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A Shift in Citizen Suit Standing Doctrine: *Friends of the Earth, Inc. v. Laidlaw Environmental Services*

Hudson P. Henry*

Citizen suits seeking to enforce environmental regulations have previously been of very little use to environmental group plaintiffs. The United States Supreme Court has traditionally interpreted constitutional standing requirements narrowly to deny such actions to most citizen suit plaintiffs. The Court's recent Laidlaw decision signifies a lowering of this bar. The decision is significant because it offers a somewhat broader definition of constitutional standing requirements and illustrates the Court's willingness to look to Congress' intent when authorizing citizen suit enforcement. In the wake of this decision, citizen suit plaintiffs should have an easier time achieving the standing that Congress intended.

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INTRODUCTION

Citizen suit standing for the private enforcement of environmental regulations has sparked much debate and controversy.\(^1\) Tension between the public rights and private law models of adjudication has led to inconsistency in court decisions applying standing doctrine, which is often described as incoherent and poorly administered.\(^2\) Traditional private law advocates frown on citizen enforcement of government regulations, while public law advocates see such enforcement as a valuable tool that Congress has every right to authorize.

An examination of decisions in past environmental citizen suits reveals a pattern of courts narrowing the standing requirements to preclude Congressionally approved citizen actions.\(^3\) A recent Supreme Court decision, however, signals a change in this trend and may move citizen suit standing doctrine closer to the public law model. In Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. (Laidlaw),\(^4\) the Supreme Court broadened the elements of its standing test, allowing citizens more access to enforce government regulations.

This Note first provides background on standing and describes the underlying complexity of the doctrine. Next, it examines the Laidlaw decision and analyzes Laidlaw's overall effect on standing. The Note concludes that the Court's decision in Laidlaw has clarified and broadened standing doctrine for


\(^2\) See Fletcher, supra note 1, at 221.


\(^4\) 528 U.S. 167 (2000).
citizen suit enforcement actions. Nonetheless, *Laidlaw* leaves some issues unresolved. Specifically, it remains to be seen where and how the private law-public rights model compromise will end and, moreover, what role separation of powers concerns will play in future court decisions.

I

BACKGROUND

A. Standing for Environmental Citizen Suits

Article III mandates that a court be presented with a "case or controversy" before it may exercise its judicial power. This requirement has gradually evolved into the requirement that a party bringing suit have standing in order to adjudicate an issue before the federal courts. Standing relates to the personal stake that a party has in the matter before the court; the requirement has come to be expressed in a well-established three-prong test. A plaintiff must show that: (1) he has suffered a concrete and particularized injury-in-fact that is actual or imminent; (2) the injury is traceable to the action of the defendant; and (3) it is likely, not just speculative, that the injury will be redressed by a favorable decision.

The origins of modern standing law date back to Justices Brandeis and Frankfurter in the first half of the twentieth century. These two Justices designed and used the doctrine "to shield politically accountable institutions from potential attacks

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5. This decision has prompted significant commentary. Thus, there are a variety of articles commenting on this case that should be reviewed in addition to this Note. See, e.g., Stephen Lanza, The Liberalization of Article III Standing: The Supreme Court's Ill-Considered Endorsement of Citizen Suits in Friends of the Earth v. Laidlaw Environmental Services, Inc., 52 ADMIN. L. REV. 1447 (2000); Joseph T. Phillips, Friends of the Earth v. Laidlaw Environmental Services, Inc.: Impact, Outcomes, and the Future Viability of Environmental Citizen Suits, 68 U. CIN. L. REV. 1281 (2000).


In the 1960s, as increasing awareness concerning civil rights arose, the Court began to recognize the potential viability and benefits of citizen suits. Nonetheless, Article III standing doctrine has gradually evolved to limit citizen suit standing.

B. The Complexity and Inconsistency of the Standing Doctrine

Although the Supreme Court has attempted to distinguish between cases and maintain a facade of consistency in standing doctrine, the decisions have led several commentators to describe the Court's modern standing doctrine as "incoherent" and "unpredictable." The Court has acted in a particularly inconsistent fashion in applying the injury-in-fact requirement. Even the seminal case in this area, Lujan v. Defenders of Wildlife (Lujan), directly contradicted prior precedent. In Lujan, involving a challenge to the Secretary of the Interior's decision not to review international projects under the Endangered Species Act (ESA), the Court held that the nonprofit plaintiff group had failed to show that any of its members were individually harmed with sufficient particularity or immediacy for standing purposes. Although two Defenders of Wildlife (DOW) members stated that they planned to view or study several potentially endangered species in the affected area in the future, the Court relied on their failure to make specific travel arrangements in denying plaintiffs' standing. The Court held that the alleged injuries were merely "generalized grievances" shared by the population at large, and therefore did not meet the Court's injury-in-fact
requirement. Just five years earlier, however, the Court had granted standing to a plaintiff group in Japan Whaling Ass'n v. American Cetacean Society, holding that "whale watching and studying of their members would be adversely affected by continued whale harvesting." Although both groups had claimed only a desire to view and study species adversely affected by government-funded projects, the Court denied standing in *Lujan*, applying a narrow injury-in-fact analysis.

