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The Standing of Citizens to Enforce against Violations of Environmental Statutes in the United States

Friends of the Earth Incorporated v Laidlaw Environmental Services 120 S Ct 693
(2000)

(The full text of the judgment can be found at <http://supct.law.cornell.edu/supct/>)

Analysis by Jeffrey G. Miller, James A. Hopkins Professor of Law, Pace University School of Law, White Plains, New York

Introduction

Judicial actions by private citizens have played a critical role in the development and enforcement of federal environmental law in the United States over several decades. The courts' general receptivity to the standing of private environmental plaintiffs has made that role possible. A troika of Supreme Court decisions on standing in environmental cases authored by Scalia J over the last decade had eroded that general receptivity, casting doubt on the continued vitality of private actions in developing and implementing environmental law. The Court's recent decision in *Friends of the Earth Inc v Laidlaw Environmental Services* halts this erosion.

In *Laidlaw* the Court held that a plaintiff organisation whose members' aesthetic and recreational interests were injured by the defendant's discharge of mercury into the North Tyger River in Roebuck, North Carolina in violation of the terms of a permit issued pursuant to the Clean Water Act¹ (CWA), had standing under the CWA's citizen suit provision² to seek the assessment of civil penalties for the violations. It also held that the case had not become moot even though the defendant had achieved 'substantial compliance' before trial.

Laidlaw should make American environmentalists dance in the streets. It is the first case on standing under environmental statutes in years in which the Supreme Court has held that citizen plaintiffs have standing. It is the first of seven CWA citizen suit cases decided by the Court in which citizen plaintiffs have prevailed. And it is only the third of thirteen CWA cases decided by the Court since 1981 in which a position favourable to environmental interests has prevailed. Although *Laidlaw* does not entirely abandon the Court's earlier precedent on standing in environmental cases, it recasts them in a more favourable

¹ 33 USC 1251, 1342.

² 33 USC 1365.

light. It could mark a sea change in the Court's attitude toward standing, citizen suits and even environmental law.

To explain the significance of the decision, this analysis begins with discussions of the role of citizen litigation in American jurisprudence and the Court's recent opinions regarding standing in such cases.

A Short History of Private Environmental Enforcement

Private litigants have brought thousands of law suits over the last several decades challenging public and private actions as contrary to federal environmental law. Many of them were actions for judicial review of agency decisions challenged as contrary to statutory authority, a cause of action created by the Administrative Procedure Act (APA).³ Others were mandamus actions against the federal government under 'citizen suit' provisions common to federal environmental statutes. Still others were citizen suit actions to enforce against violations of those statutes by the regulated public. The Clean Water Act (CWA), for instance, authorises suit both against the Administrator of the Environmental Protection Agency (EPA) for failing to take an action required by the CWA and against polluters for violating the requirements of the CWA.⁴

Some of these actions against the EPA have had profound impact on the development of environmental law and policy. An example is the action commenced by the Natural Resources Defense Counsel (NRDC) against the Administrator of the EPA for failing to promulgate standards sufficient to protect public health from the discharge of toxic pollutants, required by the CWA as originally enacted in 1972. Clearly failing to fulfil its statutory mandate, the EPA had issued few of the required standards both because it lacked supporting health data and because it feared the standards would be extremely disruptive of industry. Rather than risk a court order to do what it considered both impossible and unwise, the EPA entered into a consent decree with NRDC, agreeing to concentrate its promulgation of the CWA's second round of technology-based pollution reduction requirements for industry on the control of toxic pollutants.⁵ This approach was ultimately embraced by Congress, which amended the CWA to incorporate it into Title 33 of the Code of Laws of the United States⁶ and to eliminate the EPA's mandatory duty to promulgate health based standards for toxic pollutants under this Title.⁷

Citizen suits against polluters who are in breach of regulatory requirements (the 'regulated public') have been effective supplements to government enforcement. Indeed, when the Reagan administration virtually stopped enforcing the environmental statutes, citizen enforcement replaced federal enforcement. Although these actions have not directly developed environmental policy, they have developed judicial interpretation of the statutes. For instance, citizen suits against violating industries established (long before the EPA even tried to establish) that once a court finds a defendant had violated the CWA, it must assess a civil penalty.⁸ Indeed, the ease of private enforcement of the CWA, with its permitting and self-reporting systems, in contrast with the difficulty of private enforcement of other pollution control statutes, helped to make manifest that the CWA's systems were more efficient and more easily enforced delivery systems than those employed by many other pollution control statutes. This, in turn, led to the adoption of the CWA's systems in the other statutes, such as the Clean Air Act.⁹

³ 5 USC 551, 702.

⁴ 33 USC 1265(a)(1) & (2).

⁵ *NRDC v Train*, 8 Env Rep Cas (BNA) 2121 (DDC 1976).

⁶ 33 USC 1311(b)(2).

⁷ 33 USC 1317. The action and its consequences are described in R. O'Leary, 'The Courts and the EPA: The Amazing "Flannery Decision"', 5 *Nat Res & Env* 18 (1990).

⁸ *Atlantic States Legal Foundation v Tyson Foods Inc*, 913 F 2d 1128 (11th Cir 1990).

