AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Judicial Power/Constitutional Litigation

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Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000)

In 1972, Congress enacted the Clean Water Act, which included a provision for the issuance of National Pollution Discharge Elimination System (NPDES) permits that would impose pollution discharge limits and monitoring requirements on polluters. The statute also authorized citizen suits by anyone "having an interest which is or may be adversely affected" to force compliance with the permits. Sixty days before such suits are filed, however, plaintiffs must file a notice of the violation. Any civil penalties awarded in such a citizen suit would be paid to the federal government, but plaintiffs could win an injunction and attorney fees.

In 1986, Laidlaw Environmental Services bought a hazardous waste incinerator in South Carolina and received a NPDES permit regulating its discharge of treated water into a nearby river. Laidlaw was frequently out of compliance with the permit, however, and in 1992 the environmental activist group Friends of the Earth (FOE) sent notice of intention to sue. Laidlaw then asked South Carolina's Department of Health and Environmental Control (DHEC) to file suit seeking enforcement of the permit, and within the 60-day window initiated by the FOE notification, DHEC and Laidlaw reached a settlement regarding its past violations. When FOE filed suit in federal district court, Laidlaw moved to have it dismissed on the grounds that members of FOE had not suffered any injuries in fact from the permit violation and that the settlement with DHEC had already remedied the violation.

The trial court allowed the suit to proceed but imposed a relatively small civil penalty for the permit violation. FOE appealed the calculation of the penalty, and Laidlaw appealed the refusal of the district court to dismiss the suit. The circuit court ruled that the case had become moot during the course of the litigation because any alteration of the civil penalty would generate no further benefit to FOE. At that point, Laidlaw closed the incinerator plant. FOE appealed to the U.S. Supreme Court. In a 7–2 decision, the Supreme Court reversed the circuit court. The majority concluded that FOE had adequate standing to sue and to continue their suit even as to the civil penalty and that the case had not become moot through Laidlaw's subsequent compliance with the permit.

JUSTICE GINSBURG delivered the opinion of the Court,

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In *Lujan v. Defenders of Wildlife* (1992), we held that, 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; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

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These sworn statements, as the District Court determined, adequately documented injury in fact. We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use

the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity.

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. . . Here, in contrast [to *Los Angeles v. Lyons* (1983)], it is undisputed that Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed. Under *Lyons*, then, the only "subjective" issue here is "the reasonableness of [the] fear" that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. Unlike the dissent, we see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact.

Laidlaw argues next that even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Here the asserted defect is not injury but redressability. Civil penalties offer no redress to private plaintiffs, Laidlaw argues, because they are paid to the government, and therefore a citizen plaintiff can never have standing to seek them.

Laidlaw is right to insist that a plaintiff must demonstrate standing separately for each form of relief sought. But it is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties.

We have recognized on numerous occasions that "all civil penalties have some deterrent effect." . . . More specifically, Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect. . . .

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.

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We recognize that there may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing. The fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case. . . .

. . . *Steel Co. v. Citizens for Better Environment* (1998) established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit. We specifically noted in that case that there was no allegation in the complaint of any continuing or imminent violation, and that no basis for such an allegation appeared to exist. . . . In short, *Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.

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The only conceivable basis for a finding of mootness in this case is Laidlaw's voluntary conduct—either its achievement by August 1992 of substantial compliance with its NPDES permit or its more recent shutdown of the Roebuck facility. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." . . . In accordance with this principle, the standard we have announced for determining whether a case has been

mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." . . .

The Court of Appeals justified its mootness disposition by reference to *Steel Co.*, which held that citizen plaintiffs lack standing to seek civil penalties for wholly past violations. In relying on *Steel Co.*, the Court of Appeals confused mootness with standing. The confusion is understandable, given this Court's repeated statements that the doctrine of mootness can be described 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)." . . .

Careful reflection on the long-recognized exceptions to mootness, however, reveals that the description of mootness as "standing set in a time frame" is not comprehensive. As just noted, a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. By contrast, in a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the "threatened injury [is] certainly impending." Thus, in *Lyons*, as already noted, we held that a plaintiff lacked initial standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat arising from the policy. Elsewhere in the opinion, however, we noted that a citywide moratorium on police chokeholds—an action that surely diminished the already slim likelihood that any particular individual would be choked by police—would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent. The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.