The Court has also inconsistently applied its prudential ban on "generalized grievances." In *Lujan*, for example, Justice Scalia's majority opinion railed against the granting of standing for "generalized grievances," even in the face of Congressionally created citizen suit provisions. Prior to *Lujan*, however, the Court had granted standing to a group of law students demanding that an environmental impact statement precede a freight rate increase. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the plaintiffs alleged that higher rates would cause increased use of non-recyclable commodities, thereby creating an increase in the use of local natural resources, and thus injuring them. Despite this tenuous causal connection and arguably "generalized" grievance, the Court held that this injury might affect the group more specifically than those who did not use such resources and granted standing to sue. While their cause may have been worthy, the students' grievance was clearly far more generalized than the one later dismissed so easily in *Lujan*.

C. The Pattern of the Standing Doctrine

Despite the apparent incoherence of the Supreme Court's standing doctrine, cases from the past decade, in fact, reveal a
distinguishable pattern. Earlier cases demonstrate a narrowing of standing requirements to bar many citizen suits, but this trend has recently been offset by a relaxation of those requirements, thus allowing more claims. Lujan and Steel Co. v. Citizens for a Better Environment best exemplify the Court's use of very narrow interpretations of the injury-in-fact element to deny standing under citizen enforcement clauses.

As previously discussed, the Court in Lujan denied standing to a citizen group based on the existence or absence of an airline ticket. Similarly, in Steel Co., the Court applied a narrow interpretation of the redressability requirement to deny standing to a nonprofit citizens group suing under the Emergency Planning and Community Right-To-Know Act (EPCRA) for a manufacturing company's failure to make available required reports concerning toxic chemical use. The Court noted that the company had released the required documents prior to trial, and held that civil penalties, payable to the government, could not redress the harm caused by Steel Company's failure to comply with EPCRA.

Most importantly, Justice Scalia's majority opinions in both cases expressed a strong concern that citizen suit enforcement provisions may violate the separation of powers principle. If unchecked by Article III standing requirements, Justice Scalia argued, Congressional grants of enforcement authority would violate the Executive's power to execute the laws. If this line of

25. See Peter Manus, To a Candidate in Search of an Environmental Theme: Promote the Public Trust, 19 STAN. ENVTL. L.J. 315, 345 (2000).
28. See supra note 9 and accompanying text.
29. See Stephen G. Breyer, Et Al., Administrative Law and Regulatory Policy: Problems, Text, and Cases 916 (4th ed. 1999) ("If the plaintiffs in Lujan had a plane ticket to visit the places where the relevant species could be found, it seems generally agreed that the injury-in-fact requirement would have been satisfied.").
32. See id. at 107 ("[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated ... that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.").
34. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) ("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)).
reasoning prevails, Congress will be unable to provide agency oversight by authorizing citizen enforcement of federal regulations.

Notably, however, both *Lujan* and *Steel Company* feature concurring opinions challenging Justice Scalia’s argument on this point. Justice Kennedy’s concurring opinion in *Lujan* argues that Congress should have the right to define injuries that did not exist at common law. In a prescient article, Professor Cass Sunstein noted that Kennedy’s concurrence might indicate an upcoming debate over how far the Court will carry their added injury requirements above and beyond Congressionally defined injury. Justice Stevens’ concurring opinion in *Steel Co.* similarly asserted that civil penalties should be sufficient for standing in some cases because of their deterrent effect. Justice Stevens further argued that there is no reason why a citizen suit for penalties payable to the government would violate the Court’s separation of powers doctrine and invoke standing concerns, while the same suit for private damages would not. He suggested that if Defenders of Wildlife’s members had a past history of frequently visiting the endangered species, or had purchased airline tickets for that purpose, then their harm may have sufficed for injury-in-fact purposes.