⁹ 42 USC 7401, 7661-7661f.

The citizen suit section of the CWA is typical of such provisions in most federal environmental statutes.¹⁰ It authorises citizen enforcers to sue the EPA for failure to perform a mandatory duty and to sue members of the regulated public for failure to comply with the CWA. It bars suit, however, unless they first notify the EPA and, in suits against members of the regulated public, the violator and the state, of their intent to sue at least sixty days in advance of bringing suit. It also bars suit against a member of the regulated public if the EPA or the state is diligently prosecuting an action to require compliance in federal or state court. Another provision bars citizen suits for civil penalties under some circumstances if the EPA or a state have assessed administrative penalties.¹¹ It authorises the EPA to intervene in any citizen suit and requires plaintiffs to notify the EPA of a proposed settlement of a citizen suit, allowing the EPA to oppose judicial approval of settlements it deems inadequate. It authorises courts to issue injunctions requiring compliance and to assess civil penalties for violations. Finally, it authorises an award of attorneys fees to prevailing parties. The latter has been interpreted liberally for awards to prevailing plaintiffs and narrowly for awards to prevailing defendants.

Pre-*Laidlaw* Standing Doctrine

None of these private actions could be successful, of course, unless plaintiffs have standing to bring them. Standing, as a constitutional doctrine, rests on Article III of the Constitution, which limits the jurisdiction of federal courts to ‘case[s] or controvers[ies]’.¹² Historically this constitutional limitation has been interpreted to mean only ‘whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution’.¹³ Standing doctrine developed erratically, causing Douglas J to observe that ‘[g]eneralities about standing to sue are largely worthless as such’.¹⁴ The seminal standing decision in environmental law was *Sierra Club v Morton*, 405 US 150 (1972), in which the Supreme Court held that injury to aesthetic, conservation, and recreation interests, as well as to economic interests, could support standing to sue. Ironically, in that decision, the Court denied standing to the Sierra Club, because it sought standing on its own behalf rather than on behalf of its members. ‘Representational standing’ of environmental organisations to represent members who have standing has become a hallmark of private environmental litigation.

Appointments to the Court during the administrations of Presidents Reagan and Bush gave it a more conservative cast, resulting in more restrictive standing decisions. This new trend was signalled in a concurring opinion by Scalia J in *Gwaltney of Smitfield Ltd v Chesapeake Bay Foundation Inc.*¹⁵ In *Gwaltney* the Court interpreted the CWA’s citizen suit authority to sue persons ‘alleged to be in violation’ not to confer subject matter jurisdiction over violations which were ‘wholly past’ at the time the complaint was filed. *Gwaltney*, the defendant, also argued that plaintiffs were required to prove the existence of ongoing violations

¹⁰ 33 USC 1365.

¹¹ 33 USC 1319(g)(6).

¹² US Const Article III, s 2, cl 1.

¹³ *Flast v Cohen*, 392 US 83, 101 (1968).

¹⁴ *Association of Data Processing Service Organizations v Camp*, 397 US 150, 151 (1970).

¹⁵ 484 US 49 (1987).

before subject matter jurisdiction could attach. The majority rejected that contention, holding that good faith allegations of ongoing violations in the complaint were sufficient to invoke subject matter jurisdiction. Gwaltney argued this would allow plaintiffs to maintain suit by making good faith allegations to support standing, when they in fact lacked standing. The majority countered that defendants had the opportunity to contest standing at the summary judgment stage and the trial stage. At the summary judgment stage plaintiffs had to prove at least that there was a contested matter of fact as to standing and at the trial stage they had to prove standing. Finally, it posited mootness doctrine as a backstop to prevent continued litigation when there was no possibility of further violations, although it cautioned that the burden on the defendant to prove mootness was heavy. Scalia J, joined by Stevens and O'Connor JJ, commented in concurrence that the more important question was standing. They considered that if the defendant was in compliance at the time the complaint was filed, the plaintiffs could have suffered no remediable injury at that time, and therefore had no standing to bring the suit; the same facts that established the lack of subject matter jurisdiction established the lack of standing.

Writing the majority opinions in subsequent cases, Scalia J developed his view of standing as the Court's doctrine. In the first case, *Lujan v National Wildlife Federation*,¹⁶ the plaintiff challenged the wholesale reclassification of 1,250 tracts of federal land, making them available for mineral exploitation. The basis of its challenge was the Administrative Procedure Act (APA). The APA creates a cause of action for '[a] person suffering legal wrong ... or adversely affected or aggrieved by agency action' to seek judicial review.¹⁷ The issue considered by the Court was whether the plaintiff's members were injured by an agency action. That is not a constitutional standing issue as such, rather an issue of statutory interpretation. But the issue of whether the plaintiff's members were injured covers the same ground as standing. Scalia approached it as if it were a standing issue, and the four dissenters argued it as a standing issue. To establish that two of its members were injured, the plaintiff submitted affidavits alleging that they used land recreationally in the vicinity of two of the tracts opened for mineral exploitation and their use and enjoyment of the federal land was thereby injured. Neither in their affidavits nor in depositions did they offer proof that their recreational use and enjoyment extended to the tracts whose classification had been changed, that mineral exploitation would take place on the tracts, or that they had actually suffered or would suffer any loss of their recreational use or enjoyment. The majority found this did not amount to proof sufficient to establish injury at the summary judgment stage. Even if it did, it would do so only for the two tracts affected, not for the other 1,248 tracts. The decision was a close one: five to four, with a strong dissent on almost every point.

