because there was no nexus between the statute challenged and the alleged injury, the failure to receive child support payment.[230] The statute imprisoned violators but did not provide a mechanism for payment of child support. The Supreme Court concluded that "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative."[231] Although the decision turned primarily on a failure to meet the causation prong, the language about speculative future relief was an early version of the redressability prong.[232]

228. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 108–10 (1998).
229. Linda R. S. v. Richard D., 410 U.S. 614, 615–16 (1972).
230. *Id.* at 618.
231. *Id.*
232. *See generally* Eric J. Kuhn, *Standing: Stood Up at the Courthouse Door*, 63 GEO. WASH. L. REV. 886, 893 n.63 (1995) (noting historical grouping of causation and redressability prongs).

The Supreme Court first explicitly addressed the issue of redressability in *Simon v. Eastern Kentucky Welfare Rights Organization.*[233] The plaintiffs sought to enjoin a new IRS rule that expanded tax relief to hospitals providing care for indigent patients in emergency settings. The tax relief policy had previously applied only to hospitals that provided care to indigent patients universally, not just in emergencies.[234] The Court found that the relief sought—reserving favorable tax status for hospitals that always serve indigents—would not necessarily redress the plaintiffs' exclusion from hospitals.[235] The Court reasoned that hospitals may deny services to the indigent regardless of tax treatment.[236] Throughout the *Simon* opinion, the Court reiterated the speculative nature of the remedy as the Article III redressability problem.[237]

Subsequent standing cases reinforced the speculative approach to redressability. For example, in *Duke Power v. Carolina Environmental Study Group, Inc.,* the Court summarized its case law as "requir[ing] no more than a showing that there is a 'substantial likelihood' that the relief requested will redress the injury claimed."[238] In addition, the Court in *Allen v. Wright* framed the question of redressability as whether "the prospect of obtaining relief from the injury as a result of a favorable ruling [is] too speculative."[239]

In 1992, the Scalia plurality opinion in *Lujan* evinced renewed interest in the redressability prong. The plaintiffs in *Lujan* sought to require the Secretary of the Interior to consult with government agencies to ensure that federally-funded international projects do not jeopardize endangered species.[240] Four members of the Court concluded that the plaintiffs lacked standing because the remedy, a new regulation requiring consultation, could not ensure that the other agencies would participate since they were

233. 426 U.S. 26 (1976); *see* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.1 (2d ed. 1984) (describing *Simon* as case that "brought the concept of remedial benefit to the fore in a way that cannot be denied"); Karin P. Sheldon, Steel Company v. Citizens for a Better Environment: *Citizens Can't Get No Psychic Satisfaction,* 12 TUL. ENVTL. L.J. 1, 36 (1998) (similarly describing *Simon* as case that first presented redressability); *cf.* Warth v. Seldin, 422 U.S. 490, 499 (1975) (describing Article III power as "exist[ing] only to redress or otherwise to protect against injury to the complaining party").

234. *Simon,* 426 U.S. at 26.

235. *Id.* at 42.

236. *Id.* at 43.

237. *Id.* at 42–45. The Court used the word "speculation" or "speculative" six times in the course of a few pages.

238. 438 U.S. 59, 75 n.20 (1978).

239. 468 U.S. 737, 752 (1984); *see also* Richard J. Pierce, Jr., *Is Standing Law or Politics?,* 77 N.C. L. REV. 1741, 1757, n.102 (1999) (concluding that no case prior to *Steel Co.* had held statute unconstitutional because of lack of redressability and concluding that prior cases from 1970s were decided on failure of injury or causation prongs in addition to redressability).

240. *Lujan,* 504 U.S. at 558–59.

not parties to the suits.[241] The plurality was further troubled by the "conjectural" assumption that even if the Endangered Species Act applied to U.S. funding abroad, the international projects would adhere to the ESA requirements since U.S. dollars were only a fraction of the total budgets.[242]

The application of redressability was slippery. It announced the test for redressability as whether a favorable decision would "likely" redress the harm.[243] This articulation was a subtle rephrasing. The Court shifted from the "substantial likelihood" test to the slightly higher burden of showing that redress was "likely."[244] Whether one agrees with the plurality's conclusion that the consultation was "not likely"[245] to result from a regulation requiring such consultation,[246] the Court indicated its willingness to scrutinize the redressability prong closely. Thus the *Lujan* analysis provided a harbinger for future strict redressability requirements in environmental citizen suits while remaining consistent with the case law from the 1970s that focused on the "too speculative" formulation.

2. *EPCRA and Revisiting Information Violations*

The statutory scheme of the Emergency Planning and Community Right-To-Know Act varies in significant ways from other major environmental statutes. EPCRA was adopted in 1986 in the wake of the high-profile chemical explosion in Bhopal, India, to develop emergency response plans and provide the public with access to information about chemical uses and releases.[247] Broadly, EPCRA requires users of hazardous materials to report use and storage information and users of toxic materials to report release data.[248] By providing states and communities with specific and accurate reporting of local hazardous materials, EPCRA

241. *Id.* at 568.

242. *Id.* at 571.

243. *Id.* at 561.

244. *See, e.g., Duke*, 438 U.S. at 74–77 (using "substantial likelihood" test).

245. *Lujan*, 504 U.S. at 569.

246. *See, e.g.,* Sunstein, *supra* note 7, at 207–08 (arguing that procedural violation in *Lujan* would have been redressed by court decree).

247. *See* Kevin J. Finto, *The Information Explosion: Regulation by Information Through EPCRA*, 4 NAT. RESOURCES & ENV'T 13, 13 (1990); Krista Green, *An Analysis of the Supreme Court's Resolution of the Emergency Planning and Community Right-To-Know Act Citizen Suit Debate*, 26 B.C. ENVTL. AFF. L. REV. 387, 388–89 (1998–1999); Denise Marie Lohmann, *The Uncertain Future of Citizen Suits Under EPCRA: Can Citizens Sue for Past Violations of the Statute's Reporting Requirements?*, 30 LOY. L.A. L. REV. 1667, 1705 (1997); Rebecca S. Weeks, *The Bumpy Road to Community Preparedness: The Emergency Planning and Community Right-To-Know Act*, 4 ENVTL. LAW. 827, 834–35 (1998); Sidney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-To-Know Act*, 11 J. LAND USE & ENVTL. L. 217, 219 (1996).

248. EPCRA § 326, 42 U.S.C. § 11046 (1994).

formulates emergency community plans.[249] EPCRA also instructs states to develop emergency planning commissions and local planning committees.[250]

The most contentious feature of EPCRA is its toxic release provision.[251] Facilities are required to submit annual toxic release data along with information about their facility including address and treatment processes.[252] The disclosure of the toxic release information has made a significant impact on both public awareness and industry response to the use of chemicals. EPCRA is a piece of "new wave" environmental regulation: Rather than applying command and control, EPCRA relies on the market to appropriately respond to the pressure of informed consumers.[253] Toxic release data serves as an accountability mechanism, providing foundation for local campaigns to phase out chemicals.[254] Environmental and community organizations have used the information effectively to pressure companies to reduce or eliminate chemical releases or to mitigate the effects of those releases.[255] As well, some corporations independently initiated chemical reduction plans as a strategy to avoid negative publicity from the toxic reporting data.[256]

3. Steel Co. v. Citizens for a Better Environment

The plaintiff-respondent Citizens for a Better Environment (CBE), a regional environmental nonprofit group working towards the reduction of local environmental health threats,[257] brought suit against defendant-petitioner Chicago Steel Co. (Steel Co.) for its failure to file EPCRA usage reports for hydrochloric acid, a chemical it used in removing rust from

249. *See* Julie Shambarger Mitchell, *Environmental Law—A Citizen Suit Under EPCRA Is No Longer a Threat*—Steel Company v. Citizens for a Better Environment, 523 U.S. 83 (1998), 21 U. ARK. LITTLE ROCK L. REV. 343, 347–48 (1999).

250. EPCRA § 326, 42 U.S.C. § 11046 (1994).

251. *See* Finto, *supra* note 247, at 15, 46.

252. *Id.* at 46–47.

253. *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 106 ("Indeed, there is reason to believe that the public release of information about discharge of toxic chemicals has by itself spurred competition to reduce releases, quite independently of any government regulation."); Sheldon, *supra* note 233, at 5 (quoting President Clinton's description of EPCRA as "an innovative approach to protecting public health and the environment by ensuring that communities are informed about the toxic chemicals being released in to the air, land and water by manufacturing facilities").

254. *See* Pildes & Sunstein, *supra* note 253, at 106–07.

255. For a thorough discussion of community campaigns and their effects, see Wolf, *supra* note 247, at 284–312; *see also* Finto, *supra* note 247, at 48.

256. *See* Wolf, *supra* note 247, at 307–10.