The Court’s decision in *Federal Election Commission v. Akins* signaled a significant shift in the way it viewed citizen standing. In that case, the Court granted Akins and other voters standing to sue the Federal Election Commission (FEC) for dismissing their complaint concerning an organization’s failure to report campaign contribution data under the Federal Election Campaign Act (FECA). Rather than relying on the Court’s traditional standing test, the majority focused on what injury the statute intended to be sufficient for standing. Thus, the Court recognized that Congress has the authority to declare which

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35. See id. at 580 (Kennedy, J., concurring) (“In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”).
36. The Court’s recent decision in *Laidlaw* seems to support Professor Sunstein’s prediction. See Sunstein, *supra* note 1, at 236.
37. See *Steel Co.*, 523 U.S. at 127.
38. See id. at 130.
42. See *Akins*, 524 U.S. at 19-20.
concrete harms the courts must accept for standing purposes.\textsuperscript{43} Although the Court’s decisions in both \textit{Lujan} and \textit{Steel Co.} clearly limited the availability of citizen suits, the Court’s more recent holding in \textit{Akins} reversed this trend. The decision in \textit{Akins} signifies a lowering of the bar on statutory citizen suits and provides clarification of arguable inconsistencies in the application of this doctrine.\textsuperscript{44}

\section*{D. Tensions Between Public Rights and Private Law Models of Adjudication}

Standing doctrine has evolved as a tug-of-war between the competing litigation models of public and private law, and reaches its present state as an uncertain compromise between the two.\textsuperscript{45} The more traditional private law model views the court’s role as the adjudicator of individual rights and only allows access to the court when one party suffers a discreet injury at the hands of the other. A purely private law model, therefore, would not allow Congress to grant power to citizens in order to enforce government regulations; rather, it would require plaintiffs to show very specific harms, and it would require that their suit redress those harms.\textsuperscript{46} More conservative judges who favor this traditional litigation model tend to interpret Article III standing doctrine narrowly.\textsuperscript{47}

The majority of the Supreme Court rejects a purely private law model, with the notable exception of Justice Scalia, who advocates a near elimination of any private enforcement of agency regulations.\textsuperscript{48} Justice Scalia’s strong support for the private law model is apparent in his 1983 article, \textit{The Doctrine of Standing as an Essential Element of the Separation of Powers}.\textsuperscript{49} In this article, he argues that standing should be used to ensure that acts passed by the Legislature that lack the support or resources of the Executive for enforcement should not be enforced.\textsuperscript{50} Justice Scalia’s majority opinions in \textit{Defenders of

\begin{footnotesize}
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\item \textsuperscript{43} See \textit{id.} at 24-25.
\item \textsuperscript{44} See Farber, supra note 26, at 10,517; Fletcher, supra note 1, at 221; Pierce, supra note 1, at 1742.
\item \textsuperscript{45} See Farber, supra note 26, at 10,516.
\item \textsuperscript{46} See \textit{id.} at 10,517.
\item \textsuperscript{47} See \textit{id.}; see also Pierce, supra note 1, at 1759-60 (finding a strong statistical correlation between judges’ politics and their decisions concerning environmental suit standing).
\item \textsuperscript{48} See Farber, supra note 26, at 10,517.
\item \textsuperscript{49} Scalia, supra note 1.
\item \textsuperscript{50} See \textit{id.} at 896. But see Pierce, supra note 1, at 1774. (noting that Scalia’s proposal would further a policy goal opposite of the goal that motivated Brandeis and
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Wildlife and Steel Co., as well as his dissenting opinions in Akins and Laidlaw, showcase his devotion to this principle.

By contrast, the newer model of adjudication is the public law model. This model views the role of the court as a vindicator of public values. The public law model simply requires that common law, a statute, or the Constitution grant a cause of action to the plaintiff in order to find a sufficient basis for standing. Thus, if Congress includes a citizen suit provision in legislation, a plaintiff would not be required to separately meet the Court's Article III standing injury requirement.

Several respected legal scholars have advocated this model. Judge William Fletcher, for example, argues that if the court denies standing in cases where Congress has explicitly conferred standing upon citizens, the court acts improperly because it refuses to give effect to Congressional intent. In addition, Professor Sunstein suggests that Congressional authorization of a cause of action is sufficient to confer standing. Nonetheless, the public law model has not garnered wholehearted support in the Supreme Court. An examination of the Laidlaw decision highlights tensions between the public and private law models, and reveals that the Court is becoming more tolerant of public law ideals without relinquishing the traditional private law standards for adjudication.

