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Steel Company v. Citizens for a Better Environment

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INTRODUCTION

On March 4, 1998, the Supreme Court again narrowed standing to sue in environmental citizen suits, holding that the plaintiff in *Steel Company v. Citizens for a Better Environment*[1] had no standing under Article III to sue solely for past violations of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).[2] The case has since been cited in numerous federal opinions for the implications[3] of this holding[4] for standing

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1. 523 U.S. 83, 118 S. Ct. 1003 (1998) (Scalia, J.).

2. 42 U.S.C. §§ 11001-11050 (1994); *see also infra* notes 17-24 and accompanying text.

3. *Steel Company* is viewed as the new statement of standing law, replacing *Lujan* as the standard reference for standing doctrine in recent cases involving standing. A number of these standing cases involve environmental law. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 149 F.3d 303, 306 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999); Sierra Club v. Glickman, 156 F.3d 606, 613, 619 (5th Cir. 1998); National Solid Waste Mgmt. Ass'n v. Williams, 146 F.3d 595, 598 (8th Cir. 1998); ONRC Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1140 (9th Cir. 1998); Loggerhead Turtle v. County Council, 148 F.3d 1231, 1254 (11th Cir. 1998); NRDC v. Pena, 147 F.3d 1012, 1022, 1025 (D.C. Cir. 1998); Dubois v. USDA, 20 F. Supp. 2d 263, 266-68 (D.N.H. 1998); NRDC v. Southwest Marine, 28 F. Supp. 2d 584, 585-86 (S.D. Cal. 1998).

4. *See Steel Co.*, 118 S. Ct. at 1020. The Court also found that the use of "hypothetical jurisdiction" by the federal courts is impermissible under Article III of the Constitution. *See id.* at 1012-16. This view has been cited in a number of cases as well. *See infra* notes 83-89 and accompanying text.

doctrine. The *Steel Company* Court reiterated the familiar tripartite standing test: (1) the plaintiff must have suffered "injury-in-fact"; (2) the plaintiff's injury must be "fairly traceable" to the actions of the defendant; and (3) the relief requested in the suit must redress the plaintiff's injury.[5] Focusing on the third prong, redressability, the Court held that civil penalties payable to the U.S. Treasury cannot redress a citizen group's injury caused by past violations of EPCRA when the plaintiff has not alleged continuing or possible future violations.[6]

While *Steel Company* flows predictably from recent standing jurisprudence,[7] it only exacerbates existing problems with the standing framework established over the last quarter century. First, the decision itself needlessly complicates Article III doctrine.[8] The lower courts have had extensive trouble determining the boundaries of the *Steel Company* holding.[9]

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5. *See Steel Co.*, 118 S. Ct. at 1016-17 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).

6. *See id.* at 1018.

7. *See, e.g., Lujan*, 504 U.S. at 571 (plurality opinion) (finding that plaintiffs lacked standing because the relief requested had only an "entirely conjectural" possibility of redressing plaintiffs' injury); Renne v. Geary, 501 U.S. 312, 326-27 (1991) (suggesting in dicta that plaintiffs' challenge to only one of two laws causing the alleged injury precluded remedy, as the other law would continue the alleged harm).

8. In this Casenote, I do not discuss the merits of the tripartite test (*i.e.*, whether Article III should be read to require a plaintiff to show injury-in-fact, causation, and redressability). Numerous cogent criticisms of standing doctrine show that the three-part test lacks a historical basis, *see, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 827 (1969); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Government*, 40 STAN. L. REV. 1371, 1418-25 (1988), and that it cloaks in technical doctrine what are actually normative decisions about the proper scope of government action, *see generally* William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