In the second case, *Lujan v Defenders of Wildlife*,¹⁸ the Court held that an environmental group lacked standing to challenge regulations under the Endangered Species Act¹⁹ exempting federal actions outside of the United States from the

¹⁶ 497 US 871 (1990).

¹⁷ 5 USC 702.

¹⁸ 504 US 555 (1992).

¹⁹ 16 USC 1531-44.

requirement that federal agencies consult with the Department of Interior before taking actions that might adversely affect endangered species. Scalia laid out a three pronged ‘irreducible minimum’ test for standing. First, the plaintiff must suffer an ‘injury in fact’; an injury to a legally protected interest that is concrete and actual or imminent, not conjectural or hypothetical. Second, the injury must be ‘fairly traceable’ to the complained of action. And third, the injury must be ‘redressable’; it must be likely, not just speculative, that the injury will be redressed by a favourable judicial decision. Moreover, plaintiffs had the burden at all stages of litigation to establish their standing. The Court found affidavits by two of the plaintiff’s members insufficient to establish the first prong. The affidavits averred that the members had viewed or tried to view endangered species in Egypt and Sri Lanka, wanted to return to do so again, and specific federally funded projects in those countries reduced their chances of seeing the endangered species in the absence of consultation with the Department of Interior. The Court found that a ‘some day’ desire to return was not sufficient to demonstrate a real or imminent injury. Seeking underpinnings for his view of standing, Scalia invoked a series of opinions denying standing to plaintiffs alleging injury as taxpayers to support their suits for various ‘good government’ causes of action. He commented that standing was almost automatic for a person at whom a government action was directed, and difficult for anyone else. Kennedy, Souter, and Stevens JJ filed concurring opinions, agreeing in the outcome but distancing themselves to various degrees from Scalia’s arguments. Blackmun J wrote a vigorous dissent, in which O’Conner J joined.

Finally, *Steel Company v Citizens for a Better Environment*²⁰ was a replay of *Gwaltney* in a Court with a different composition and under the citizen suit provision of a different statute. Two issues were before the Court: whether the statute conferred subject matter jurisdiction over wholly past violations and whether the plaintiffs had standing to sue for wholly past violations. The violations at issue were failures to file required reports of toxic chemical releases. The defendant filed all the reports after the plaintiffs gave notice of their intent to sue and before they filed their complaint. In *Gwaltney* the majority opinion had addressed the subject matter jurisdiction issue extensively and touched on the standing issue only to outline the differences in the plaintiff’s burden of establishing standing at different stages in the litigation. Scalia J’s dissent in *Gwaltney* contended that standing as well as subject matter jurisdiction must be addressed and that the plaintiffs had no standing to sue for wholly past violations because they could suffer no present injuries from them. In *Steel Company* Scalia, writing the majority opinion, vehemently argued that the ‘cases and controversies’ provision of the Constitution required courts to consider as a threshold issue whether the plaintiffs had standing and that the plaintiffs in the case had no standing.

The majority in *Steel Company* reiterated the three pronged test for standing from *Defenders of Wildlife*. It side-stepped the first prong, whether plaintiffs suffered an ‘injury in fact’ by the late filing of the toxic release reports. Instead, it concentrated on the third prong, redressability. It held that if plaintiffs were injured by the late filing, that injury was not redressable by judicial action. No

²⁰ 118 S Ct 1003 (1998).

remedy available under the statute would compensate plaintiffs for injuries caused by late reporting or eliminate any lingering effects from late reporting. In particular, the assessment of civil penalties for past violations would not redress the injury because they are payable to the US Treasury, not to the plaintiffs. And penalties would only vindicate the general rule of law, not redress plaintiffs' particular injuries. The impact of *Steel Company* is diluted by the fact that six of the nine justices found it necessary to write or join concurring opinions. Most of the attention of the concurring justices was devoted to whether standing or subject matter jurisdiction should be addressed first. O'Connor, Souter and Breyer JJ distanced themselves to varying degrees from Scalia's insistence that standing was always the threshold issue. Stevens J, in a concurring opinion joined by Souter and Ginsburg JJ, argued vehemently that there was no compelling reason that standing be addressed before subject matter jurisdiction; there was good reason to address the latter first in this case, and that the lack of subject matter jurisdiction in the case was dispositive. Although Stevens' opinion concurred in the outcome, the closest he got to standing was to criticise Scalia's preoccupation with redressability, which Stevens regarded as Scalia's latter-day supplement to standing doctrine.