257. *See* Respondent's Brief, 1997 WL 348462, at *5, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (No. 96-643); *see also* Citizens for a Better Environment Web Site, *at* http://www.cbemw.org (last visited Feb. 20, 2001) (stating that CBE is "[p]rotecting human health and the environment through research, advocacy, public education and citizen empowerment").

steel.[258] Alerted by a resident that Steel Co. was piping acidic material through its smokestacks by night, CBE investigated the defendant's compliance with the EPCRA reporting requirements.[259] CBE determined that the defendant had not filed the required data for seven consecutive years, so CBE notified the defendant and the EPA of its intent to sue under the EPCRA citizen suit provision.[260] Steel Co. responded to the notice by filing all of its past due information before the expiration of the sixty-day notice period. After sixty days, CBE filed suit against Steel Co. for past EPCRA violations.[261]

Steel Co. moved to dismiss for lack of jurisdiction, arguing that under *Gwaltney* the plaintiff was required to allege an ongoing violation.[262] Since Steel Co. filed all of its overdue information before CBE commenced the action, Steel Co. argued that CBE was filing suit for past violations only. Steel Co. relied on a Sixth Circuit opinion that held EPCRA to the same continuing violation standard as the other environmental statutes.[263] CBE argued that the difference in the EPCRA statutory language and statutory purpose should compel a different analysis.[264] The district court agreed with the defendant that the case was governed by *Gwaltney*, but the Seventh Circuit reversed and held that EPCRA does permit suit for wholly past violations.[265]

The Supreme Court sidestepped the issue of whether EPCRA authorized suits for past violations and decided the case on standing grounds alone. The Court devoted the bulk of the decision to a discussion of whether the Court should first analyze standing or the authorization of suit under EPCRA.[266] The Scalia opinion recharacterized the earlier holding in *Gwaltney* as a decision evaluating whether a cause of action existed rather than whether the Court had jurisdction, and therefore concluded that past EPCRA violations raised a question of the breadth of the cause of action.[267] The Court decided, without briefing on the issue, that when presented with one complicated jurisdictional question and one clear-cut

258. CBE had a history of utilizing EPCRA toxic release data in community campaigns. For example, the Minnesota office initiated a "good neighbor project" that involved a community education outreach project with profiles of the top state-wide polluters and basic steps to initiate a conversation with local facilities about toxic reduction. *See* Wolf, *supra* note 247, at 290 n.406.

259. *See* Respondent's Brief, *supra* note 257, at *5.

260. *Steel Co.*, 523 U.S. at 87–88.

261. *Id.*

262. *Id.*

263. *See* Petitioner's Brief, *supra* note 64, at *27–28, *36 (relying on Atl. States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc., 61 F.3d 473 (6th Cir. 1995)).

264. *See* Respondent's Brief, *supra* note 257, at *10–19.

265. *Steel Co.*, 523 U.S. at 88–104.

266. For a full discussion of the tension between *Gwaltney* and *Steel Co.* about whether the issue of past harms is appropriately considered subject matter jurisdiction or standing, see Ann Powers, Gwaltney of Smithfield *Revisited*, 23 WM. & MARY ENVT'L L. & POL'Y REV. 557, 584–90 (1999).

267. *Steel Co.*, 523 U.S. at 88–89.

nonjurisdictional question, the court must always first address the jurisdictional question.[268]

The Court declined to answer whether the informational injury alleged was sufficient to establish an injury-in-fact. Instead, the Court assumed injury for the purpose of the redressability analysis.[269] The Court then held that the plaintiff's requested relief—including a declaratory judgment, a request to inspect the defendant's records and facility, copies of the compliance reports filed by the defendant, civil penalties for the past violations as authorized by the statute, and costs for investigation, attorneys' fees, and expert witness fees—could not redress the alleged injury.[270] The Court concluded that none of these items "would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent."[271] The Court's constitutional analysis of standing and redressability was a mere eight paragraphs long,[272] or what Justice Scalia might refer to as a "drive-by" analysis.[273]

4. Problems with the Court's Analysis

The Court's redressability analysis suggested significant problems ahead for the doctrine of standing in general and for citizen suits in particular. Because the decision did not reach the merits of whether EPCRA authorized suits for wholly past violations, the Court did not resolve any of the lingering tensions from *Gwaltney* about what constitutes an ongoing violation or the appropriateness of that requirement in access to information statutes. By concluding that past violations cannot be remedied by civil penalties, declaratory judgments, or the award of litigation costs, the Court ensured that questions about ongoing violations will likely go unanswered, unless and until Congress rewrites the statute to provide for an individual cash bounty. The doctrinal import of the case is that it elevated the prohibition on suits for wholly past violations from a statutory one to a constitutionally-grounded one.

At the same time that the decision failed to provide direction on the merits of what constitutes an ongoing violation, it compounded many of the theoretical tensions raised by *Lujan*. Despite the Court's casual approach

268. *Id.* at 93–95. This holding significantly impacted lower courts and generated a body of scholarly debate on its own. For a general discussion of the hypothetical jurisdiction holding, see Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235 (1999).

269. *Steel Co.*, 523 U.S. at 103 ("We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA—or at least being deprived of it when one has a particular plan for its use—is a concrete injury in fact that satisfies Article III. And we need not reach that question in the present case because, assuming injury in fact, the complaint fails the third test of standing, redressability.").

270. *Id.*

271. *Id.* at 105.

272. *Id.* at 105–06.

273. *Steel Co.*, 523 U.S. at 89.

to whether CBE alleged a sufficient injury-in-fact, defining injury is inextricably linked to the question of redressability. Scholars have long noted that whether the court finds redressability turns on the court's articulation of the injury.[274] Under Professor Gene Nichol's approach, injury can be divided into two distinct questions: (1) is the interest asserted actually injured, and (2) will the court recognize this injury.[275] The Court in *Steel Co.* assumed the injury existed, but failed to explore the second question of whether the Court would recognize the injury. The Court also did not clearly provide a definition of which injury it assumed. There is good reason to suspect that the Court neglected to define the injury because the justices could not agree whether to recognize the injury.[276] Justice Scalia, the opinion's author, demonstrated in his dissent in *FEC v. Akins* that he does not consider an information injury sufficient for constitutional standing purposes.[277] On the issue of redressability the *Steel Co.* majority included Justices Breyer, Kennedy, and Chief Justice Rehnquist. Breyer, joined by Kennedy and Rehnquist, wrote the majority opinion in *Akins*, holding that an information injury can be a constitutionally sufficient injury under Article III.[278] Given the sharp dissent on this point in *Akins*, it is possible that the Court stayed away from the question of injury in *Steel Co.* in favor of the less divisive issue of redressability. Regardless of the Court's rationale for declining to address the question of injury-in-fact, the opinion failed to define the injury it was assuming.

As a theoretical matter, the Court's willingness to answer redressability without clearly defining injury is troubling. If redressability is no longer tethered to the likelihood of addressing the plaintiff's specific harm alleged, redressability becomes another completely subjective inquiry by the court.[279] Under the guise of determining injury-in-fact, the court has the opportunity to ask if it values the injury asserted. Similarly, under the guise of determining redressability, the court has the opportunity to ask if it

274. *See* Gene R. Nichol, *Rethinking Standing*, 72 CAL. L. REV. 68, 79–82 (1984) (arguing that Court misleadingly opined that favorable court decision would not ensure child support for plaintiff—plaintiff came to court seeking equal treatment with wed mothers, an outcome which would have been achieved by favorable ruling); *see also* Fletcher, *supra* note 158.

275. *See* Gene R. Nichol, *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1929–30 (1986).

276. Although the Supreme Court avoided the question of injury-in-fact, the lower courts routinely concluded that EPCRA citizen groups had suffered injury from their deprivation of information. *See* Aaron Roblan & Samuel H. Sage, Steel Company v. Citizens for a Better Environment: *The Evisceration of Citizen Suits Under the Veil of Article III*, 12 TUL. ENVTL. L.J. 59, 67 (1998); *see also* Sheldon, *supra* note 233, at 23.

277. FEC v. Akins, 524 U.S. 11, 32–36 (1998) (Scalia J., dissenting).

278. *Akins*, 524 U.S. at 11; *see* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 657 (1999).

279. Critics have long maintained that the redressability prong has been abused by the Court and has lead to wildly variant outcomes due in part to the Court's ability to tinker with injury first. *See, e.g.*, Nichol, *supra* note 275, at 79–82.

deems valuable the form of redress. In *Lujan* the Court rejected Congress's definition of an injury. In *Steel Co.*, the Court likewise rejected what Congress had already decided was a sufficient form of redress. Both *Lujan* and *Steel Co.* illustrate the problems with judicial determination of policy decisions.

Presumably the injury the Court had in mind when Justice Scalia wrote that the Court would "assume injury in fact" was the past deprivation of information that CBE needed for its community planning.[280] In addition to this injury, CBE alleged other forms of injury as well: (1) a legal injury created by the statute itself,[281] (2) injury in the form of lost investigation and litigation costs that it incurred to determine that Steel Co. was using and releasing toxic chemicals despite its failure to file use reports,[282] (3) the lost opportunity to persuade Steel Co. to reduce its emissions,[283] and (4) the likelihood that in the future Steel Co. would fail to file its EPCRA reports and injure CBE's membership again.[284] The story of *Steel Co.* illustrates the general rule that the definition of the interest bears directly on whether the outcome sought offers redress.

The Supreme Court rejected each of the forms of relief CBE sought. However, the rationale for each of the Court's conclusions is debatable. The Court dismissed the possibility that a declaratory judgment could provide redress to CBE since the defendant did not contest liability.[285] By equating a declaratory judgment in this case with all declaratory judgments, the Court demonstrated a lack of sensitivity to the theory and purpose of information statutes. As discussed above, disclosure of information is intended to motivate polluters to pollute less. This process involves at least two mechanisms. Information statutes assume that in some cases the polluter will be embarrassed by the disclosure of the data and take steps on its own to reduce its emissions. A second mechanism involves the community pressure of citizen groups, where an organization publicizes the poor environmental record and campaigns for the polluter to reduce pollution. While the disclosure of the actual data of its toxic emissions might encourage Steel Co. to reduce its emissions,[286] publication of a judicial determination that Steel Co. violated the law could serve as a significant tool in applying community pressure and reducing emissions. This enhanced opportunity to press for reduced emissions would directly redress the second

280. *Steel Co.*, 523 U.S. at 105.