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Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal. This argument from sunk costs[5] does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died. . . . But the argument surely highlights an important difference between the two doctrines.

. . . The effect of both Laidlaw's compliance and the facility closure on the prospect of future violations is a disputed factual matter. FOE points out, for example—and Laidlaw does not appear to contest—that Laidlaw retains its NPDES permit. These issues have not been aired in the lower courts; they remain open for consideration on remand.

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Reversed.

JUSTICE STEVENS, concurring.

. . . The District Court entered a valid judgment requiring respondent to pay a civil penalty of $405,800 to the United States. No post-judgment conduct of respondent could retroactively invalidate that judgment. A record of voluntary post-judgment compliance that would justify a decision that injunctive relief is unnecessary, or even a decision that any claim for injunctive relief is now moot, would not warrant vacation of the valid money judgment.

. . . As the Courts of Appeals (other than the court below) have uniformly concluded, a polluter's voluntary post-complaint cessation of an alleged violation will not moot a citizen-suit claim for civil penalties even if it is sufficient to moot a related claim for injunctive or declaratory relief. This conclusion

is consistent with the structure of the Clean Water Act, which attaches liability for civil penalties at the time a permit violation occurs. . . . It is also consistent with the character of civil penalties, which, for purposes of mootness analysis, should be equated with punitive damages rather than with injunctive or declaratory relief. No one contends that a defendant's post-complaint conduct could moot a claim for punitive damages; civil penalties should be treated the same way.

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JUSTICE KENNEDY, concurring.

Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. The questions presented in the petition for certiorari did not identify these issues with particularity; and neither the Court of Appeals in deciding the case nor the parties in their briefing before this Court devoted specific attention to the subject. In my view these matters are best reserved for a later case. With this observation, I join the opinion of the Court.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

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Plaintiffs, as the parties invoking federal jurisdiction, have the burden of proof and persuasion as to the existence of standing. The plaintiffs in this case fell far short of carrying their burden of demonstrating injury in fact. The Court cites affiants' testimony asserting that their enjoyment of the North Tyger River has been diminished due to "concern" that the water was polluted, and that they "believed" that Laidlaw's mercury exceedances had reduced the value of their homes. These averments alone cannot carry the plaintiffs' burden of demonstrating that they have suffered a "concrete and particularized" injury. . . .

Typically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him. This route to injury is barred in the present case, however, since the District Court concluded after considering all the evidence that there had been "no demonstrated proof of harm to the environment," that the "permit violations at issue in this citizen suit did not result in any health risk or environmental harm." . . .

The Court finds these conclusions unproblematic for standing, because "the relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." This statement is correct, as far as it goes. We have certainly held that a demonstration of harm to the environment is not *enough* to satisfy the injury-in-fact requirement unless the plaintiff can demonstrate how he personally was harmed. In the normal course, however, a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs. While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury. Ongoing "concerns" about the environment are not enough, for "it is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff 's subjective apprehensions." . . .

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. . . By accepting plaintiffs' vague, contradictory, and unsubstantiated allegations of "concern" about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham. If there are permit violations, and a member of a plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today's lenient standard.

The Court's treatment of the redressability requirement—which would have been unnecessary if it resolved the injury-in-fact question correctly—is equally cavalier. As discussed above, petitioners allege ongoing injury consisting of diminished enjoyment of the affected waterways and decreased property values. They allege that these injuries are caused by Laidlaw's continuing permit violations. But the remedy petitioners seek is neither recompense for their injuries nor an injunction against future violations. Instead, the remedy is a statutorily specified "penalty" for past violations, payable entirely to the United States Treasury. Only last Term, we held that such penalties do not redress any injury a citizen plaintiff has suffered from past violations. *Steel Co. v. Citizens for a Better Environment* (1998). The Court nonetheless finds the redressability requirement satisfied here, distinguishing *Steel Co*. on the ground that in this case the petitioners allege ongoing violations; payment of the penalties, it says, will remedy petitioners' injury by deterring future violations by Laidlaw. . . .

That holding has no precedent in our jurisprudence, and takes this Court beyond the "cases and controversies" that Article III of the Constitution has entrusted to its resolution. Even if it were appropriate, moreover, to allow Article III's remediation requirement to be satisfied by the indirect private consequences of a public penalty, those consequences are entirely too speculative in the present case. The new standing law that the Court makes—like all expansions of standing beyond the traditional constitutional limits—has grave implications for democratic governance. . . .