FOE v Laidlaw

The Lower Court Decisions

In 1986 Laidlaw bought and thereafter operated a waste incinerator equipped with a wet scrubber for air pollution control. Laidlaw treated wastewater from the scrubber before discharging it. A CWA permit issued by the state to Laidlaw's predecessor and later reissued to Laidlaw established effluent limitations for the discharge. (CWA permits are issued by the EPA or, if the EPA has approved a state's permit programme as meeting the CWA's criteria, by the state.) The discharge repeatedly violated limitations on heavy metals, including mercury. Laidlaw experimented with and installed several control devices, eventually achieving compliance with all of the effluent limitations except for mercury. In the course of three successive permits, the state established changing but stringent mercury limitations: first 20 ppb, then 1.3 ppb, and finally 10 ppb. The 1.3 ppb limitation in particular was beyond achievement by demonstrated treatment systems and the trial court characterised it as 'draconian'. Laidlaw hired qualified consultants to help it achieve the limitation. They failed to do so. It had an opportunity under the permit to seek an upward modification of the 1.3 ppb limitation, but instead of seeking a modification, persevering in efforts to achieve compliance with the limitation. Laidlaw kept experimenting and ultimately did achieve substantial compliance in 1993. During a short part of this period, it ceased operating the facility as a means of compliance. Although Laidlaw persevered throughout in looking for solutions to its non-compliance, the trial court found that it did not take critical steps open to it in a timely fashion.

In 1992 the plaintiff notified Laidlaw of its intent to sue, as required by the citizen suit provision (42 USC 1365(b)(1)(A)). Laidlaw immediately requested the state to take judicial action against it, in an attempt to bar the citizen suit by 'diligent prosecution' of an action in court to require compliance under

1365(b)(1)(B). Laidlaw drafted a complaint for the state, paid the filing fee, and drafted a consent decree under which it agreed to pay a \$100,000 penalty to the state and to use 'every effort' to achieve compliance. The state cooperated, filing the complaint and entering the consent decree. The plaintiff thereafter filed suit for an injunction requiring compliance and for the assessment of civil penalties. Laidlaw immediately moved to dismiss the action as barred by the state court action. Not misled by Laidlaw's transparent ploy, the trial court dismissed the motion, finding the consent decree did not represent diligent prosecution.²¹ Laidlaw subsequently moved for summary judgment that the plaintiff had not presented evidence of an injury in fact to establish standing. After examining affidavits of the plaintiff's members and transcripts of their depositions, the court denied this motion, although it found the plaintiff prevailed only by the 'slimmest of margins'. After a trial on the merits in 1995, the court found Laidlaw had violated its permit's effluent limitations and reporting requirements hundreds of times and assessed a penalty of \$405,800.²² Its opinion in this regard is a detailed inquiry into many factors relevant to the appropriate size of a civil penalty in an environmental case. Part of the penalty calculation was based on the court's finding that the violations had caused no harm to the environment or public health and that Laidlaw had persevered in good faith to comply with technically difficult limitations. The court denied an injunction, based on its finding that Laidlaw had achieved substantial compliance with the permit, violating the mercury limit only 13 times between the filing of the complaint and trial.

The plaintiff organisation appealed the trial court's penalty assessment as inadequate because it did not recover the economic benefit of non-compliance. Laidlaw cross appealed, arguing that the plaintiff lacked standing because its members suffered no injury from the violations. Laidlaw based that argument on the trial court's finding that the violations caused no environmental or health harm. The Fourth Circuit Court of Appeals addressed neither of these issues. Rather, in an extremely short opinion it held that the case was moot because Laidlaw had achieved compliance.²³ The Fourth Circuit took cues from two recent decisions of the Court. The first, *Arizonians for Official English v Arizona*,²⁴ a unanimous opinion on mootness written by Ginsburg J, contained a footnote linking standing and mootness doctrines. It described mootness as 'the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)'.²⁵ The second cue, of course, was *Steel Company*, which reiterated the three elements of standing necessary at the commencement of an action and focused on the third element, redressability. Combining both cues, the Fourth Circuit held that all three of the elements of standing had to continue throughout the action if it was not to become moot. Once Laidlaw achieved compliance, there was no injury the trial court could redress, a fact underscored by the plaintiff's failure to appeal

²¹ *Friends of the Earth v Laidlaw Environmental Services (TOC) Inc*, 890 F Supp 470 (DSC 1995).

²² *Friends of the Earth v Laidlaw Environmental Services (TOC) Inc*, 956 F Supp 588 (DSC 1997).

²³ *Friends of the Earth v Laidlaw Environmental Services (TOC) Inc*, 149 F 3d 303 (4th Cir 1998).

²⁴ 520 US 43 (1997).

²⁵ 520 US at 68, fn 20, quoting *United States Parole Comm'n v Geraghty*, 445 US 388, 397 (1980), in turn quoting Monaghan, 'Constitutional Adjudication: The Who and When', 82 Yale LJ 1363, 1384 (1973).

the court's denial of an injunction. The plaintiff therefore failed the third prong of the test for mootness. The Fourth Circuit had held in earlier cases that the plaintiff's request for civil penalties was sufficient to prevent cases from becoming moot in similar circumstances. But it felt compelled by *Steel Company* to abandon its precedents and hold that where civil penalties did not redress any injury to the plaintiff's members and, lacking a redressable injury, the case was moot.