281. *See* Respondent's Brief, *supra* note 257, at *24.

282. *Id.* at *26.

283. *Id.* at *27.

284. *Id.* at *34–35.

285. *Steel Co.*, 523 U.S. at 106 ("There being no controversy over whether the petitioner failed to file reports, or over whether such a failure constitutes a violation, the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world.").

286. *See* Respondent's Brief, *supra* note 257, at *9 (arguing that as result of publication of data, Steel Co. reduced emission).

harm alleged by Steel Co., the lack of opportunity to negotiate for reduced emissions.

In strong language, the Court expressed its view that civil penalties merely evince the plaintiff's general interest in vindication of the law or in obtaining "psychic satisfaction" and thus cannot adequately redress the plaintiff's injury.[287] Here the Court's new approach to redressability is clear. The Court did not ask whether civil penalties were likely to deter future violations by Steel Co. and provide redress. Abandoning the "too speculative approach," the Court instead asked the subjective question of whether payments to the U.S. Treasury should count as redress. The Court's criticism that "psychic satisfaction" is not meaningful is unrelated to the determination whether achievement of the asserted goal—future deterrence—was too unlikely.

Since the Court did not ask whether civil penalties deter future violations,[288] the Court avoided addressing the legislative history indicating that Congress authorized civil penalties for the specific purpose of deterrence.[289] The Senate debates and congressional record stress the importance of civil penalties in citizen suits as a deterrent.[290] Despite Justice Scalia's characterization of CBE's interest as broad and undifferentiated, CBE clearly alleged that it would be directly and concretely affected by future violations. Later, in its analysis of injunctive relief as a form of redress, the Court concluded that CBE must not actually fear future violations since it did not allege a continuing violation.[291] The Court's analysis conflates the allegation of injury for standing purposes with the allegation of law violations. A considerable gap exists between the level of certainty of future violations necessary to allege ongoing violations of the law and

287. *Steel Co.*, 523 U.S. at 106 ("But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.").

288. Scalia briefly mentions the deterrence argument, ignoring that the criticism in *Linda R. S.* and *Simon* was based on a speculation problem rather than the normative judgment at play in *Steel Co.* "Justice STEVENS thinks it is enough that respondent will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm. If that were so, our holdings in *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973), and *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976), are inexplicable. Obviously, such a principle would make the redressability requirement vanish." *Steel Co.*, 523 U.S. at 106–07.

289. *See* Boyer & Meidinger, *supra* note 1, at 839–40; Hecker, *supra* note 96, at 10564; Roblan & Sage, *supra* note 278, at 78.

290. *See* Hecker, *supra* note 96, at 10565; Roblan & Sage, *supra* note 276, at 78 (describing testimony from CERCLA and CWA debates in late 1980s that stressed deterrent effects of civil penalties).

291. *Steel Co.*, 523 U.S. at 108.

the common sense presumption of future violations from a defendant who complied with the law only in response to notice of impending litigation.[292]

The Court's rejection of civil penalties as a form of redress raises the question of whether it is appropriate for the Court to substitute its own judgment for that of Congress. Congress considered the appropriate form of redress within the context of the statute's purpose and its overall pollution control scheme. Acknowledging the limitations of EPA resources, Congress chose to create the citizen suit as an alternate enforcement mechanism.[293] The enforcement of the environmental statute provides specific deterrence to the defendant-company as well as general deterrence to other corporations.[294] Perhaps more importantly, the payment of civil penalties affects the incentive structure. Without the imposition of civil penalties, it will be cheaper to avoid compliance than to comply.[295]

The Court's analysis of litigation costs as a form of redress is also flawed. The Court explained its rejection of litigation costs in the following terms: "Obviously, however, a plaintiff cannot achieve standing to litigate a substantial issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself."[296] Although rhetorically neat, this picture of litigation costs ignores the incentive structure at work. As a starting point, the Court's analysis belies a basic truth of the American legal system: legal fees are rarely recoverable and are only recoverable when a statute dictates.[297] By providing for the award of legal fees, Congress developed a mechanism for recovery of costs for the citizen groups and removed a hurdle to investigating violations and bringing suits. Congress declined to provide incentives like bounties that might have drawn litigants with financial motives. Instead, it provided the mechanism that would allow good-faith plaintiffs to recover the costs of their involvement in the litigation.

---

292. *See* Brief for Individual States as Amicus Curiae Supporting Respondent, 1997 WL 348211, at *21, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (No. 96-643).

293. *See* Boyer & Meidinger, *supra* note 1, at 844–51.

294. *See, e.g.*, Wendy Nayerski & Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECON. 28 (1992) (discussing role of penalties for general and specific deterrence); *cf.* Michael D. Axline, John E. Benine, Tanya Barnett, Laurence Oates & Greg Skillman, *Stones for David's Sling: Civil Penalties in Citizen Suits Against Polluting Federal Facilities*, 2 J. ENVTL. L. & LITIG. 1, 42–44 (1987) (arguing that application of civil penalties to federal government defendants will encourage compliance and deter future violations by other federal agencies).

295. *See* Scott, *supra* note 96, at 233–34 (arguing that compliance costs, including penalties and litigation costs, must be less than noncompliance costs in order for legislation to have meaning).

296. *Steel Co.*, 523 U.S. at 107.

297. *See* 32 AM. JUR. 2D *Federal Courts* § 260 (1995); *id.* § 280 (1998) (listing statutes that provide for attorneys' fees, including antidiscrimination laws, environmental laws, health and safety laws, privacy laws, and access to information laws).

The Court dismissed as "frivolous" the suggestion that "costs of litigation" include the costs of investigating and preparing for litigation.[298] Even within the narrow interpretation of costs as attorneys' fees, however, there is room to seek direct redress or repayment. Presumably an attorney drafted the notice letter that led to Steel Co.'s compliance. As alleged by CBE, it had to spend its organizational funds on this project. An award of litigation costs would repay these attorney costs. Steel Co.'s failure to file its reports required CBE to pay funds for an attorney to draft the notice letter and thus injured CBE. Repayment of those costs would directly compensate CBE for this injury.

The Court's narrow analysis of litigation costs is also ultimately unpersuasive in the context of the larger policy and separation of powers concerns implicated. Giving meaning to the decision of Congress to provide an incentive for this type of suit and to the congressional goals of environmental enforcement requires that an interpretation of litigation costs be inclusive of investigation prior to litigation. Citizen suits must be investigated prior to filing the statutorily required notice letter and filing suit.[299] Without investigation the plaintiff cannot sufficiently plead injury and causation to avoid a motion to dismiss. Citizen investigation of information violations is a slow and expensive process when no monitoring system is in place.[300] If litigation costs are not intended to cover this component, then citizen environmental enforcement statutes ask a few individuals to bear the enormous economic cost of achieving broad social benefits.[301] Congress included litigation costs as part of every environmental statute, sending a clear signal that it did not intend to create such an unfair burden. The legislative history of the Clean Air Act confirms that Congress intended fees to serve a rewarding function: "The courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party."[302]

At the heart of the analysis of attorneys' fees is a struggle over who should decide appropriate incentives for nontraditional litigation. Under the guise of standing, the Court brought merit and policy determinations into the judiciary's realm. Justice Scalia suggested that the Court would be

298. *Steel Co.*, 523 U.S. at 123–24 n.16 (Stevens, J., concurring).

299. *See, e.g.*, Clean Water Act (CWA) § 505, 33 U.S.C. § 1365(b) (1986).

300. *See* Boyer & Meidinger, *supra* note 1, at 918 (outlining specific difficulties of this type of investigative work); Hecker, *supra* note 97, at 10307 (comparing detection of ongoing violation under statute like EPCRA and statute like Clean Water Act where monitoring system is in place).

301. *See* Boyer & Meidinger, *supra* note 1, at 918.

302. S. REP. No. 91-1196, at 38 (1970).

more inclined to recognize environmental citizen suits if a bounty incentive[303] were provided.[304] However, under the incentive system established by Congress, the complainant is motivated to file suit only out of concern for the well-being of the environment, not potential financial reward. The complainant is only reimbursed for either attorneys' fees or attorney and investigation fees, without opportunity to receive additional money. In contrast, Scalia's preference for a bounty system makes the normative determination that individuals motivated by financial bounties are the only welcome litigants.

The Court's comfort with financial gain as the only appropriate motivation is consistent with Scalia's use of standing to express his general hostility towards nontraditional litigation. Public law litigation challenges traditional notions of dispute resolution and involves different objectives. Thus redressability, like injury, may be more complicated in such litigation.[305]

5. *Further Weakening of Environmental Citizen Suits*

The Court's holding in *Steel Co.* has potentially broad implications for future environmental citizen suits. The majority of commentators consider *Steel Co.* to have drastically diminished incentives to bring suit,[306] particularly with respect to EPCRA suits. In an article published shortly after *Steel Co.*, attorney Jim Hecker stressed the unique hurdles in alleging an ongoing violation under EPCRA. Unlike pollution control statutes like the Clean Water Act, there is no ongoing monitoring of noncompliance for EPCRA.[307] Since the important filing requirements arise only once a year,

303. *See* Respondent's Brief, *supra* note 257, at *31 (arguing that costs may be better suited than bounty to avoid "windfall" or "inadequate" incentives since costs are tailored to suit, unlike flat bounty).