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The Court's opinion reads as though the only purpose and effect of the redressability requirement is to assure that the plaintiff receive *some* of the benefit of the relief that a court orders. That is not so. If it were, a federal tort plaintiff fearing repetition of the injury could ask for tort damages to be paid, not only to himself but to other victims as well, on the theory that those damages would have at least some deterrent effect beneficial to him. Such a suit is preposterous because the "remediation" that is the traditional business of Anglo-American courts is relief specifically tailored to the plaintiff 's injury, and not *any* sort of relief that has some incidental benefit to the plaintiff. Just as a "generalized grievance" that affects the entire citizenry cannot satisfy the injury-in-fact requirement even though it aggrieves the plaintiff along with everyone else, so also a generalized remedy that deters all future unlawful activity against all persons cannot satisfy the remediation requirement, even though it deters (among other things) repetition of this particular unlawful activity against these particular plaintiffs.

. . . In seeking to overturn that tradition by giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an "undifferentiated public interest" into an "individual right" vindicable in the courts. . . . A claim of particularized future injury has today been made the vehicle for pursuing generalized penalties for past violations, and a threshold showing of injury in fact has become a lever that will move the world.

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The Court cites the District Court's conclusion that the penalties imposed, along with anticipated fee awards, provided "adequate deterrence." There is absolutely no reason to believe, however, that this meant "deterrence adequate to prevent an injury to these plaintiffs that would otherwise occur." The statute does not even *mention* deterrence in general (much less deterrence of future harm to the particular plaintiff) as one of the elements that the court should consider in fixing the amount of the penalty. . . .

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The Court points out that we have previously said "'all civil penalties have some deterrent effect.'" That is unquestionably true: As a general matter, polluters as a class are deterred from violating discharge limits by the *availability* of civil penalties. However, none of the cases the Court cites focused on the deterrent effect of a single *imposition* of penalties on a particular lawbreaker. Even less did they focus on the question whether that particularized deterrent effect (if any) was enough to redress the injury of a citizen plaintiff in the sense required by Article III. They all involved penalties pursued by the government, not by citizens. . . .

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In sum, if this case is, as the Court suggests, within the central core of "deterrence" standing, it is impossible to imagine what the "outer limits" could possibly be. The Court's expressed reluctance to define those "outer limits" serves only to disguise the fact that it has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests.

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By permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA. Where, as is often the case, the plaintiff is a national association, it has significant discretion in choosing enforcement targets. Once the association is aware of a reported violation, it need not look long for an injured member, at least under the theory of injury the Court applies today. And once the target is chosen, the suit goes forward without meaningful public control. The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing. Thus is a public fine diverted to a private interest.

To be sure, the EPA may foreclose the citizen suit by itself bringing suit. This allows public authorities to avoid private enforcement only by accepting private direction as to when enforcement should be undertaken—which is no less constitutionally bizarre. Elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed. This is the predictable and inevitable consequence of the Court's allowing the use of public remedies for private wrongs.

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. . . I am troubled by the Court's too-hasty retreat from our characterization of mootness as "the doctrine of standing set in a time frame." We have repeatedly recognized that what is required for litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." A Court may not proceed to hear an action if, subsequent to its initiation, the dispute loses "its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." . . . Because the requirement of a continuing case or controversy derives from the Constitution, it may not be ignored when inconvenient, or, as the Court suggests, to save "sunk costs." . . .

. . . [T]he fact that we do not find cases moot when the challenged conduct is "capable of repetition, yet evading review" does not demonstrate that the requirements for mootness and for standing differ. "Where the conduct has ceased for the time being but there is a demonstrated probability that it will recur, a real-life controversy between parties with a personal stake in the outcome continues to exist."

Part of the confusion in the Court's discussion is engendered by the fact that it compares standing, on the one hand, with mootness *based on voluntary cessation*, on the other hand. The required showing that it is "absolutely clear" that the conduct "could not reasonably be expected to recur" is *not* the threshold showing required for mootness, but the heightened showing required in a particular category of cases where we have sensibly concluded that there is reason to be skeptical that cessation of violation means cessation of live controversy. For claims of mootness based on changes in circumstances other than voluntary cessation, the showing we have required is less taxing, and the inquiry is indeed properly characterized as one of "'standing set in a time frame.'" . . .

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