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51. See Farber, supra note 26, at 10,518.
52. See id. at 10,517.
53. See id.
54. See id. (stating that the rationale is simple: a cause of action constitutes a legal interest and deprivation of that interest causes a cognizable injury, so if Congress creates a cause of action then all requirements of injury-in-fact should be satisfied).
55. See Fletcher, supra note 1, at 253-54.
56. See Sunstein, supra note 1, at 236 ("[A]n injury in fact is neither a necessary nor a sufficient condition for standing. Indeed, the notion of injury in fact is a form of Lochner-style substantive due process. It assumes that there can be a factual inquiry into 'injury' independent of evaluation and of legal conventions. There can be no such law-free inquiry... Despite the holding of Lujan, Congress should be permitted to grant standing to citizens.").
STATEMENT OF THE CASE

A. The Facts and the Lower Court Findings

Laidlaw Environmental Services owned a wastewater treatment facility on the North Tyger River in South Carolina.\(^5\) Laidlaw obtained the required National Pollutant Discharge Elimination System (NPDES) permit from the South Carolina Department of Health and the Environment (DHEC).\(^6\) After Laidlaw allegedly discharged mercury 489 times between 1987 and 1995 in violation of its NPDES permit,\(^7\) Friends of the Earth and other environmental groups (referred to collectively as FOE) gave the required sixty-day notice of intent to file suit for numerous alleged violations of Laidlaw's NPDES permit.\(^8\) Before the District Court could issue an opinion, Laidlaw violated its discharge permit thirteen more times and committed thirteen monitoring and ten reporting violations.\(^9\)

In response to FOE's sixty-day notice, Laidlaw immediately requested that DHEC file suit to displace the citizen action.\(^10\) DHEC agreed and Laidlaw's own attorney drafted the complaint for the agency.\(^11\) On the last day of the sixty-day notice period, however, DHEC and Laidlaw settled their "suit" for $100,000 in fines and an agreement by Laidlaw to make "every effort" to comply with its NPDES obligations.\(^12\) Finding this settlement unsatisfactory, FOE filed suit in District Court.\(^13\)

Immediately, Laidlaw moved for summary judgment on the ground that FOE failed to demonstrate an injury-in-fact

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57. Laidlaw purchased a facility in Roebuck, South Carolina that included a wastewater treatment facility. See Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs., 528 U.S. 167 (2000).
59. See Laidlaw, 528 U.S. at 176.
60. 33 U.S.C. § 1365(a) sets forth the procedures under the CWA for filing a citizen suit.
61. See Laidlaw, 528 U.S. at 178.
62. See id. at 176. Pursuant to 33 U.S.C. § 1365(b)(1)(B), a citizen suit cannot be filed if, within 60 days after filing the notice, the Administrator files a civil or criminal action seeking compliance from the alleged violator. The court recognized that Laidlaw's sole reason for requesting that DHEC file suit was to "bar FOE's proposed citizen suit." Id.
63. See id. at 176-77.
64. See id. at 177.
65. The District Court found that this suit was not diligently prosecuted, and was only filed to displace the pending citizen suit. See id. at 178 n.1.
sufficient to confer Article III standing. The District Court denied Laidlaw's motion "by the very slimmest of margins," and fined the company $405,800 in civil penalties. Finding that Laidlaw had received over one million dollars of economic benefit from these violations, the court noted the judgment's "total deterrent effect." Nevertheless, because the court found Laidlaw to be in compliance with its permit obligations by the end of the trial, the court denied injunctive relief. Both parties appealed the judgment.

The Court of Appeals for the Fourth Circuit reversed the District Court decision, finding that the case was moot. The Court of Appeals explained that the elements of Article III standing must persist throughout every stage of review in order to avoid mootness. Using this standard, the Court of Appeals found that FOE failed to meet the redressability prong of the standing test in light of Steel Co.'s holding that civil penalties cannot redress a private citizen's injury. Following this decision, FOE petitioned for a writ of certiorari in the Supreme Court; the Supreme Court granted the writ. After the Court of Appeals issued its decision, but prior to the grant of certiorari, Laidlaw permanently closed its North Tyger facility.

B. The Supreme Court Decision

1. Majority Opinion

On January 12, 2000, the Supreme Court reversed the Fourth Circuit in a landmark 7-2 decision authored by Justice Ginsburg. In the most important aspect of the majority opinion, the Court broadened the injury-in-fact analysis to find that FOE did have standing to bring a citizen suit against Laidlaw.