The Court's Decision

After the Fourth Circuit issued its opinion, the plaintiff petitioned the Supreme Court to accept certiorari. In the meantime Laidlaw closed, dismantled and permanently shut its incinerator and put it up for sale. The Court granted certiorari to resolve a split between the Fourth Circuit and four other circuits on the issue of whether compliance with a permit after commencement of litigation moots claims for civil penalties. The opinions in the other circuits were all rendered before *Steel Company*. Indeed, the Fourth Circuit's pre-*Steel Company* decisions were in accord with the other circuits' decisions. Ginsburg J, the newest appointment to the bench, wrote the opinion.

Standing

Although the Fourth Circuit had ruled only on the issue of mootness, the Court began its opinion by ruling that the plaintiff organisation had standing. It stated that it had an obligation to do so, since mootness was irrelevant if the plaintiff had no standing. Of course, the Court had no obligation to do so. It does not customarily address standing every time it overturns an appeals court's reversal of a plaintiff's victory. If standing was an issue, the Court easily could have remanded it to the Fourth Circuit for a decision on standing. A remand might not have promoted judicial economy, but the Court made no mention of judicial economy as a reason for deciding rather than remanding the standing issue. The Court's insistence on addressing standing in an appeal of a mootness decision suggests the Court was seeking an opportunity to change the restrictive gloss imposed on its standing doctrine by its recent opinions. Because the chief significance of the opinion is its treatment of standing rather than of mootness, this analysis will focus primarily on standing.

The Court began by reciting the by now familiar three pronged test for standing. Half of its discussion of standing focused on whether the plaintiff's members suffered an injury in fact. It summarised affidavits from six members. All basically asserted they lived near the affected river, had used the river or its banks in the past for recreational purposes, and would use the river or its banks presently and in the future for recreational purposes but for their concern with the pollutants Laidlaw discharged to the river. The Court concluded these were just the sorts of aesthetic and recreational injuries that support standing under *Sierra Club v Morton*. And it noted the continued vitality of *Sierra Club v Morton* from Scalia J's remarks in *Defenders of Wildlife* that interference with the desire to see or use wild animals, even for aesthetic purposes, was an injury in fact that could support standing. It contrasted the identification by the plaintiff's members

of specific harms in specific parts of a river affected by defendant's actions to the very general and conclusory averments of plaintiffs in *National Wildlife Federation*.

In his dissent Scalia J, joined as usual by Thomas J, argued that the trial court's finding that the violations caused no public health or environmental harm was tantamount to a finding of no injury in fact for standing purposes. The majority had two responses. First, it posited that a plaintiff is not required to prove environmental injury from permit violations to prevail on the merits, implying that it should not be required to prove more to establish standing than to prevail on the merits. While its premise is true, its conclusion is a bit of a non sequitur. Of course, Congress did not require a plaintiff to prove environmental damage to prevail on the merits. (The whole approach of the CWA in establishing water pollution control requirements was to switch from reliance on water quality to primary reliance on technological performance, because harm to water quality was too difficult to prove on a case-by-case basis.) But the Court, not Congress, developed standing doctrine and developed it based on constitutional, not practical considerations. And the Court could develop the doctrine to the point where a plaintiff had standing to enforce against only the small number of CWA violations which clearly harm both it and the environment. Indeed, that is precisely the direction that Scalia J was trying to lead the Court. The majority's second response was simply that the environment does not have to be injured for a plaintiff's members to be injured. Their reasonable perception was that Laidlaw's pollution kept them from using the river and its environs and was an injury in fact, even though it was proven later that the pollution caused no environmental or health danger.

The second half of the majority's standing discussion addressed Laidlaw's contention that plaintiffs never have standing to seek civil penalties because penalties paid to the Treasury do not redress private injury. The Court acknowledged that the inquiry is a proper one, for a plaintiff must have standing for each claim it pursues. In analysing whether it had standing to seek penalties, the majority relied on the common sense observation that penalties deter violations and may do so as effectively as injunctions. If penalties serve to deter continuance or recurrence of violations that injure a plaintiff's members, penalties redress their injuries. In response to Laidlaw's contention that *Steel Company* held plaintiffs had no standing to pursue penalties for past violations because they did not redress plaintiffs' injuries, the majority correctly replied that *Steel Company* held only plaintiffs had no standing to seek penalties for violations wholly past when the complaint was filed, and did not address whether they had standing to seek penalties for violations that continued when and after the complaint was filed. But while that was a correct statement of the narrow holding of *Steel Company*, it ignores the analysis of the redressability of civil penalties in that opinion. Scalia J, writing the majority opinion in *Steel Company*, had stated in the baldest terms that civil penalties paid to the Treasury did not and could not redress plaintiffs' private injuries. While he was aware of the deterrence argument, he rejected it out of hand and none of the separate concurring opinions in *Steel Company* suggested that penalties could redress private plaintiffs' injuries. The majority in *Laidlaw* simply repudiated the reasoning of Scalia's majority opinion in *Steel Company* that penalties could not redress private injury.