9. Recent cases involving environmental citizen suits have extended *Steel Company* almost indiscriminately to dismiss civil penalties under a variety of environmental statutes. In its decision on a case argued the day after *Steel Company* was decided, the Fourth Circuit summarily vacated (with little to no analysis) a district court ruling in favor of the plaintiff environmental organization on the grounds that the case was moot under *Steel Company*, even though the case involved the Clean Water Act instead of EPCRA and involved substantially different facts than those in *Steel Company*. *See Laidlaw*, 149 F.3d at 306-07; *see also* Dubois v. USDA, 20 F. Supp. 2d 263 (D.N.H. 1998) (same); San Francisco BayKeeper v. Cargill, No. 96-02161 (N.D. Cal. Nov. 19, 1998) (partial grant of summary judgment) (finding plaintiff lacked standing to sue for civil penalties). In contrast, some of the lower courts have read *Steel Company* extremely narrowly. *See, e.g.*, NRDC v. Southwest Marine, 39 F. Supp. 2d 1235, 1237-38 (S.D. Cal. 1999); San Francisco BayKeeper v. Vallejo Sanitation and Flood Control District, No. CIV-S-96-1554, 1999 U.S. Dist. LEXIS 2211 (E.D. Cal. Mar. 1, 1999); Local Envtl. Awareness Dev. Group v. Exide Corp., No. CIV-96-3030, 1999 WL 124473 (E.D. Pa. Feb. 19, 1999). The Supreme Court granted certiorari in *Laidlaw* in March 1999. 119 S. Ct. 1111.

While new Supreme Court cases inevitably cause readjustment in the lower courts, *Steel Company* has resulted in more than readjustment.[10]

Second, the *Steel Company* Court overreaches its power in the name of restraint. Since *Allen v. Wright*, the central purpose of standing doctrine has been to limit the powers of the federal courts.[11] In the same vein, the Court must avoid a constitutional question if the case may be resolved without reaching the Constitution.[12] The imperatives of these two doctrines conflict in *Steel Company*. As Justice Stevens argues in his concurrence, the majority in *Steel Company* avoided any inquiry into whether Congress intended to create the cause of action pleaded by the plaintiffs.[13] If Congress did not intend to create such a cause of

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10. The impending Supreme Court decision in *Laidlaw* should make clear whether the Court approves of the broad interpretations of *Steel Company* made by the lower courts.

11. 468 U.S. 737, 750-52 (1984) (O'Connor, J.); *see also, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992) (Scalia, J.); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473-74 (1982) (Rehnquist, J.); United States v. Richardson, 418 U.S. 166, 179 (1974) (Burger, C.J.); *id.* at 188-92 (Powell, J., concurring). Academic commentaries have also emphasized the separation of powers aspect of standing doctrine. *See* Richard H. Fallon, Jr., *On Justiciability, Remedies, and Public Law Litigations: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 16 (1984); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

While I agree that Article III imposes separation of powers limits on the judicial branch, I am unconvinced that standing doctrine provides a workable means of observing those limits. Such questions are beyond the scope of this Casenote. I instead ask whether *Steel Company* fulfills the separation of powers concerns that the Court itself invokes to justify its decision. For one criticism of the connection between standing doctrine and separation of powers, see Jonathan Poisner, *Environmental Values and Judicial Review after* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991).

12. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). *Ashwander* states that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Id.* at 347.

13. Justice Stevens would have the Court dismiss the case because EPCRA does not allow suits for past violations. The immediate criticism is, of course, that such a dismissal would be on the merits and would forestall any possibility of suits for past violations under EPCRA. On this argument, the Court would have exercised more power by taking Justice Stevens' approach. Given the effect of *Steel Company*'s standing ruling on suits under numerous different environmental statutes and for both past and ongoing violations, however, Justice Stevens' approach appears the more restrained.

One can also argue that, had a majority of the Court decided to reach the statutory question, it would have rejected Justice Stevens' analysis of the statute and agreed with the Seventh Circuit's holding below that EPCRA did create a cause of action for past violations. Presumably Justices O'Connor and Breyer would have taken this approach to EPCRA because both reject the idea that the Court can *never*

action, the Court need not reach the standing question; it can dismiss under the statute. In addressing standing, the Court advised Congress.[14] As Justice Scalia himself points out in *Steel Company*, advisory opinions have been "disapproved by this Court from the beginning."[15] Thus, the Court's approach has the same problems it tries to avoid, highlighting the "intricate interrelat[ionship]"[16] between the questions of statutory jurisdiction and Article III standing.

In this Casenote, I first outline the procedural history of *Steel Company* and the structure and content of the Court's decision. I then argue that *Steel Company* is a decision with unfortunate implications for environmental and constitutional law. However, because plaintiffs must craft their litigation to avoid or defeat motions to dismiss for lack of standing under *Steel Company*, I conclude with some practical suggestions.