304. *Steel Co.*, 523 U.S. at 107 ("[C]ivil penalties authorized by the statute, sec. 11045(c), might be viewed as a sort of compensation or redress to respondent if they were payable to respondent.").

305. *See* Sheldon, *supra* note 233, at 40 ("Not only are the injuries suffered by potential plaintiffs of a different kind, but causation is more likely to be indirect and the relief sought injunctive and prospective, rather than compensatory. Consequently, the link between right and remedy that exists in private law actions may be more abstract.").

306. *See* Frank P. Grad, *Citizen Suits, Environmental Law and the Protection of Public Health*, ALI-ABA Course of Study, Feb. 10, 1999, WL SD47 ALI-ABA 437, 444 ("Thus, citizen suits authorized by EPCRA, the Clean Air Act, the Clean Water Act, etc., whether for ongoing or past violations, would never meet the purported Article III requirement of redressability."); Green, *supra* note 247, at 432–33 (arguing that citizens should continue to bring litigation even though fees will not be recoverable and penalties not paid because compliance is still goal, and EPA can take over litigation); Mitchell, *supra* note 249, at 360; Roblan & Sage, *supra* note 276, at 80; Sheldon, *supra* note 233, at 26 (suggesting that implications of *Steel Co.* for EPCRA environmental citizen suits are limited because litigants will merely change pleadings to allege future and present harm and draft new requests for relief).

307. Hecker, *supra* note 97, at 10307.

in order to know if a company will fail to comply in the future, the complainant must wait a considerable time period.[308] If an organization undergoes the cost and work of uncovering violations, the defendant can avoid liability by complying before the organization files suit.[309] Assuming that an organization can absorb the resource loss of not gaining compensation for its investigation, the organization or individual still loses incentive to use the process to set an example for other organizations or deter future violations.

For organizations that do not have the resources to fund investigation and attorney costs of prelitigation work, EPCRA citizen suits will be nearly impossible to pursue. The Supreme Court's new compensation laws will most likely disproportionately effect individuals and organizations in low-income communities. Environmental justice organizations who have begun to use citizen suits in recent years[310] are likely to be prevented from enforcing environmental laws in their communities. *Steel Co.*'s devastating impact on the viability of EPCRA suits is evident by the dearth of published decisions involving EPCRA citizen suits since *Steel Co.* was decided.[311] After *Steel Co.*, there is little left to challenge under EPCRA.

The impact of *Steel Co.* on other environmental citizen suits, like the impact of *Gwaltney* and *Lujan*, includes some surprising results. Three trends emerged post–*Steel Co.*: first, attempts to minimize and distinguish the holding of the case; second, an unsuccessful strategy by defendants to extend the holding to suggest that civil penalties are inappropriate even in cases with ongoing violations; and third, attempts to apply the holding in the mootness context.[312]

Cases that limit the holding of *Steel Co.* do so by reading *Steel* in light of *Gwaltney*.[313] These cases argue that *Steel Co.* reached the unremarkable conclusion that suits must allege ongoing violations at the time the complaint is filed, which is the central holding of *Gwaltney*.[314] This analysis refines the source of the requirement for ongoing violations. A district court decision in *L.E.A.D. v. Exide Co.*[315] provides an example. In addition to bringing suit under the Resource Conservation and Recovery Act, the plaintiffs brought suit pursuant to the Clean Air Act after Congress had

308. *Id.*

309. *Id.*

310. *See* Wolf, *supra* note 247, at 286–87.

311. A search of Westlaw on Apr. 1, 2001, uncovered only one EPCRA citizen suit since *Steel Co.*—Hassain v. City of Chicago, No. 98 C 4768, 1999 WL 89612 (N.D. Ill. Feb. 12, 1999)—an unpublished opinion dismissing the pro se plaintiff's case.

312. For the most part, the Court's analysis in *Laidlaw* addressed the second two trends.

313. *See, e.g.*, Natural Res. Def. Council v. Southwest Marine, 28 F. Supp. 2d 584 (E.D. Pa. 1999).

314. The *Steel Co.* decision avoided the issue of whether *Gwaltney* was only a statutory decision and dismissed the plaintiff's suit for failure to meet redressability, a constitutional requirement.

315. No. 96-3030, 1999 WL 124473 (E.D. Pa. Feb. 19, 1999).

amended the CAA to authorize suit for past violations.[316] The *L.E.A.D.* court read the CAA as authorizing suits for past violations in cases where the past violations suggested a future threat of violations.[317]

The burden of showing an "ongoing violation," while difficult in the EPCRA context, may provide a mechanism for maintaining the *Gwaltney* framework post–*Steel Co.* for other environmental statutes. As noted earlier, courts and litigants will continue to struggle over this definition without guidance. The lack of guidance affords courts greater discretion in determining standing and jurisdiction.[318]

In the context of the CAA or state environmental statutes, some courts have found standing and redressability for wholly past violations. Unlike the EPCRA statute, the CAA explicitly vests the trial judge with the power to award fines for use in a beneficial local environmental or health project in place of payment to the U.S. Treasury.[319] Relying on this distinction, the district court in *United States v. LTV Steel Co.* ruled that a private citizen group had standing under the CAA.[320] The court found that since the funds could be used to improve the plaintiff's immediate environment through a statutorily authorized mitigation fund, payment of civil penalties for past violations would redress their harm. The CAA thus has two unique components that seem to place it outside both *Gwaltney* and *Steel Co.*: explicit statutory authorization for past violations and provision for a mitigation fund with the potential to directly and specifically benefit the plaintiffs. The *L.E.A.D.* court similarly found standing for citizen suit plaintiffs alleging wholly past violations of a Pennsylvania environmental statute[321] based on a state scheme that applied violation fines to a "clean

316. *See supra* notes 74–75 and accompanying text.

317. *L.E.A.D.*, 1999 WL 124473, at *15.

318. *See, e.g.*, Anderson v. Farmland Indus., Inc., 70 F. Supp. 2d 1218 (D. Kan. 1999) (denying summary judgment motion, holding that evidence of ongoing violations does not automatically preclude standing for summary judgment motions, leaving this determination to trier of fact).

319. *See* CAA § 304, 42 U.S.C. § 7604(g) (1994) ("[T]he court in any action under this subsection to apply civil penalties shall have discretion to apply civil penalties, in lieu of being deposited in the [U.S. Treasury fund], be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000."); *cf.* David S. Mann, *Polluter Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 ENVTL. L. 175, 207 (1990) (suggesting that Congress's incorporation of mitigation fund projects in Clean Air Act could be interpreted as support for body of case law that permitted similar projects as settlement conditions in environmental citizen suits brought under Clean Water Act).

320. No. 98-570, 1998 WL 1073925 (E.D. Pa. Dec. 31, 1998).

321. *See* 35 PA. CONS. STAT. § 4013.6(c) (1993) (providing for use of civil penalties to prevent air pollution or payment to general Clean Air Fund).

air fund" used in local counties.[322] Both the CAA and state statutes like Pennsylvania's provide models for legislatures to draft statutes to revive citizen suits for past violations without bounty provisions.

Defendants have attempted to extend the *Steel Co.* redressability analysis by arguing that even if their violations are ongoing, *Steel Co.* stands for the proposition that citizen plaintiffs can never seek penalties payable to the U.S. Treasury. The Eastern District of California rejected this argument by concluding that civil penalties offer specific deterrence and therefore are a form of redress when the plaintiff alleges ongoing violations.[323] In another California case, the Southern District described the defendant's argument as an attempt to create an additional layer of standing for each type of redress sought. The Southern District reasoned that since injunctive relief met the standing requirement, standing was satisfied and the plaintiffs were entitled to any type of relief authorized by Congress.[324] Because both courts reached their conclusions under traditional analyses, neither decision had to consider the dramatic limitation on Congress's power to define remedies that would flow from the defendant's argument.

6. *The Impact of* Friends of the Earth v. Laidlaw Environmental Services

Laidlaw substantially narrowed the wide sweep of *Steel Co.*'s language regarding civil penalties. With regard to standing, the Supreme Court considered whether an environmental citizen suit plaintiff may allege civil penalties and whether civil penalties could redress injury by deterring the defendant from committing future violations. The Court unequivocally affirmed the role for civil penalties in citizen suits and their ability to serve as a deterrent.[325] Recognizing Congress's central role in proscribing remedies, the Court based this conclusion in part on the congressional determination that penalties deter.[326] The Court distinguished the analysis in *Steel Co.* by noting that *Steel Co.* involved a suit for past violations only. While civil penalties would not redress a wholly past violation, they could redress ongoing violations or the threat of continuing violations.[327]

322. L.E.A.D. v. Exide Corp., 1999 WL 124473 at *16. *But see id.* at *15 n.15 (rejecting suggestion that payment under Federal Clean Air Act for beneficial mitigation project constitutes specific redress).

323. S.F. Baykeeper v. Vallejo Sanitation & Flood Control Dist., 36 F. Supp. 2d 1214 (E.D. Cal. 1999).

324. Natural Res. Def. Council v. Southwest Marine, Inc., 39 F. Supp. 2d 1235 (S.D. Cal. 1999).

325. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).

326. *Laidlaw*, 528 U.S. at 184 (acknowledging that "congressional determination warrants attention and respect").

327. *Id.* at 185.