Dissenting in *Laidlaw*, Scalia elaborated his analysis in *Steel Company* that penalties are a public remedy that does not redress private injury. Indeed here he began to develop a constitutional argument that allowing private parties to sue for public remedies deprives the executive branch of its authority to make enforcement decisions, violating separation of powers principles. In a concurring opinion Kennedy J raised the same concern. Finally, Scalia argued that the deterrent effect of penalties is too speculative as a matter of law and fact to redress a private injury.

The Significance of the Opinion

Two aspects of the Court's opinion are striking. First, its tone treats citizen suits as a valued and legitimate form of litigation. This is in marked contrast to its earlier standing opinions authored by Scalia J, which treated citizen suits as a form of litigation with limited value and legitimacy. This change of tone sends positive signals to lower courts about the value of citizen suits and will impact their consideration of a whole range of issues related to them. Second, the Court focused its attention on standing, even though the case came to it on an issue of mootness. That suggests the Court finally understood where Scalia J was trying to lead it on standing and seized the opportunity to turn its back on his leadership. The earlier decisions contained many hints of dissatisfaction with his direction. In *Defenders of Wildlife* and *Steel Company*, the only members of the Court who were unequivocally behind Scalia's opinion were Chief Justice Rehnquist and Thomas J. All the rest either wrote or joined concurring opinions or dissented. The disenchantment of Stevens and O'Connor JJ with Scalia's approach is particularly striking, for they had joined him in the beginning in his concurrence in *Gwaltney*. A part of the colloquy before the Court in *Laidlaw* suggests the disenchantment may be both personal and doctrinal. *Laidlaw's* counsel responded to a statement by Scalia J, 'I'll agree with that, although I'm not sure I understand it.' Laughter. Stevens J interjected, 'We have learned not to do that.' More laughter.²⁶

Scalia's dissent in *Laidlaw* is further evidence that his long term objective has been to limit, almost to the point of elimination, citizen's use of the courts to challenge government actions or to enforce federal laws. For standing in citizen suits, he would require plaintiffs to suffer injuries sufficient to maintain traditional public or private nuisance actions. He would not concede standing for citizens to sue for civil penalties under any circumstances. Indeed, he rejects the underlying objective of citizen suit provisions to empower citizens as 'private attorneys general'. He regards this as a violation of separation of powers principles, at least for the assessment of penalties. His attitude toward citizen participation in government by way of lawsuit is well summarised by his candid remarks in *Defenders of Wildlife* that economic interests subject to governmental action would always have standing to challenge the action as more stringent than required by statute, but that members of the public would rarely have standing to challenge the same action as less stringent than required by the statute. When

²⁶ 1999 WL 955378, p 23.

hedged in by all of the restrictions he would raise, citizens would have very little role in environmental law litigation. And he would develop his restrictions as constitutional limitations, so that they could not be undone by another branch of the government. Although not known for eschewing hyperbole, Scalia J's bitter reaction to the Court's abandonment of his leadership on standing is palpable in the language he uses to describe the Court's opinion: 'watered-down, inexplicably, casual, a sham, cavalier, grave implications for democratic government, revolutionary, and uncritically.'

The most significant departure from the Court's earlier decisions is on the injury in fact requirement for standing. The Court makes it clear that the injury required is injury to the plaintiffs, not to the environment, and that the plaintiffs may be injured even if the environment is not injured. This follows from the proposition first enunciated in *Sierra Club v Morton* and frequently repeated thereafter that injuries to aesthetic and recreational interests are sufficient to support standing. Aesthetics, of course, are perceptions by people, not the environment. Recreation is an activity conducted by people, not the environment. Scalia would require both the environment and plaintiff's interest in it to be injured for standing. In *National Wildlife Federation* he asked whether any of the lands near those used by plaintiff's members had actually been converted to mining or would be converted to mining. In *Defenders of Wildlife* he asked whether federally funded projects had actually affected endangered species observed by plaintiff's members. And in *Steel Company* he wondered if plaintiff's members could suffer a cognisable 'informational' injury, although he did not address the question. And, of course, he makes it explicit in his dissent in *Laidlaw* that both plaintiff's members and the environment must be injured to support standing. His coupling of the two injuries had not gone unnoticed by the lower courts which increasingly asked plaintiffs to demonstrate injury to the environment by defendant's actions.²⁷ Proving injury to the environment from many violations of environmental statutes may be difficult or impossible, as exemplified by the lack of environmental harm from the discharge of mercury in this case, despite the highly toxic nature of mercury. Proving injury to the reasonable perceptions of the plaintiff's members, however, is relatively easy. Indeed, Scalia J states that it is as easy as good pleading. But it is more than just good pleading; according to the Court the injury to perceived values must be a reasonable result of the defendant's actions. The Court provides no guidance on what is reasonable, leaving that as an issue for further litigation in the lower courts. Moreover, the Court cited *National Wildlife Federation* and *Defenders of Wildlife* with approval and both found no injury to support standing.