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answer the merits before addressing jurisdiction as long as the same result obtains. If so, the Court would presumably have gone on to address the issue of Article III standing and would probably have reached the same conclusion it did here. As discussed later, this Casenote is concerned with the path the Court took in reaching its destination. Had the Court first asked whether Congress meant to confer a cause of action on the plaintiff, found that it did, and then asked whether the plaintiff had Article III standing, the result would be a *non*-advisory opinion. One could argue that it is logically impossible to interpret a statute and then to find that the plaintiff has no standing to have the statute interpreted. But if the standing inquiry would affect numerous statutes (as this one has), it is preferable to avoid reaching that question until one is certain it must be answered. *See infra* Part III.B.

14. Judge (then-Professor) Fletcher has argued that the Court's typical injury-in-fact analysis disguises a normative assessment of whether a plaintiff should have the right to sue, thus trumping legislative determinations of what constitutes injury. *See* Fletcher, *supra* note 8, at 231. The *Steel Company* analysis of redressability similarly imposes on Congress a normative assessment of what constitutes a remedy, even though the question was not clearly necessary to the result in the case.

Judge Fletcher describes Supreme Court jurisprudence regarding injury-in-fact as tantamount to substantive due process: "For the Court to limit the power of Congress to create statutory rights enforceable by certain groups of people— to limit, in other words, the power of Congress to create standing— is to limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against." *Id.* at 233. He has argued that the Constitution would be best served by scrapping the three-pronged test applied in cases such as *Lujan* and *Steel Company* in favor of a doctrine that recognizes the power of Congress to confer standing on any persons it wishes, subject only to the limitation that the duty such persons sue to enforce is a duty that Congress may legitimately create. *See id.* at 223-24; *see also* Christopher J. Sprigman, Comment, *Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis*, 59 U. CHI. L. REV. 1645, 1646 (1992) (commenting on the de novo review of congressional findings of redressability and causation by one wing of the D.C. Circuit).

15. *Steel Co.*, 118 S. Ct. at 1016.

16. *Id.* at 1027 (Stevens, J., concurring).

I
BACKGROUND

A. *The Emergency Planning and Community Right-to-Know Act*

In the wake of the 1984 Union Carbide disaster in Bhopal, India, Congress passed the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA)[17] to make information about hazardous and toxic chemicals more readily available to the public.[18] EPCRA requires users of listed chemicals to file annual forms reporting the use of such chemicals.[19] Under its citizen suit provision, "any person" may bring suit "on his own behalf" against an alleged violator to compel the violator to file the mandated inventory and toxic chemical release forms.[20] The federal district courts have exclusive jurisdiction over citizen suits under EPCRA.[21] Like many environmental statutes with citizen suit provisions,[22] EPCRA requires a potential plaintiff to

17. 42 U.S.C. §§ 11001-11050 (1994).

18. *See* Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1238 (1996), *vacated*, 523 U.S. 83, 118 S. Ct. 1003 (1998); *see also* H.R. CONF. REP. NO. 99-962, at 281 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3374.

19. EPCRA requires that emergency and hazardous chemical inventory forms be filed about each chemical for which a material safety data sheet must be kept under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-667 (1994), and associated regulations. *See* 42 U.S.C. §§ 11021(a)(2)(A)(i), 11021(a)(2)(B), 11022(a)(1), 11022(c) (1994). The inventory form must include an estimate of the maximum and average amounts of such chemicals present during the year and the general location of such chemicals, and may, at the request of state or local planning committees, include additional information regarding storage and precise location of chemicals. *See* 42 U.S.C. § 11022(d) (1994). EPCRA further requires that toxic chemical release forms be filed for all chemicals listed in "Toxic Chemicals Subject to Section 313 of the Emergency Planning and Community Right-to-Know Act," Committee Print Number 99-169, Senate Committee on Environment and Public Works, or any revision of that list made by the Administrator of the Environmental Protection Agency. *See* 42 U.S.C. § 11023(c), (d) (1994). The toxic chemical release form must include information about the general way in which the chemical is generated or used, the estimated maximum amount of the chemical present at any time during the year, the method of waste treatment or disposal, an estimate of the efficiency of such treatment or disposal, and the total amount of the chemical entering each environmental medium per year. *See* 42 U.S.C. § 11023(g)(1) (1994).