7. Potential Solutions

The intrusion on congressional power to define redress and the use of highly normative decision-making to prevent litigants from reaching the courthouse door are two problems posed by *Steel Co.* that can only be undone by the Supreme Court itself. To a certain extent, the Court in *Laidlaw* restored some of the power of Congress to define remedies. Congress can now attempt to restore EPCRA environmental citizen suits and answer some of the questions left lingering after *Gwaltney* and *Steel Co.*

By establishing a bounty,[328] awarding pre-suit investigation costs,[329] or providing for local mitigation projects,[330] Congress could grant a specific form of redress cognizable by the Supreme Court. These schemes would probably be embraced by lower courts as the type of remedy required by *Steel Co.*, as the Clean Air Act case example suggests. The pre-suit investigation option has the appeal of restoring the citizen to her pre-suit financial position, so that work for the broader community is not at her expense. Bounties have the appeal and drawback of providing cash assistance to litigants. For litigants such as community nonprofit organizations, this type of assistance may have the benefit of enabling future environmental work. For corporate litigants who are motivated to file suit by interests beyond those intended by the statute, a bounty provision may have the unwanted consequence of creating incentives for corporations to use environmental statutes to fight nonenvironmental battles. In contrast, the creation of mitigation fund projects protects against nonenvironmental incentives.

In addition to providing remedies that will be recognized by the Court as meeting the redressability requirements, Congress could also explicitly authorize suits for past violations. For EPCRA, a statutory grant is essential to retaining its viability as a tool for communities and effectuating the goals intended by the legislation. For other statutes, like the Clean Water Act, Congress could guard against the potentially unnecessary pursuit of technical, one-time violators by permitting suit for multiple past violations. As the Attorney General argued in *Steel Co.*, at some point a number of past violations is indicative of a strong likelihood of future violations.[331] By statutorily assigning a number, Congress could provide for the pursuit and deterrence of bad actors who are likely to be repeat offenders and simultaneously reduce the intensive fact-finding determination by courts about whether a defendant's actions pose a substantial likelihood of future violations.

328. *See* Hecker, *supra* note 97, at 10308 (arguing in favor of establishment of bounty system in EPCRA context).

329. *See id.*

330. *See id.*

331. *See* Respondents' Brief, *supra* note 257, at *5.

D. *Mootness and Postfiling Compliance*

One of the largest questions left open after *Steel Co.* was its application to the issue of mootness.[332] Despite the fact that the defendants in *Steel Co.* achieved compliance before a complaint was filed, the *Steel Co.* plaintiffs filed suit. Under any other statute, this suit would have been dismissed; however, the unusual language and nature of EPCRA allow for postcompliance complaints to be filed.[333] *Steel Co.*'s redressability analysis raised the question of whether compliance mooted only injunctive relief or claims for civil penalties and litigation costs as well. This section briefly summarizes prior Supreme Court mootness case law and citizen suit decisions pre–*Steel Co.* that considered the question, then considers the handful of cases tackling the question since *Steel Co.* It then summarizes the analysis in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, the Supreme Court decision reversing the Fourth Circuit's extension of *Steel Co.* to mootness. Finally, the section argues that *Laidlaw* was decided appropriately given the constitutional doctrine and consequences for citizen suits.

1. *Supreme Court Mootness Doctrine and Pre–*Steel Co. *Case Law*

In *United States Parole Commission v. Geraghty*[334] the Supreme Court adopted Professor James Monaghan's articulation of mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation must continue through its existence."[335] Like standing, the mootness doctrine has come under fire from critics for its elevation to constitutional status.[336] Perhaps the most notable critic, Justice Rehnquist, argues that mootness is better considered a prudential requirement.[337]

Despite similarities, the doctrines of mootness and standing evolved with important differences. At the same time that the Supreme Court was tightening standing rules, it continued to pursue a policy of "flexibility"[338]

---

332. *See* Marcia Coyle, *Citizen Suit on Docket*, NAT'L L.J., Mar. 15, 1999 (noting environmentalist fear that application of mootness doctrine under one interpretation of *Steel Co.* has potential to chill future suits).

333. This characterization assumes that the plaintiffs did not suggest sufficient facts to reach the "ongoing" risk threshold.

334. 445 U.S. 388 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

335. *Id.* at 397; *see also* Arizonans for Official English v. Arizona, 520 U.S. 43, 58 (1997) ("To qualify as a case fit for federal-court adjudication an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." (quotation omitted)).

336. *See, e.g.*, Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 605 (1992) (arguing for prudential view of mootness based on Congress's power to define courts).

337. *See* Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, J., concurring).

338. *Geraghty*, 445 U.S. at 400 (referring to "flexible character of the Art. III mootness doctrine"); *see also* Fallon, *supra* note 143, at 26.

and recognized categorical exceptions in the area of mootness. Mootness rules are relaxed or abandoned for many well-established exceptions including the voluntary cessation doctrine,[339] class actions,[340] and cases "capable of repetition, yet evading review."[341] The mootness doctrine also recognizes cases with secondary or collateral injuries and cases involving injuries that would not have met the standing doctrine but meet the mootness standard.[342]

The burden of proof is another important distinction: while the plaintiff bears the burden of demonstrating that she meets the requirements of standing, the defendant is the party responsible for showing that the plaintiff's case is moot. The defendant's burden is heavy.[343] In *Church of Scientology of California v. United States*[344] the Court characterized the standard as whether "any effectual relief whatever" could be awarded.[345] The *Scientology* petitioners initially challenged a summons from the IRS to obtain tapes in the custody of the district court. After the tapes were turned over to the IRS, the Ninth Circuit dismissed the Scientologists' suit challenging the summons on the grounds of mootness. The Supreme Court reversed and held that regaining possession of the records met the standard for effectual relief.[346]

Prior to the *Steel Co.* decision, federal courts resoundingly rejected defendants' arguments that cases with postcomplaint compliance should be dismissed on mootness grounds.[347] Courts found that while the request for

339. *See* DeFunis v. Odegaard, 419 U.S. 393 (1975). The Court noted "a line of decisions in this Court standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" *Id.* at 399–402 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1935)).

340. *See* Sosna v. Iowa, 419 U.S. 393, 399–402 (1975) (announcing rule that class certification alters mootness analysis).

341. For cases announcing the "capable of repetition, yet evading review" doctrine, see *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1975), and *Roe v. Wade*, 410 U.S. 113, 125 (1973).

342. *See* Fallon, *supra* note 143, at 27–28.

343. *See* United States v. W.T. Grant Co., 345 U.S. 629, 633 (referring to defendant's burden of demonstrating mootness as "a heavy one").

344. 506 U.S. 9 (1992).

345. *Id.* at 12 (quoting Mills v. Green, 159 U.S. 651, 653 (1895)).

346. *Id.* at 13.

347. *See* Comfort Lake Ass'n v. Dresel Contracting, 138 F.3d 351, 356 (8th Cir. 1998) ("[A] polluter should not be able to avoid otherwise appropriate civil penalties by dragging the citizen suit plaintiff into costly litigation and then coming into compliance before the lawsuit can be resolved."); Atl. States Legal Found. v. Stroh Die Casting Co., 116 F.3d 814 (7th Cir. 1997); Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 503–04 (3d Cir. 1993) ("A citizen suit would lose much of its effectiveness if a defendant could avoid paying any penalties by post-complaint compliance. . . . We cannot embrace a rule that would weaken the deterrent effect of the Act by diminishing incentives for citizens to sue and encourage dilatory tactics by defendants."); Atl. States Legal Found., Inc. v. Pan Am. Tanning Corp., 993 F.2d 1017 (2d Cir. 1993); Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1065 (5th Cir. 1991); Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128 (11th Cir. 1990); Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690,

injunctive relief had been mooted, the requests for civil penalties and attorneys' fees prevented the entire case from being moot.[348] Courts also considered *Gwaltney* in arriving at this decision. The Supreme Court in *Gwaltney* had made two ambiguous statements relevant to the question of mootness.[349] In a footnote the Court explained that the discretionary nature of the provision for litigation costs permits courts to award costs to plaintiffs in cases that do not reach final judgment because, "as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation."[350] The Court also expressed in dicta that "longstanding principles of mootness . . . prevent the maintenance of suit when there is no reasonable expectation that the wrong will be repeated."[351]

Prior to *Steel Co.*, courts considered these statements in the context of the facts of *Gwaltney* itself. As discussed earlier, by the time *Gwaltney* reached the Supreme Court the defendant was in compliance with its permit. The Supreme Court remanded the case for a factual determination of whether there was an ongoing risk of continued violations. At the point of remand, only civil penalties and attorneys' fees turned on the issue of whether there was an ongoing violation. Lower courts were persuaded by these facts that the Supreme Court did not intend in *Gwaltney* to suggest dismissal on mootness grounds for cases with live claims for penalties and costs.[352]

Courts also considered other constitutional and policy concerns. Some courts maintained that separation of powers issues may arise when citizens independently pursue civil penalties as relief after state enforcement agencies had chosen to forgo penalties to ensure enforcement.[353] Other courts explicitly held that civil penalties are a form of deterrence; thus they directly redress the plaintiff's interest in preventing future violations.[354] Finally, courts were concerned that dismissing suits for mootness after a complaint had been filed would create an incentive for defendants to postpone compliance until the last minute and still escape all consequences.[355]

696–97 (4th Cir. 1989); Sierra Club v. Union Oil, 853 F.2d 667 (9th Cir. 1988); Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1094 (1st Cir. 1986). *See generally* Wiygul, *supra* note 82, at 453 (describing circuit consensus that claims for civil penalties survive mooting of injunctive relief).

348. *See* Wiygul, *supra* note 82, at 453.