66. Id. at 177.
67. See id. (quoting the District Court).
68. See id. at 168.
69. See id. at 179 (quoting transcript record of District Court hearing).
70. See id.
71. See 149 F.3d 303 (4th Cir. 1998).
72. See id. at 306.
73. See Laidlaw, 528 U.S. at 179 (noting that civil penalties for past violations cannot support standing redressability requirements).
75. Id.
76. See Laidlaw, 528 U.S. at 179 (noting that civil penalties for past violations cannot support standing redressability requirements).
77. Id. at 180-83. The Court also briefly examined the mootness issue. The majority held that the Fourth Circuit erred in finding the case moot, explaining that a
Justice Ginsburg noted that the lower court found that Laidlaw's discharges "did not result in any health risk or environmental harm," but that "the relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." FOE specifically alleged that Laidlaw's discharges caused several of its members to refrain from engaging in recreational use of the river or from buying property along it. The Court reaffirmed that the lessening of aesthetic and recreational values of an area can constitute a valid injury-in-fact for Article III purposes and held that FOE's members had suffered a sufficiently concrete injury-in-fact.

The Laidlaw majority also relaxed Article III's redressability prong by marginalizing the Court's previous opinion in Steel Co. The Court held that Steel Co. only barred citizen suits for civil penalties in cases where the alleged wrongful behavior had abated prior to the filing of the suit. In Laidlaw, by contrast, Justice Ginsburg reasoned that civil penalties payable to the government could address the plaintiffs' injuries by deterring defendant's voluntary cessation of statutory violations does not moot a case unless that defendant shows it is absolutely clear that the behavior cannot be reasonably expected to recur. See id. at 189-94; see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66-67 (1987); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968). Because Laidlaw had not given up its NPDES permit or proven that violations could not reasonably be expected to recur, the majority held that this was an issue for the lower court on remand. See Laidlaw, 528 U.S. at 194. Justice Stevens in his concurrence expressed concern at the prospect of the plant closure mooting the lower court's holding on remand. He argued that post-judgment conduct should never invalidate that judgment. Id. at 196.

An NPDES permit holder can violate that permit's restrictions while not causing sufficient pollution damage to exceed EPA water quality standards.

One FOE member, Kenneth Lee Curtis, averred that he lived near the facility and occasionally drove over the river. Curtis stated that he would like to "fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility." See id. at 181-83. Other plaintiff group members attested to similar concerns. See id. CLEAN member Gail Lee averred that her home near Laidlaw's facility "had a lower value than similar homes located further from the facility, and that she believed the pollutant discharges accounted for some of the discrepancy," See id.

See Manus, supra note 25, at 350 (noting that the Court used Scalia's narrow factual construction technique against him to alter the law in Steel Co.).
similar future injuries. Because the Court had previously held that citizens lack standing when violations have ceased before the complaint is filed, its decision in *Laidlaw* effectively marginalized *Steel Co.*'s ban on civil penalties.

In *Laidlaw*, as it did in *Akins*, the Court looked to Congressional intent for guidance on the standing issue. The majority emphasized the Congressional intent to deter future harm in allowing CWA citizen suits. In *Laidlaw*, the Court found that civil penalties under the CWA were intended in part to deter future violations. *Ginsburg* distinguished *Steel Co.* by emphasizing that there the violations abated before the case ever came to trial, and thus, the decision never reached the issue of penalties for ongoing violations that could continue if undeterred. In contrast, *Laidlaw*’s violations continued during the district court proceedings. Utilizing this distinction, Justice Ginsburg effectively marginalized *Steel Co.*’s ban on civil penalties for citizen suits, finding such a ban unnecessary because the Court had previously held that citizen suit plaintiffs already lack standing when violations have ceased before the complaint is filed.

In a short but ominous concurring opinion, Justice Kennedy raised the issue of separation of powers. He noted the absence of any debate over the separation of powers implications of allowing private litigants to sue for public fines and asserted that these matters should be addressed in a later case.