20. 42 U.S.C. § 11046(a)(1) (1994).

21. "Any action under subsection (a) of this section against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred." *Id.* § 11046(b)(1). Section 11046(b)(2) allows suit in the district court for the District of Columbia for suits brought against the EPA.

22. *See, e.g.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. § 797(b)(5) (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a) (1994); Clean Water Act, 33 U.S.C. § 1365 (1994); Solid Waste Disposal Act, 42 U.S.C. § 6972 (1984); Clean Air Act, 42 U.S.C. § 7604 (1994); Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124(a) (1994).

give sixty-day notice of violation to the alleged violator, to the state in which the violation is alleged to have occurred, and to the Administrator of the U.S. Environmental Protection Agency (EPA).[23] No suit may be filed prior to the end of the sixty days, and no suit may be filed if the Administrator takes civil or administrative action against the violator.[24]

B. Steel Company *in the Lower Courts*

In 1995, Citizens for a Better Environment (CBE), a Chicago environmental organization, gave notice of violation both to The Steel Company, a steel pickling[25] operation, and to state and federal administrators.[26] CBE claimed that The Steel Company had failed since 1988 to file the reports required by EPCRA.[27] The company had indeed not filed the required reports; it did, however, file them before the end of the sixty-day notice period.[28] Once the sixty days had passed and EPA had made clear that it planned to take no action against The Steel Company, CBE filed suit in the District Court for the Northern District of Illinois for the company's past violations of EPCRA.[29]

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23. *See* 42 U.S.C. § 11046(d)(1) (1994).

24. *See id.* § 11046(d), (e). EPCRA does not provide any exceptions to this requirement. *But cf.* Clean Air Act, 42 U.S.C. § 7604(b) (1994) (allowing suits immediately after notice is given for certain violations of the statute); Clean Water Act, 33 U.S.C. § 1365(b) (1994) (same); Solid Waste Disposal Act, 42 U.S.C. § 6972(b)(1)(A)(iii) (1994) (same).

25. "[S]teel pickling . . . is a finishing operation that removes scale and rust from steel coils . . . . Steel coils are first unwound and then pulled through a series of sealed tanks containing diluted hydrochloric acid or 'pickle liquor.' . . . Over 95 percent of The Steel Company's waste hydrochloric acid and waste rinse water is either recycled off-site or treated on-site." Brief for the Petitioner, 1997 WL 221790, at *3-4, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S. Ct. 1003 (1998) (No. 96-643). Hydrochloric acid is "an extremely hazardous toxic chemical. . . . Between 1988 and 1995, petitioner . . . released 130,618 pounds of hydrochloric acid into the air." Brief for the Respondent, 1997 WL 348462, at *4, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S. Ct. 1003 (1998) (No. 96-643) (citations omitted).

26. *See Steel Co.*, 118 S. Ct. at 1009.

27. *See id.* EPCRA required that initial material safety data sheets be filed in late 1987 or early 1988, *see* 42 U.S.C. § 11021(d) (1994) (the date varies according to OSHA's reporting deadlines), and that the initial emergency and hazardous inventory forms be filed on or before March 1, 1988, *see id.* § 11022(a)(2). Thus, The Steel Company had never filed EPCRA reports.

28. *See id.*

29. *See* Citizens for a Better Env't v. Steel Company, No. 95-C-4534, 1995 WL 758122, at *1 (N.D. Ill. Dec. 21, 1995). In its brief opposing The Steel Company's motion to dismiss, CBE argued that The Steel Company was in fact in ongoing violation because its EPCRA filings were deficient. *See id.* at *5 n.3. The court found CBE's effort unavailing because the allegations of ongoing violation were not in the complaint. *See id.* Throughout the appellate litigation, CBE focused the courts'

In response, The Steel Company filed a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.[30] The Steel Company asserted that EPCRA does not allow suit for "historical" violations, that the company's violations were wholly past at the time suit was filed and thus, that the court lacked jurisdiction.[31] CBE replied that EPCRA's citizen suit provision allows enforcement of all EPCRA requirements, including the requirement that filings be submitted by specified dates.[32] Thus, CBE argued, the statute authorized the suit.