349. Timothy A. Wilkins, *Mootness Doctrine and the Post-Compliance Pursuit of Civil Penalties in Environmental Citizen Suits*, 17 HARV. ENVTL. L. REV. 389, 393 (1993) (discussing Court's lack of clarity of whether this pertained to claims for injunctive relief or also punitive damages).

350. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 67 n.6 (1987) (quoting S. REP. No. 92-414 (1971)).

351. *Gwaltney*, 484 U.S. at 66 (citations omitted).

352. *See Tyson Foods*, 897 F.2d at 1133–37; *Gwaltney*, 890 F.2d at 696–97.

353. *See, e.g.*, Comfort Lake Assn. v. Dresel Contracting, 130 F.3d 351, 358 (8th Cir. 1998).

354. *See* Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 503 (3d Cir. 1993); Sierra Club v. Simkins, 847 F.2d 1109, 1113 (4th Cir. 1988).

355. *See Comfort Lake Ass'n*, 130 F.3d at 356; *Texaco*, 2 F.3d at 503.

*2. Post–*Steel Co. *Cases—*Laidlaw *and Beyond*

The Fourth Circuit took the lead after *Steel Co.* and embraced the mootness argument in *Laidlaw*, the case that ultimately reached the Supreme Court.

Friends of the Earth (FOE), the Sierra Club, and Citizens Local Environmental Action Network (CLEAN)—all nonprofit environmental organizations—together brought suit against Laidlaw Environmental Services, a hazardous waste incinerator, for violating its NPDES permit when discharging waste into the North Tyger River in South Carolina.[356] The plaintiffs filed suit on June 12, 1992, seeking declaratory and injunctive relief, civil penalties, costs, and attorneys' fees.[357] The district court found that Laidlaw had committed hundreds of permit violations between 1987 and 1995, including 420 violations of the monitoring requirements, 503 violations of the reporting requirements, and 489 violations of the mercury limits.[358] The district court additionally found that Laidlaw's violations fell off sharply, but did not cease, after the plaintiffs filed suit. From the beginning of the suit in 1992 through 1995, Laidlaw violated mercury limits fourteen times and violated the monitoring requirements on one occasion only.[359] The decline in violations became an issue in the remedy fashioned by the district court, but the number of violations clearly met the *Gwaltney* ongoing violation requirement.

The district court weighed multiple factors to determine appropriate relief. The court found that the mercury violations did not result in a health risk or environmental harm,[360] that the lack of monitoring and reporting of violations could not be considered "serious,"[361] and that Laidlaw made significant good-faith efforts to comply.[362] The court also concluded that Laidlaw reaped an economic benefit of $1,092,581 through noncompliance[363] and that Laidlaw could pay a fine of $10 million without adverse economic impact.[364] Lastly, the district court considered the fact that Laidlaw came into substantial compliance with its permit after the complaint was filed to militate against a large fine, assessing a civil penalty of $405,800 against Laidlaw.[365] Based on Laidlaw's substantial compliance

356. Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 592–93 (D.S.C. 1997), *vacated by* 149 F.3d 303 (4th Cir. 1998), *rev'd,* 528 U.S. 167 (2000).

357. *Id.* at 592.

358. *Id.* at 600.

359. *Id.* at 609.

360. *Id.* at 602.

361. *Id.*

362. *Id.* at 607–08.

363. *Id.* at 603–06. The court adopted an economic benefit calculation based on the calculation produced by the Laidlaw expert, Robert Fuhrman ($884,797) rather than the calculation introduced by the plaintiff's expert, Dr. Michael Kavanaugh ($3,139,418). *Id.*

364. *Id.* at 609.

365. *Id.* at 609–10. Later the court noted that Laidlaw became in substantial compliance in August, 1992, two months after the complaint was filed. *Id.* at 611.

and the demonstrated lack of environmental harm, the court denied the plaintiffs' claim for declaratory and injunctive relief.[366]

The plaintiffs appealed the judgment to the Fourth Circuit to challenge the penalty.[367] The defendant cross-appealed on the ground that the plaintiffs failed to demonstrate an injury-in-fact and that the case was precluded by a state suit.[368] The decision of the Fourth Circuit was striking: in a few short paragraphs the Fourth Circuit interpreted *Steel Co.* to require dismissal of the appeal and vacatur of the lower court decision since the plaintiffs did not challenge the district court's denial of injunctive relief.[369] The Fourth Circuit denied the plaintiffs attorneys' fees in a footnote.[370] The case was decided on July 16, 1998, just months after the *Steel Co.* decision.

Shortly after the Fourth Circuit decision, a court in the District of New Hampshire adopted the Fourth Circuit's *Laidlaw* analysis to dismiss a Clean Water Act citizen suit. In *Dubois v. United States Department of Agriculture*,[371] the plaintiff sued the Forest Service alleging that the Forest Service authorized a plan that would allow a ski company to expand and discharge pollutants into a local pond without a National Pollution Discharge Elimination System (NPDES) permit. The district court granted summary judgment to the Forest Service, but the First Circuit reversed and directed entry of judgment for injunctive relief.[372] The issue of civil penalties was not reached by the district court; thus the First Circuit did not reach it.[373]

The *Dubois* district court granted injunctive relief to the plaintiff, but the claim for civil penalties remained undetermined. The district court noted in dicta that *Steel Co.* could be read to hold that plaintiffs can never seek civil penalties.[374] The court then concluded that the case was moot because the plaintiffs sought only civil penalties, which could not redress their harm.[375] The district court relied on *Laidlaw* for this analysis. Anticipating this possibility, the *Dubois* plaintiffs had argued that the voluntary cessation exception should apply.[376] The voluntary cessation doctrine concerns defendants who defeat jurisdiction by coming into compliance with the law after commencement of a suit; the defendants can then resume illegal conduct after the complaint is dismissed, thereby avoiding the law

366. *Id.* at 610.

367. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 149 F.3d 303 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000).

368. *Id.* at 305.

369. *Id.* at 306–07.

370. *Id.* at 307 n.5.

371. 20 F. Supp. 2d 263 (D.N.H. 1998).

372. *Id.* at 265.

373. *Id.*

374. *Id.* at 267 n.3.

375. *Id.* at 268.

376. *Id.* at 269.

and a hearing on the merits.[377] The district court rejected the voluntary cessation exception in *Dubois* since the federal government's compliance was the result of court's injunctive order.

A district court in Colorado pursued an opposite course from that of *Dubois* and *Laidlaw* in *Old Timer v. Blackhawk-Central City Sanitation District.*[378] The *Old Timer* plaintiffs brought suit under the Clean Water Act seeking injunctive relief and civil penalties for wastewater discharges in excess of the defendant's permit.[379] After the filing of the complaint, the sanitation district upgraded its treatment plant and ceased violating its permit.[380] The sanitation district argued that as a result of its postcomplaint compliance the claims for injunctive relief and penalties were moot. The district court agreed that the claim for injunctive relief was moot, but retrained jurisdiction by finding that the claim for civil penalties remained.[381]

The *Old Timer* court rested its conclusion on two rationales. First, the court distinguished *Steel Co.* by noting that the *Old Timer* plaintiffs alleged continuing violations at the time the complaint was filed. Based on this difference, the court found that civil penalties could redress the plaintiffs' injury by ensuring future compliance.[382] The court also relied on the argument that since the Supreme Court remanded the *Gwaltney* case after compliance for determination of the penalties and costs, the Supreme Court had essentially addressed the issue of civil penalties.[383]

In *Natural Resources Defense Council v. Southwest Marine,* a district court in the Southern District of California also held that postcomplaint compliance, while mooting injunctive relief, does not moot civil penalties.[384] The *Southwest Marine* decision rejected the Fourth Circuit's *Laidlaw* analysis and observed that the Fourth Circuit had reached the opposite conclusion from seven other circuits.[385] The court reasoned that the opportunity provided to the defendant to comply during the notice period would be rendered meaningless by an interpretation of the statute that allowed postcomplaint compliance to moot the case.[386] The court agreed with earlier decisions that to permit postcomplaint compliance to moot a

377. *See supra* note 340.
378. 51 F. Supp. 2d 1109 (D. Colo. 1999).
379. *Id.* at 1111, 1116.
380. *Id.* at 1116.
381. *Id.* at 1116–17.
382. *Id.* at 1117.
383. *Id.*
384. 39 F. Supp. 2d 1235, 1239 (S.D. Cal. 1999). In Kansas a third district court also suggested in dicta that post complaint compliance would not moot a citizen suit case where the defendant voluntarily came into compliance. *See* Anderson v. Farmland Indus., Inc., 70 F. Supp. 2d 1218, 1234 (D. Kan. 1999). The court's analysis was dicta because it was not clear whether the defendant had in fact become compliant. *Id.*
385. 39 F. Supp. 2d at 1242 (citing to opinions in First, Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits).
386. *Id.* (citing Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 503–05 (3d Cir. 1993)).

claim would encourage defendants to delay litigation and undermine the deterrent effects of the statute.[387]

The Fourth Circuit's decision in *Laidlaw* raised two significant questions for the Supreme Court: first, are civil penalties and attorneys' fees claims moot if injunctive relief is mooted by postcomplaint compliance; and second, can the plaintiff receive attorneys' fees as a prevailing party if the suit is dismissed for mootness. The arguments presented on the mootness question by the *Laidlaw* litigants and amici reflect the split in lower court decisions. Laidlaw argued that under *Steel Co.,* the plaintiffs could not meet the redressability requirement; thus the case should be deemed moot. The petitioners relied on the *Gwaltney* analysis to argue that the standards for mootness and standing are different.[388] The petitioners also argued from a policy perspective and maintained that federal environmental laws would be undermined if their claim were held to be moot.