2. Dissent

Justice Scalia delivered a scathing dissent. He first took issue with the majority’s conversion of the injury-in-fact requirement into what he termed “a sham.” Utilizing his

84. *See Laidlaw*, 528 U.S. at 185-86.
86. *See Laidlaw*, 528 U.S. at 185.
87. *See id.* at 185-86; *see also Michael P. Healy, Standing in Environmental Citizen Suits: Laidlaw's Clarification of the Injury-in-Fact and Redressability Requirements*, 30 ENVTL. L. REP. 10,455, 10,466 (2000) (noting that the Court's acknowledgement of the relevance of Congressional intent further strengthens and legitimizes the reasoning in *Akins*).
88. *See Laidlaw*, 528 U.S. at 188.
89. *See supra* note 61 and accompanying text.
91. *See Laidlaw*, 528 U.S. at 197 (noting that “difficult and fundamental” questions are raised by such delegations of Executive power).
92. *See id.* at 198 (joined by Justice Thomas).
93. *Id.* at 201.
reasoning in *Lujan*, Justice Scalia argued that the plaintiffs' alleged injuries amounted to nothing but vague and frivolous allegations because they had not proven a pattern of using the river, and because there was no proof of harm to the environment. Justice Scalia additionally questioned whether FOE's alleged injuries could be redressed. Citing *Steel Co.* for the principle that public penalties cannot redress the injury of citizen suit plaintiffs for past violations, Justice Scalia argued that the Court's opinion concerning redressability was in error for three reasons. Justice Scalia asserted that allowing public penalties for citizen suits contravened precedent, that the deterrent effect of such penalties was speculative, and that the Court's holding violates principles of separation of powers.

The dissent relied heavily on a 1973 decision, *Linda R.S. v. Richard D.*, in which the Court denied standing to a woman who sued to force a Texas District Attorney to bring criminal charges against a father for delinquent child support payments. The *Linda R.S.* Court denied standing based on the inability of public criminal sanctions to redress the plaintiff's injuries. Justice Scalia suggested that, "precisely the same situation exists here." Moreover, despite the majority's reasoning that "a defendant once hit in its pocketbook will surely think twice before polluting again," the dissent argued that the deterrent effect of the criminal penalties in *Linda R.S.* was far less speculative than the deterrent effect of *Laidlaw*'s civil penalties.

Finally, although the Executive branch supported FOE's action throughout the process, Justice Scalia suggested that the majority's decision took enforcement power out of the hands

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95. See *Laidlaw*, 528 U.S. at 199-200 (arguing that a lack of harm to the environment should equal a lack of harm to the plaintiffs).
96. See id. at 202 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998)).
97. See id.
99. See *Laidlaw*, 528 U.S. at 203.
100. See *Linda R.S.*, 410 U.S. at 617-18.
101. See *Laidlaw*, 528 U.S. at 204. But see id. at 188 n.4 (providing the majority's response, which argues that *Linda R.S.* is distinguishable by the special status of criminal prosecutions, and by the fact that incarcerating the father and reducing his earning power would be very unlikely to redress the plaintiff's lack of child support).
102. See id. at 186.
103. See id. at 208. But see supra note 101 (majority response to this argument).
104. See id. at 188 n.4 (noting that the Justice Department had submitted amicus briefs supporting FOE in the District Court, the Court of Appeals, and the Supreme Court).
of the Executive, in violation of the Constitution. Justice Scalia also rejected the argument that the citizen suit provision itself allows the Executive to foreclose such suits by diligently undertaking its own actions, arguing instead that plaintiff groups have too much bargaining power and can turn the threat of national penalties into funding for private environmental projects.

III
ANALYSIS

A. Laidlaw's Effect on Standing

Laidlaw signals a continuation of the Court's discomfort with Justice Scalia's purely private law model of litigation. The Laidlaw decision, coupled with the Court's earlier holding in Akins, nudges the Court's treatment of citizen suit standing substantially closer to the public law model. The Court significantly relaxed its injury-in-fact requirement by shifting the inquiry from an exclusive focus on the plaintiff to a more open examination of the plaintiff's relationship with the environment. Laidlaw's analysis of Article III standing requirements, combined with its inclusion of Congressional intent in the analysis, signifies the Court's willingness to recognize a wider variety of cognizable harms and remedies.

This broadening of the Court's standing doctrine will lead to fewer narrow factual distinctions and therefore to more overall consistency in the doctrine's application. In addition, the broader recognition of cognizable injuries will allow many more legitimate and valuable environmental citizen suit plaintiffs to survive the

105. See id. at 209; see also U.S. CONST. art. II, § 2.
106. See Laidlaw, 528 U.S. at 209-10 (citing 33 U.S.C. § 1365(b) (2000)).
107. See id. at 210.
108. See Manus, supra note 25, at 350-51 (observing that Laidlaw may represent the Court's backlash against Scalia's unilateral control over the issue of environmental standing in recent years).
109. See Farber, supra note 26, at 10,517-18 (noting that this may move litigation closer to the public law model).
110. See id. at 10,519.
111. This wider recognition of cognizable harms and deference to congressional grants of private enforcement authority signifies the shift to a broader compromise between the traditional private law model of adjudication and the public law model the Court has previously resisted. See supra notes 45-56 and accompanying text.
112. See supra notes 15-24 and accompanying text.
injury-in-fact prong of the standing test.\textsuperscript{113} This is important because courts using the standing doctrine to block statutory citizen suits may prevent Congress from utilizing citizen suits to enforce government regulations when executive agencies lack the resources or political will to properly carry out environmental regulatory laws. This is a dramatic shift from the intention of Justices Brandeis and Frankfurter who "certainly did not intend to create a weapon that politically unaccountable judges could use to render statutes ineffective."\textsuperscript{114}