The district court granted The Steel Company's motion to dismiss. Following the Sixth Circuit's[33] holding in *Atlantic States Legal Foundation v. United Musical Instruments U.S.A., Inc.*,[34] the district court found that EPCRA does not allow suits for past violations.[35] Both the *United Musical Instruments* court and the district court analogized from the United States Supreme Court's opinion in *Gwaltney v. Chesapeake Bay Foundation*, in which the Court found that the language of the Clean Water Act precluded citizen suits for past violations.[36]

The Seventh Circuit reversed.[37] The Court of Appeals found that the district court had mechanically transferred the *Gwaltney* holding to the EPCRA context, assuming without analysis that, if the Clean Water Act forbids suits for past violations, then EPCRA does too.[38] The Seventh Circuit determined that the proper use of *Gwaltney* was to apply

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attention on the issue of past violations and did not argue that their complaint had alleged continuing and possible future violations. *See Steel Co.*, 90 F.3d at 1238, *vacated*, 523 U.S. 83, 118 S. Ct. 1003 (1998); Brief for the Respondent, *Steel Co.*, 118 S. Ct. at 1003 (1998) (No. 96-643). The United States pointed out in its amicus brief that CBE had in fact used language in their complaint that could be construed as alleging ongoing injury. *See* Brief For The United States As Amicus Curiae Supporting Respondent at 24, *Steel Co.*, 118 S. Ct. at 1003. (1998) (No. 96-643).

30. *See Steel Co.*, 1995 WL 758122, at *2.

31. *See id.* The Steel Company did not raise the issue of standing until it petitioned the Supreme Court for certiorari. *See Steel Co.*, 118 S. Ct. at 1009.

32. *See Steel Co.*, 1995 WL 758122, at *2-3.

33. At the time of this case the Sixth Circuit was the only circuit court of appeals to have addressed the question of past violations under EPCRA. *See Steel Co.*, 90 F.3d at 1238, *vacated*, 523 U.S. 83, 118 S. Ct. 1003 (1998).

34. 61 F.3d 473 (6th Cir. 1995).

35. *See Steel Co.*, 1995 WL 758122, at *4.

36. 484 U.S. 49, 64 (1987).

37. *See* Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1242 (1996), *vacated*, 523 U.S. 83, 118 S. Ct. 1003 (1998).

38. *See id.* at 1242.

Gwaltney's "interpretive methodology" to EPCRA's language.[39] In *Gwaltney*, the Supreme Court interpreted the Clean Water Act by closely scrutinizing its text.[40] The Court found that Congress' use of the language "to be in violation"[41] precluded suits for past violations under the Clean Water Act.[42] Using the same "interpretive methodology," the Seventh Circuit read EPCRA's citizen suit provision to allow citizen suits for past violations: the phrase "failure to [comply]"[43] included past and present violations.[44]

The Seventh Circuit thus explicitly rejected the Sixth Circuit's interpretation of EPCRA. The United States Supreme Court granted certiorari on February 24, 1997, to resolve the conflict.[45]

II

STATEMENT OF THE CASE

In a 9-0 judgment,[46] the Supreme Court reversed the Seventh Circuit Court of Appeals.[47] The Court did not, however, resolve the conflict between the Sixth and the Seventh Circuits over EPCRA's meaning.[48] To interpret the statute would involve reaching the merits of the case, and a federal court has the duty to ascertain its jurisdiction over the case before it can address the merits. Thus, the Court focused on Article III standing, an

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39. *Id.*

40. "It is well settled that the 'starting point for interpreting a statute is the language of the statute itself.'" *Gwaltney*, 484 U.S. at 56 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

41. 33 U.S.C. § 1365 (1994).

42. *See Gwaltney*, 484 U.S. at 57. Focusing on the verb tenses used in the Clean Water Act, the Court found that the phrase "to be in violation" required violations to be ongoing at the time of suit. If violations are wholly past, the violator cannot not "be in violation;" rather, the violator "has been" or "had been" in violation. *See id.*

43. 42 U.S.C. § 11046(a)(1)(A) (1994).