The parties' differences over whether attorneys' fees should be awarded to the plaintiff if the defendant complies after filing suit revolved around the "catalyst doctrine" and whether a 1992 Supreme Court case, *Farrar v. Hobby*,[389] overruled that doctrine.[390] The *Farrar* plaintiff won damages in the amount of one dollar and sought attorneys' fees.[391] The Court ruled that although a plaintiff should be considered a "prevailing party" for winning nominal damages,[392] the size of the award should be an important factor in determining the reasonableness of awarding fees.[393] The *Laidlaw* parties disagreed as to whether this language overruled the line of catalyst cases that recognized the appropriateness of fees when the plaintiff's law suit instigated change in the defendant's behavior.[394]

3. *The Supreme Court's Decision in* Laidlaw

The majority opinion in *Laidlaw*, authored by Justice Ginsburg, affirmed the vitality of citizen suits by providing the most generous decision to environmental plaintiffs in twenty years of environmental citizen suit cases. The Court's opinion considered whether or not the plaintiff had

387. *Id.*

388. The government argued as amicus that the Fourth Circuit erroneously applied standing analysis rather than mootness and ignored the steep burden of defendant. Brief of the United States as Amicus Curiae Supporting Petitioners, 1999 WL 311773, at *15–*20, *24, Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (No. 98-822).

389. 506 U.S. 103 (1992).

390. *See* Andreen, *supra* note 22 (presenting overview of *Laidlaw* litigation prior to announcement of Supreme Court decision as it relates to catalyst doctrine and attorneys' fees).

391. *Farrar*, 506 U.S. at 107.

392. *Id.* at 112.

393. *Id.* at 114.

394. *See generally* Joel H. Trotter, *The Catalyst Theory of Civil Rights Fee Shifting After* Farrar v. Hobby, 80 VA. L. REV. 1429, 1433–35 (1994) (describing history and function of catalyst doctrine).

standing at the time the suit was filed. It then highlighted the doctrinal and policy differences in standing and mootness inquiries and applied the mootness analysis to the facts of *Laidlaw*.[395]

The Supreme Court agreed with the district court opinion that the plaintiffs had sufficiently demonstrated standing and had met the requirements of injury-in-fact and redressability.[396] As discussed in previous sections, the Court rejected restrictive readings of *Lujan* and *Steel Co.* The Court's analysis of redressability was notable for its acceptance of the general proposition that penalties can abate conduct and deter future violations. The Court noted that while some cases may push the limits of when deterrence could be implied from civil penalties, for cases such as *Laidlaw* where the plaintiffs have alleged ongoing violations, the deterrence value is clear.[397] In a footnote, the Court responded to Scalia's dissenting argument that citizen suits undermine the authority of the executive to enforce laws by noting that the Department of Justice had filed an amicus brief in support of the citizen plaintiff at each stage of the litigation.[398] *Laidlaw* was an important step towards restoring judicial integrity in the area of standing. However, the Court could have gone further. The Court stopped short of overruling its faulty determination in *Steel Co.* that civil penalties cannot provide deterrence where the defendant complies prior to the filing of the complaint.

By distinguishing the doctrines of mootness and standing, the Court brought much needed clarity to the tension between the *Spencer v. Kemna*[399] approach of strictly requiring each prong of standing to be met at every stage of the litigation and the more flexible approach to mootness reflected in the difference in burdens of proof and multiple mootness exceptions. The majority opinion acknowledged this tension and rejected the definition of mootness as "standing set in a time frame" as overly narrow.[400] The Court stressed the difference in burdens of proof, the fact that mootness recognizes exceptions for cases "capable of recognition, yet evading review," and the fact that standing guards against the investment of judicial resources in a noncontroversy, while recognizing that mootness poses a risk that a substantial judicial investment will be lost.[401]

The Court also rejected the suggestion that the plaintiff's case should be considered moot merely because the litigant did not appeal the denial of injunctive relief.[402] The Court remanded the case to answer the question of

395. Since the district court did not rule on the award of attorneys' fees, the Supreme Court considered the question of the catalyst doctrine and award of attorneys' fees an inappropriate topic for review. *Laidlaw*, 528 U.S. at 194–97 (2000).
396. *Id.* at 704–08.
397. *Id.* at 706–07.
398. *Id.* at 708 n.4.
399. 523 U.S. 1 (1998).
400. *Laidlaw*, 528 U.S. at 189–91.
401. *Id.* at 191–94.
402. *Id.* at 193–94.

whether the prejudgment achievement of substantial compliance or the postjudgment closing of the factory should moot the case.[403] The parties disagreed about whether Laidlaw's actions should be interpreted as foreclosing the possibility of future violations, given that Laidlaw retained its permit.[404] In his concurring opinion, Justice Stevens noted a weakness in the majority's opinion: the majority leaves open the possibility that postjudgment compliance could moot a case,[405] a dangerous idea for citizen suits and, more broadly, for the notion of judicial finality.

The Court declined to address the issue of awarding litigation costs when cases are dismissed on mootness grounds or whether the catalyst doctrine survived the Court's opinion in *Farrar*.[406] Unlike the analysis of the Article III standing and mootness doctrines, the Court is more closely bound by the will of Congress in its evaluation of whether the plaintiff can win litigation costs. In her concurrence in *Farrar*, Justice O'Connor noted that the Court must defer to Congress's intent when interpreting whether attorneys' fees should be awarded.[407] Regardless of the meaning of *Farrar* for the catalyst doctrine in the context of civil rights suits, the Court's prior decision in *Gwaltney* recognized the legislative history of the attorney fee provision in the environmental citizen suit context. As discussed earlier, the *Gwaltney* Court suggested that, in light of congressional history, plaintiffs could still receive attorneys' fees despite a dismissal on mootness grounds.[408] Since the attorney fee question is not related to Article III or constitutional concerns, Congress could clarify the language to provide for attorneys' fees after dismissals when defendants comply with the law in response to the initiation of suit. The award of fees after a mootness dismissal is particularly important for suits brought by plaintiffs seeking injunctive relief only. However, given the statutory authorization for penalties, these cases are likely to be few and far between, suggesting that the issue may not be litigated.

Justice Scalia's dissent articulated familiar Scalia themes: distaste for generalized grievances and nontraditional litigation and preference for strict application of standing requirements. Scalia expressed blanket opposition to the notion of citizen suits as a marriage of "private wrong with

403. *Id.* at 194–95.

404. *Id.*

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

406. *Id.* at 194–97.

407. *Farrar v. Hobby*, 506 U.S. 103 (1992).

> After all, where the only reasonable fee is no fee, an award of fees would be unjust; conversely, where a fee award would be unjust the reasonable fee is no fee at all. Of course, no matter how much sense this approach makes, it would be wholly inappropriate to adopt it if Congress had declared a contrary intent. When construing a statute, this Court is bound by the choices Congress has made, not the choices we might wish it had made.

Id. at 118.

408. *See supra* note 353 and accompanying text.

public remedy."[409] Adopting the reasoning of courts such as *Gaston Copper*, Justice Scalia argued in favor of requiring a factual showing of physical harm to the environment for the plaintiff to meet the injury requirement.[410] Justice Scalia also argued that the plaintiff failed the redressability requirement because deterrence of future wrongdoing is a generalized interest, not a plaintiff-specific remedy.[411] However, Scalia's dissent ignored the holding of *Akins* that accepts generalized interests in some cases. He also attacked Congress for having "done precisely what we have said it cannot do: convert an 'undifferentiated public interest' into an 'individual right' vindicable in the courts."[412] The only surprise in Justice Scalia's dissent is his agreement that a remand would have been appropriate to determine whether the case was moot if the plaintiff had demonstrated standing. Justice Scalia considered the case to be a strong candidate for the established voluntary cessation exception to mootness doctrine.[413]

The Court's decision in *Laidlaw* signals growing dissatisfaction with the Scalia-led assault on citizen suit justiciability. To a limited extent, it restores a function for Congress in defining remedies and retreats from the untenable proposition that civil penalties do not deter future violations. Perhaps most importantly, it suggests a limit to the Court's willingness to undermine a nontraditional model of litigation.

IV.
WRAPPING UP: THE CONTINUED VIABILITY OF THE CITIZEN SUIT

Jurisdictional hurdles erected by the Supreme Court have fundamentally altered the concept of the citizen suit. The citizen suit was initially created to give individual community members a chance to help the government enforce federal environmental laws and clean up polluted communities. Today the environmental citizen plaintiff must have the resources and capacity to extensively research and allege proof of a direct and personalized injury, that the injury is ongoing, and that the form of relief is recognized by the Supreme Court, even if Congress already statutorily recognizes the relief requested. What is more, all of this must occur before the court can even reach the merits of the citizen's claim. This change from generous jurisdictional requirements in the 1970s to the current complex array of requirements has broad implications for standing doctrine generally and environmental citizen suits specifically.