The Fourth Circuit's recent en banc reconsideration of \textit{Friends of the Earth v. Gaston Copper Recycling Corp.}\textsuperscript{115} illustrates the extent to which the \textit{Laidlaw} shift in injury analysis impacts environmental plaintiffs.\textsuperscript{116} In \textit{Gaston}, an FOE member owned a 67 acre lake four miles downstream from defendant's copper recycling facility. The state found the same toxic PCBs in the plaintiff's lake as those discharged from the defendant's plant, in violation of the facility's NPDES permit.\textsuperscript{117} The Fourth Circuit initially found that FOE had failed to meet the injury-in-fact requirement for Article III standing even though one member had stopped fishing and swimming in his lake for fear of harm from PCB's that had accumulated in the sediment.\textsuperscript{118}

After \textit{Laidlaw}, however, the court reheard the case en banc and reversed its prior decision.\textsuperscript{119} The court explicitly cited \textit{Laidlaw}, stating that the Court "made it clear that such interests may be vindicated in the federal courts."\textsuperscript{120} The court also held that standing should be granted to satisfy Congressional intent to enforce higher water quality standards under the Clean Water Act.\textsuperscript{121} In \textit{Gaston}, Judge Niemeyer issued a concurring opinion, correctly concluding that, "\textit{Laidlaw} represents a sea change in

\begin{itemize}
\item \textsuperscript{113} See Farber, \textit{supra} note 26, at 10,522 ("\textit{Laidlaw}... is a welcome sign that the long string of restrictive environmental standing decisions may be coming to an end. It is particularly welcome in its clarification that 'injury-in-fact' is a contextual question, requiring not only a classification of different forms of damages but a consideration of harm to the plaintiff's relationship with the environment.").
\item \textsuperscript{114} Pierce, \textit{supra} note 1, at 1767-68.
\item \textsuperscript{115} 204 F.3d 149 (4th Cir. 2000) (en banc).
\item \textsuperscript{116} See Johnston, \textit{supra} note 1, at 10,323.
\item \textsuperscript{117} See \textit{Gaston}, 204 F.3d at 158.
\item \textsuperscript{118} See \textit{id.} at 152-53.
\item \textsuperscript{119} See \textit{id.} at 153.
\item \textsuperscript{120} \textit{Id.} at 154.
\item \textsuperscript{121} See \textit{id.} at 163.
\end{itemize}
constitutional standing principles."\textsuperscript{122} \textit{Laidlaw} specifically serves as an admonition to the lower courts not to use narrow definitions of injury-in-fact and redressability to deny standing to plaintiffs suing under citizen suit provisions.

\textbf{B. Issues Left Unresolved After Laidlaw}

\textbf{1. Compromise Between Private and Public Law Standards}

While \textit{Laidlaw}'s holding is likely to permit more citizen plaintiffs to bring their cases to trial, the Court's standing doctrine still amounts to a compromise between the private and public law models of litigation. Although \textit{Laidlaw} demonstrates the Court's willingness to give more deference to Congressionally mandated causes of action and to recognize wider definitions of both injury-in-fact and redressability, thus softening the formerly rigid private law model of adjudication, the Court is not about to give up certain elements of the private law model.

Specifically, none of the Justices on the Supreme Court seem ready to allow Congress to authorize uninjured citizens to bring lawsuits enforcing government regulations. In \textit{Laidlaw}, Justice Ginsburg stated, "to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury-in-fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."\textsuperscript{123} Permitting lawsuits by uninjured parties purely for enforcement purposes would be a dramatic shift from the long-standing, private law legal tradition.