It should be noted that the opinion does not abandon the three pronged test for standing developed by Scalia J. Although Stevens J earlier made a compelling argument that redressability is not part of the Court's traditional conception of standing, but a latter-day add-on by Scalia J, the Court retains redressability and merely applies it differently than Scalia would. Although Scalia's leadership on standing may have been shunned by the Court, the shadow of his earlier opinions and framework they established still remain.

²⁷ See *Public Interest Research Group of New Jersey v Powell Duffryn Terminals Inc*, 914 F 2d 64 (3rd Cir 1990).

In his concurrence to *Laidlaw*, Stevens J states that the trial court entered a valid judgment on penalties and that no post-judgment conduct by a defendant could render that judgment moot. Indeed, he notes that all courts of appeal considering the issue except the Fourth Circuit's opinion below, had held that post-complaint conduct by a defendant could not render moot a claim for civil penalties for violations that continued at the time the complaint was filed. But the Court's retention of redressability as a test for both standing and mootness appears to rule out second and perhaps even the first of these two possibilities.

Kennedy J's agreement with Scalia that the separation of powers argument is at least a real issue, also invites further litigation. That is surprising, for the Court has decided issues in many citizen suit cases in which the district courts had assessed penalties, including *Gwaltney*, without even hinting that the assessment of penalties raised a constitutional issue. Indeed, two decades ago the Court noted that civil penalties could be assessed in citizen suit cases.²⁸ In *Laidlaw* the Court commented that Scalia's 'grave implications for democratic government' observation was 'overdrawn'.²⁹ Since none of the justices joining the majority opinion joined Kennedy's concurrence, six of the nine justices apparently agree. The issue has been argued in and rejected by several lower courts. They concluded that the Court's separation of powers cases all precluded one branch of government from exercising powers entrusted by the Constitution to another branch. Since the citizen suit provisions do not give executive powers to the courts or the legislature, they do not violate separation of powers doctrine.³⁰ All of this suggests attempts to stifle citizen suits on separation of powers grounds will not be successful. But since Kennedy J often exercises a swing vote on the Court,³¹ his concurrence encourages further litigation on the issue and indicates that its outcome is not certain.

Laidlaw: Some Observations from the UK/EU

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The US Supreme Court's decision in *Laidlaw* raises a number of interesting points of comparison with the position in the UK and the EU. To a European observer, one of the most striking aspects of US law on standing is the explicit role played by judicial politics. 'Citizen suit' provisions—many of which were introduced by a Democrat Congress during the 1970s—have allowed citizen enforcement to circumvent the poor enforcement record of the regulatory agencies seen under

²⁸ *Middlesex County Sewerage Authority v National Sea Clammers Association*, 453 US 1, 14, n 25 (1981).

²⁹ 120 S Ct at 708, n 4.

³⁰ For a particularly well-reasoned opinion see *Atlantic States Legal Foundation Inc v Buffalo Envelope, a Division of American Envelope Co*, 823 F Supp 1065 (WDNY 1993). Contra, see W.H. Lewis Jr, 'Environmentalists' Authority to Sue Industry for Civil Penalties Is Unconstitutional under the Separation of Powers Doctrine', *Env LR* (April 1986).

³¹ R.J. Lazarus, 'Thirty Years of Environmental Protection Law in the Supreme Court; 17 *Pace Env rev* (1999) 1, 6-7.

certain Republican executives.¹ It is thus hardly surprising that from the late 1980s to the late 1990s, a predominantly conservative Supreme Court, led by Justice Scalia, chose to block such Congressional moves by holding that these provisions were in breach of the Constitution's rules on standing.² After all, poor enforcement is a form of deregulation—a policy much favoured by Republicans. However, it also comes as no surprise that *Laidlaw* saw a liberal Supreme Court seeking to fulfil an earlier Democrat Congressional mandate, even at a time when there is a Democrat executive: presidential elections are looming and the political colour of the executive may soon change.

UK environmental litigation can similarly be analysed in terms of judicial politics. During the 1980s, the English High Court was far from pro-environment in sympathy. Indeed, given the social background of many of the judges and their ascendance from the planning Bar, one would expect many of them to have shared the Conservative government's pro-development and deregulatory bias. Jonathan Golub has suggested that the English High Court's reluctance to make Article 177 (now 234 EC) references to the European Court of Justice (ECJ) during that period, could be explained as a desire by a conservative judiciary to protect British environmental policy from the risk of pro-environment judgments by the ECJ.³ Much the same might be said of the more restrictive High Court decisions on standing such as *Rose Theatre*⁴ and, more recently, *Garnett*⁵: in both cases, pro-developer planning decisions were protected by denying standing to citizen challengers.