44. *See Steel Co.*, 90 F.3d at 1243. Under this analysis, a party who did not file required disclosures in 1990 would be liable in 1999 for a "failure to" comply with EPCRA, though the party may well not "be in violation" as the Clean Water Act requires. The absence of a present tense verb, the court said, meant that EPCRA would be interpreted differently from the Clean Water Act.

45. *See* 519 U.S. 1147, 117 S. Ct. 1079 (1997).

46. The Justices presented several different opinions on the reasoning behind the judgment. Thus, the actual holdings in the majority opinion did not receive unanimous support. The decision on standing received six votes, *see Steel Co.*, 118 S. Ct. at 1008-21, and the decision on hypothetical jurisdiction received only three clear votes, *see id.* at 1021-31 (Justices O'Connor, Kennedy, and Breyer did not cast clear votes for the holding on hypothetical jurisdiction). *See infra* note 89.

47. *See Steel Co.*, 118 S. Ct. at 1020.

48. *See id.* at 1009, 1020.

issue raised by The Steel Company only in its petition for certiorari.[49] Holding that plaintiff CBE lacked standing under Article III, the Court tabled the question of whether EPCRA permits suits for past violations.[50]

While all nine Justices agreed that CBE's claim should be dismissed, they disagreed sharply over *why* it should be dismissed. Chief Justice Rehnquist and Justices O'Connor, Kennedy, Thomas, and Breyer joined in Justice Scalia's opinion dismissing CBE's claim for lack of Article III standing.[51] Justices Souter and Ginsburg joined in Justice Stevens' concurrence recommending that the Court dismiss CBE's claim because EPCRA conferred no cause of action on the plaintiffs.[52]

A. Majority Opinion: CBE Lacked Standing to Sue

After a "long front walk" in which the doctrine of "hypothetical jurisdiction" was found invalid,[53] the Court arrived at the central question: did the plaintiff have standing?[54] The Court applied the familiar three-prong test from *Lujan*, asking whether the plaintiff suffered injury-in-fact, whether that injury was fairly traceable to the defendant's conduct, and whether the injury could be redressed with a favorable judgment.[55] Focusing on the redressability analysis, the Court concluded that CBE

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49. *See id.* at 1009.

50. *See id.* at 1020. Under *Steel Company*, because a plaintiff has no standing when she sues solely for past violations and only civil penalties are available for relief, a suit for past violations is now possible only in conjunction with a suit for ongoing or possible future violations. The question the Court has postponed, then, is whether a plaintiff who does have standing due to the present and future violations has the right to claim civil penalties for wholly past violations. Some courts have interpreted *Steel Company* to require that the plaintiff have standing for each category of violations. *See* San Francisco BayKeeper v. Cargill, No. 96-02161 (N.D. Cal. Nov. 19, 1998) (partial grant of summary judgment).

51. *See Steel Co.*, 118 S. Ct. at 1008-21. Justice O'Connor also filed a concurrence emphasizing her belief that in some cases the Court can resolve merits questions before jurisdictional questions; she was joined by Justice Kennedy. *See id.* at 1020. Justice Breyer joined the majority as to Parts I and IV and wrote a concurrence stating that judicial economy is served by allowing a court to rule on the merits of a case when its jurisdiction is unclear and resolving the jurisdictional uncertainty would be much more complex. *See id.* at 1020-21. For a fuller explanation of the debate over merits questions and jurisdictional questions, see *infra* notes 118-32 and accompanying text.

52. *See id.* at 1021-32. Justice Stevens was joined by Justice Souter as to Parts I, III, and IV, and by Justice Ginsburg as to Part III. *See id.* at 1021. Justice Ginsburg also filed her own concurring opinion, echoing Justice Stevens' condemnation of ruling on constitutional questions unnecessarily. *See id.* at 1032.

53. *See id.* at 1012-16; *see also infra* notes 83-89 and accompanying text.

54. *See Steel Co.*, 118 S. Ct. at 1016.