Although \textit{Laidlaw} represents movement towards a public law model, it also represents compromise between competing concerns about the adequacy of representation\textsuperscript{124} and the need for enforcement in the absence of agency will or resources. Proponents of the private law model argue that a redressable injury to the plaintiff is necessary to ensure that both sides of the legal issue receive adequate and zealous legal representation.\textsuperscript{125} Such concerns must, however, be balanced against the need to enforce regulations in the absence of agency will or resources. When, for example, executive agencies lack the

\textsuperscript{122} See id. at 164 (arguing that before \textit{Laidlaw} he would have upheld the judgment, and disagreeing with the majority that this case could be distinguished as doctrinally consistent with prior Article III standing).


\textsuperscript{124} See Farber, supra note 26, at 10,518.

\textsuperscript{125} See id.
political will or resources to properly carry out enforcement of regulations, such citizen actions are the only remaining avenue of legal enforcement. The Court has determined that Congress should be given deference in deciding what harms are sufficient for Article III standing, but the existence of those harms must be proven in the case at hand. Because of this compromise, the continued existence of competing policy goals, differing political backgrounds, and the sea of confusing standing precedent may once again lead to inconsistent application of this complex doctrine.

Nonetheless, the shift toward a public law model represents good news for environmental group plaintiffs. Previously, such plaintiffs had very little chance of achieving standing without irrefutable, narrowly defined injuries, even if their harm was Congressionally approved under the citizen suit statute in question. Now, in the wake of *Laidlaw*, environmental citizen suit plaintiffs will be much less likely to be turned away because of narrow interpretations of Article III's injury-in-fact requirement.

2. The Separation of Powers Debate

Justice Steven's concurrence in *Steel Co.*, Justice Kennedy's concurrence in *Laidlaw*, and Justice Scalia's dissent in *Laidlaw* foreshadow an upcoming constitutional debate concerning whether citizen suits interfere with the Executive's ability to execute the law under Article II. Proponents of the private law model argue that Congressional grants of citizen suit power violate such authority by reducing the Executive's ability to decide how and when laws are executed. The opposition, however, asserts that Congress has the power to pass laws defining injuries that the courts must acknowledge.

Recent Supreme Court decisions favor some deference to Congressional intent when determining a plaintiff's standing.

127. *Cf.* Farber, *supra* note 26, at 10,520-21. (arguing that this compromise will lead to inconsistent and unprincipled application).
130. *See id.* at 209-10.
131. *See* U.S. CONST. art. II, § 3.
132. *See supra* notes 95, 96 and accompanying text.
under Article III. The Court in both *Laidlaw* and *Akins*, for example, deferred to Congress in defining what harms and redress are sufficient to grant citizen suit standing. The *Akins* Court declared that the "injury at issue here . . . is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of its constitutional power to authorize its vindication in the federal courts." When determining that civil penalties could suffice under the redressability prong, the Court emphasized the Congressional intent to deter future violations of the CWA in providing for citizen suits. These recent decisions indicate that future debate over the intersection of citizen suit standing and the separation of powers doctrine will likely be decided in favor of such a compromise between the public and private law models of adjudication. Thus, future decision regarding the separation of powers doctrine may well be made in favor of citizen suit plaintiffs.

**CONCLUSION**

*Laidlaw* represents a change in the Court's treatment of Article III standing for citizen suits. With a broader interpretation of cognizable injury and redressability, citizen suit plaintiffs will have an easier time achieving standing, as Congress intended. *Laidlaw* offers a broader interpretation of the injury-in-fact and redressability showings necessary to establish standing. This will discourage courts from using insignificant factual distinctions to determine plaintiffs' Article III standing. This movement away from historically narrow interpretations of standing also increases the consistency with which courts administer the doctrine.

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134. *See Laidlaw*, 528 U.S. at 185; *Akins*, 524 U.S. at 24-25.
137. It is of great significance that a 7-2 majority decided *Laidlaw*.
138. For a detailed discussion of why the Court should allow Congressional grants of enforcement power to citizens, see Sunstein, *supra* note 1, at 212-14 (arguing that if Article II imposes a duty on the President to enforce the law, then the failure of an executive agency to enforce a statute is a constitutional violation, and the citizen suit provisions merely aid the Executive in fulfilling its constitutional duty). But see Manus, *supra* note 25, at 351 ("That debate, if it emerges, could significantly undercut the effectiveness of environmental watchdogs. Thus, although *Laidlaw* may be heartening to environmentalists . . . it would be premature to cast the decision as inviolate precedent or as an end to the obstacles encountered by environmental plaintiffs over the past decades.").
Although the continuing compromise between private and public law models of standing and separation of powers issues remain sources of uncertainty, *Laidlaw* signifies a much more predictable and progressive citizen suit standing doctrine. After years of marginal usefulness, environmental citizen suits have been given new life.