However, there are difficulties in applying the judicial politics mode of analysis to English High Court decisions. And this stems from the fact that, unlike the US Supreme Court, English High Court actions produce individual judgments. Judicial politics thus turns on the leanings of the relevant judge and it is difficult to make generalisations about the High Court as a whole. Thus, one might compare the conservative decisions of Schiemann J in *Rose Theatre* and Popplewell J in *Garnett* with the more liberal decisions of Otton J in *Greenpeace*,⁶ and Sedley J in *Dixon*⁷—in both of which the applicants were granted standing.⁸ That said, it is interesting to observe that since the election of a Labour Government at the beginning of May 1997, there has now been an Article 234 reference from the High Court in an environmental case⁹ and there do not appear to have been any restrictive standing decisions. However, to conclude that this is because the more conservative judges in the High Court are happy to see Labour environmental policy being attacked would be too simplistic. There is little clear water separat-

¹ See e.g. Miller's note in this journal; A. Afilalo, 'How Far Francovich? Effective Judicial Protection and Associational Standing to Litigate Diffuse Interests in The European Union', Jean Monnet Working Paper 1/98, <http://www.law.harvard.edu/programs/JeanMonnet/papers/98/98-1-.html>; J.E. Bonine, 'Standing to Sue: The First Step In Access to Justice', <http://merlin.law.mercer.edu/elaw/standingtalk.html>.

² *Ibid.*

³ J. Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction Between National Courts and the European Court of Justice' (1996) 19 *West European Politics* 360.

⁴ *R v Secretary of State for the Environment ex parte Rose Theatre Co Ltd* [1990] 1 QB 504.

⁵ *R v North Somerset District Council ex parte Garnett* [1998] Env LR 91.

⁶ *R v Inspectorate of Pollution ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329.

⁷ *R v Somerset County Council ex parte Dixon* [1997] JPL 1030.

⁸ Schiemann, Otton and Sedley JJ are all now in the Court of Appeal (and thus are LJ).

⁹ Case C-293/97, *R v Secretary of State for the Environment ex parte Standley* [1999] 2 CMLR 902.

ing New Labour's environmental policy from the Conservative's and thus if judges have reacted in that way, it would appear to be more a matter of *general* political persuasion than one of dislike of a *particular* policy area.

In relation to the substantive law at the heart of the case, there are of course key differences between America on the one hand and England and Wales on the other. In America, there is a number of ways of impugning decisions of the environmental regulator (the Environmental Protection Agency), including judicial review under the general Administrative Procedure Act (APA) and citizen suits under specific statutory regimes such as the Clean Water Act. Many citizen suit provisions also authorise actions against the regulated for injunctions or *civil* penalties. There are two points worthy of note at this stage. First, other than tort actions, the public's right of redress against the regulated stops there. In particular, there is no right to bring *criminal* proceedings against polluters. And secondly, standing is necessary for both APA proceedings and citizen suits. In England and Wales in contrast, the public has a general power to bring private prosecutions under section 6(1) of the Prosecution of Offences Act 1985,¹⁰ subject to specific restrictions in particular environmental statutes.¹¹ And there are no standing requirements in relation to this power.¹²

In terms of the laws on standing themselves, the old, Scalia approach to standing has much in common with that adopted by the ECJ. In the *Greenpeace* case¹³ for example, the Advocate General appeared to suggest that—had they adduced sufficient evidence that they were affected by the decision to build the power stations—individual residents on the Canary Islands could have demonstrated the relevant 'individual concern' for the purposes of standing under Article 230 EC. In his view they had not produced enough such evidence to differentiate them from all others on the islands. The Court itself simply ruled that the applicants had failed to differentiate themselves. While it did not mention the evidence possibility, neither did it rule it out. Taken together, the Advocate General's Opinion and the Court's judgment look very much like Scalia's strict application of the US 'injury in fact' requirements.

Domestic laws on standing in England and Wales have, in general, been liberalised in recent years. In Scalia's dissent in *Laidlaw*, he states that 'the Court makes the injury in fact requirements a sham. If there are permit violations and a member of a plaintiff environmental organisation lives near the offending plant, it would be difficult not to satisfy today's lenient standard'. Much the same might be said of the English courts' current approach to the 'sufficient interest' test for standing. Those living in the areas where pollution licences or planning permissions are granted are likely to have little problem in standing terms.¹⁴ However,

¹⁰ Although the Director of Public Prosecutions is able to take over proceedings and may also discontinue them.

¹¹ For example, s 16 Water Resources Act 1991. See further C. Hilson, *Regulating Pollution: A UK and EC Perspective* (Oxford: Hart Publishing, 2000) p 161.

¹² Although there are in relation to another of the specific restrictions: under s 4(3) Salmon and Freshwater Fisheries Act 1975, in order to bring a private prosecution, a person must obtain a certificate from the Minister of Agriculture confirming that he has a 'material interest' in the waters affected.

¹³ Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) v Commission* [1998] ECR I-1651, [1998] 3 CMLR 1.

¹⁴ See e.g. *Greenpeace*, supra, n 6, *Dixon*, supra, n 7; cf *Garnett*, supra, n 5.

the question remains whether English law has become more liberal still. Is a connection with a place still necessary?² This author would suggest that it should not be: in many cases (particularly those involving transboundary pollution) the right of democratic self-determination for those in the relevant area should arguably be subject to the legitimate interest of outsiders.¹⁵ In other words, the constituency boundaries of environmental citizenship should be widely not narrowly drawn.

¹⁵ The recent High Court decision in *R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd* (unreported)—which involved an area of the North East Atlantic Ocean and in which standing was granted to Greenpeace with very little comment—thus offers no particular clues because there was obviously nobody living in the area whose rights to self-determination might have been affected.