In the name of separation of powers, the Supreme Court has tightened injury-in-fact and redressability requirements for environmental citizen

409. *Laidlaw*, 528 U.S. at 198–99 (Scalia, J., dissenting).
410. *Id.* at 201.
411. *Id.* at 203.
412. *Id.* at 203–06.
413. *Id.* at 211.

suits. However, the unmistakable irony is that the congressional and executive branches have consistently opposed the Court's desire to restrict judicial interference. In each of the major environmental citizen suit cases, plaintiffs were joined by federal amici briefs. Overall, from *Gwaltney* to *Steel Co.*, the Supreme Court has chosen to rely on a judicially-created doctrine—standing—to redirect the intent of Congress and the executive.[414]

In the major environmental citizen suit cases, the rise of Justice Scalia's view of standing as grounded in separation of powers concerns[415] is reflected as much through the articulation of that theory as it is through the absence of reference to traditional justifications of standing. Concern for preventing the federal judiciary from interfering with policy-making functions drove the early standing cases.[416] The other justifications commonly articulated for standing included ensuring that the people most directly affected were able to litigate the issue and that the adversary system sharpened representation.[417] These traditional justifications are difficult to reconcile with current standing doctrine in the context of environmental citizen suits. First, assuming that the federal government would intervene, it is not clear that anyone would ever sue if every plaintiff motivated to bring suit is dismissed. There is not necessarily another more concerned environmental plaintiff waiting to challenge a defendant's conduct. The tie between traditional standing concerns and the Court's actions is tested most strongly by *Steel Co.* and its redressability analysis. If Congress and the litigants consider litigation costs and civil penalties redress, and the plaintiffs have sufficient stake in the injury to meet the *Lujan* requirements, it is difficult to take seriously allegations that the litigants are not concerned or that there is not a sharp adverse interest. More optimistically, *Laidlaw* and *Akins* may suggest that the dominance of Justice Scalia's restrictive view of standing is waning.

Perhaps the most troubling aspect of the Supreme Court's jurisprudence in environmental citizen suits is its demonstrated willingness to erode congressional power to define legal rights and remedies and to rely

414. *See* Weinberg, *supra* note 35, at 11 (comparing legacy of Supreme Court's standing decisions in area of environmental citizen suits with 1920s Court decisions striking down laws on Commerce Clause and substantive due process grounds).

415. *See* Sheldon, *supra* note 233, at 37–38 (discussing importance of theory of separation of powers for modern standing).

416. *See* Pierce, *supra* note 239, at 1767 (tracing modern standing law to desire of Justices Brandeis and Frankfurter to protect citizen will by curtailing activist judges from declaring new statutes and programs unconstitutional).

417. *See* Fletcher, *supra* note 158, at 222. *See generally* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.1 (2d ed. 1984) (discussing historic development of two competing standing rationales—separation of powers concerns and effective adversary litigation).

instead on its own normative decision making.[418] This approach has serious potential consequences far beyond the area of environmental citizen suits: it demonstrates general judicial hostility to all forms of nontraditional litigation.

Behind the sweeping changes in standing theory created by the Supreme Court's case law in environmental citizen suits are a set pragmatic implications that have dramatically altered enforcement of environmental laws. First, the number of suits has fallen dramatically since its peak in the 1980s.[419] The Court created a layer of complicated prelitigation jurisdictional requirements that often prove more challenging than the liability determinations themselves. The Court has also undermined a number of significant aspects of environmental citizen suits, the impacts of which vary across statutes. The Appendix compares the restrictions of each of the major doctrinal shifts for four major statutes, the Emergency Planning and Community-Right-To-Know Act, the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

The Court in *Steel Co.* essentially ended the viability of EPCRA suits. In its current form, EPCRA suits are only available to plaintiffs seeking injunctive relief. Only organizations with sufficient resources to absorb the costs of litigation are in a position to file EPCRA suits since defendants can easily defeat jurisdiction by complying after the plaintiff provides notice and before the plaintiff files suit. Without jurisdiction, courts cannot shift the litigation costs of preparing the suit and filing notice. Even if the defendant does not comply in time and the court takes jurisdiction, the EPCRA plaintiff after *Steel Co.* cannot recover investigation costs.

Excluding investigation costs will hurt environmental plaintiffs across statutes. The benefit of environmental legislation that empowers citizens to file suit is lost when the citizen plaintiff, not the polluting defendant, must pay for the cost of statute enforcement. *Steel Co.* also undermined the deterrent value of civil penalties, a holding that is likely to reverberate beyond the environmental context. Finally, the *Steel Co.* Court weakened citizen suits, and potentially civil rights suits, by ruling that attorneys' fees cannot be a form of redress.

Despite the fact that much of the utility of citizen suits has been foreclosed by the Supreme Court, some types of cases remain survivors thus far. Two provisions of the Clean Air Act—the authorization for past violations and the option to use penalties for local mitigation funds—suggest that Clean Air Act suits could surmount the combined *Lujan–Steel Co.* requirements. *Laidlaw* made it clear that plaintiffs can seek civil penalties in cases where they allege an ongoing violation at the time the suit is filed.

418. *See* Laveta Casdorph, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 546 (noting that under current standing doctrine courts rather than Congress define legal injuries).

419. *See supra* note 39.

The more flexible standard for mootness adopted in *Laidlaw* suggests that jurisdiction will not be ousted easily based on a defendant's postcomplaint compliance.

A number of questions remain unanswered. The definition of an ongoing violation has been unclear since *Gwaltney* and was not addressed by *Steel Co.* Congress should statutorily assign a number of past violations which constitute a presumptive risk of ongoing violations, rather than allow federal courts to continue to engage in costly fact-intensive determinations. The questions of information violations and citizen suits alleging widespread grievances also remain unresolved in light of the opposite outcomes of *Steel Co.* and *Akins.* In future cases, the Supreme Court should affirm the *Akins* reasoning.

The question left open by *Laidlaw*—whether courts can award litigation costs to plaintiffs as prevailing parties if the suit is dismissed for mootness—could be resolved by either the courts or Congress. In light of the legislative history that Congress intended for litigation costs to go to plaintiffs responsible for bringing about compliance even if the case were dismissed for compliance, courts should grant the litigation costs. Alternatively, Congress could change the statutory language to explicitly provide for the award of litigation costs in cases where the plaintiff's suit resulted in compliance by the defendant.

The Supreme Court has the power to either recognize or dismiss the ability of Congress to define injury and redress. In *Laidlaw* the Court made some progress toward recognizing that Congress can define injury and redress. Despite the fact that much of the Court's curbing of citizen suits was articulated as constitutionally required, substantial room remains for congressional action to build on *Laidlaw* and reverse the narrowing of jurisdiction. Congress could define a form of redress recognized by the Supreme Court, like bounties or local mitigation funds to address the burden imposed by *Steel Co.* Congress could also authorize by statute suits for past violations only, since *Gwaltney* was not facially a constitutionally-mandated decision. This strategy would have the advantage of removing the unnecessary layer of litigation regarding the sufficiency of a plaintiff's allegation of an ongoing violation. For example, clarifying that pre-suit investigation costs are within the scope of litigation costs could potentially overcome the redressability hurdle.

A counterintuitive result of the Supreme Court's aggressive march against environmental citizen suit standing is the textured applications of its holdings in the lower courts. This phenomena of dilution reflects the scattered and vacillating approach to standing questions in different areas.[420] In citizen suits, the sweeping changes anticipated after *Lujan*,

420. *See* Pierce, *supra* note 239, at 1743, 1766–67 ("[T]he applicable [standing] doctrines are so malleable, however, that it is impossible to avoid the inference that the Justices manipulated the doctrines to rationalize their politically preferred results. . . . Of course,

Gwaltney, and *Steel Co.* did not immediately come to pass. With notable exceptions, the majority of courts adopted limited interpretations. *Laidlaw* offers a supportive nod to the more expansive approaches of the lower courts and at least complicates the narrower approaches adopted by a minority of courts. Whether Congress or plaintiffs will attempt to revisit the viability of citizen suits in the aftermath of *Laidlaw* remains to be seen.

now that the Court has created the doctrine of constitutional standing out of whole cloth and has issued scores of opinions elaborating and expanding the doctrine, there is recent precedent to support virtually any conceivable version of standing law.").

APPENDIX

Application of Jurisdiction Doctrines To Select Citizen Suit Statutes

Statute	*Can Plaintiff Sue for Past Violations?*	*Type of Injury Plaintiff Must Allege*	*Remedy Plaintiff Must Seek*	*Degree of Continued Viability of Suit*
EPCRA	No, because of limits on redressability (*Steel Co.*)	Personal use of the information, but after *Akins* injury widespread in nature is okay	Injunctive relief (*Steel Co.*)	Very low—enormous incentive for defendant to wait until she receives notice of litigation and then file all papers before the suit is filed
CAA	Unclear—the Court has not considered the new language authorizing suit for repeat past violations	Personal use of the affected area (progeny of *Lujan*), including aesthetic and recreational injuries (*Laidlaw*)	If ongoing violations at time suit is filed, civil penalties are sufficient (*Laidlaw*); unclear how courts will treat suits for past violations if penalties payable to local mitigation projects are sought	Moderate to good—the CAA has the most expansive authorization and may be able to avoid the past violations bar
CWA	Not without a claim of continuing or ongoing violations (*Gwaltney*)	Personal use of the affected area (progeny of *Lujan*), including aesthetic and recreational injuries (*Laidlaw*)	Injunctive relief or civil penalties since the case will only be heard if the plaintiff alleges ongoing violations	Moderate—although the Clean Water Act remains easy to apply on the merits, the ongoing requirement is a hurdle
*ESA**	Not without a claim of continuing or ongoing violations (*Gwaltney*)	Direct contact with species; perhaps a higher standard than in suits against private defendants (*Lujan*)	A favorable decision—but it must have a likelihood of redressing the harm alleged	Moderate—the plaintiffs may have to make a higher showing of injury and redress than in other suits

* Action brought against administrator