55. *See id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

lacked standing.[56]

First, the Court declined to address the question of injury-in-fact.[57] CBE had alleged that, because EPCRA is an informational statute and because The Steel Company failed to file the required information on time, CBE's right and that of its members to receive timely information had been violated. The Steel Company's violation of EPCRA allegedly had damaged CBE's interest in protecting and improving the environment, and allegedly had harmed the "safety, health, recreational, economic, aesthetic, and environmental interests" of its members in the information.[58] The Court, however, did not decide whether being deprived of timely information required to be disclosed under EPCRA is a sufficient injury-in-fact to meet the standing test.[59] Instead, Justice Scalia found that, even assuming injury-in-fact occurred, the plaintiff failed to satisfy the redressability prong of

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56. *See id.* at 1017-20.

57. *See id.* at 1018.

58. *Id.* at 1017-18 (citing plaintiff's complaint).

59. *See id.* at 1018. The Court's language suggests that informational injury under EPCRA is not sufficient to meet Article III's requirement of injury-in-fact. The Court has held informational injury sufficient under other statutes, however. A case decided later in the 1998 term held that the Federal Election Commission's failure to provide information to a political action committee regarding donors and campaign expenditures was sufficient injury to satisfy Article III. *See* FEC v. Akins, 524 U.S. 11, 118 S. Ct. 1777, 1784-85 (1998). Similarly, in *Havens Realty v. Coleman*, the Court found that a plaintiff alleging that she had been denied accurate real estate information because of her race had standing under Article III to sue for violations of Section 804 of the Fair Housing Act of 1968, 42 U.S.C. § 3604 (1994). 455 U.S. 363 (1982). The Court granted standing despite the plaintiff's status as a "tester"— a person who has no intent of renting or buying property but who visits the real estate agency to ensure compliance with the Fair Housing Act:

> A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions.
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> . . . .
>
> If the facts are as alleged, then [the black tester] has suffered "specific injury" from the challenged acts of petitioners and the Article III requirement of injury in fact is satisfied.

Id. at 373-74 (citation omitted); *see also* Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989) (noting that the plaintiff's inability to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").

Justice Scalia's statement in *Steel Company* is thus puzzling. If it suggests that informational injury under environmental statutes will be treated differently from similar injuries under civil rights statutes, then Justice Scalia's statement provides support for Judge Fletcher's argument that standing analysis is akin to substantive due process. *See supra* note 14.

the standing test.[60]

Redressability requires "a likelihood that the requested relief will redress the alleged injury."[61] CBE requested declaratory relief, costs and attorney fees, civil penalties, and injunctive relief under EPCRA.[62] The Court analyzed each potential remedy in turn.

The Court quickly disposed of the request for a declaratory judgment, stating that it was "seemingly worthless to all the world."[63] Because no dispute existed over whether a violation of EPCRA had actually occurred (The Steel Company freely admitted it had violated EPCRA), no controversy existed for a declaratory judgment to remedy.[64] Justice Scalia gave similarly brief treatment to CBE's claim for costs and attorney fees, stating that "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."[65]

The Court discussed CBE's demands for civil penalties and injunctive relief at greater length. The Court held that civil penalties could not redress CBE's injury because such penalties would be paid directly to the U.S. Treasury, not to CBE.[66] Though CBE argued for the deterrent effect of civil penalties, Justice Scalia responded by pointing out that CBE's own allegations showed no conduct by The Steel Company that civil penalties would deter. CBE had alleged only past violations. The Court thus concluded that CBE's only benefit from civil penalties would be its satisfaction in seeing a wrongdoer pay for his wrong.[67] Such "comfort and joy" or "psychic satisfaction" is not sufficient redress for any cognizable Article III injury.[68] Such satisfaction is identical to the "vindication of the rule of law" in the "undifferentiated public interest" deemed insufficient in *Lujan*.[69]

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60. *See Steel Co.*, 118 S. Ct. at 1018-20. The Court ignores the causation prong of the standing test altogether.

61. *Id.* at 1017.

62. *See id.* at 1018. EPCRA authorizes the recovery of "costs of litigation (including reasonable attorney and expert witness fees) [by] the prevailing or the substantially prevailing party." 42 U.S.C. § 11046(f) (1994).

63. *Steel Co.*, 118 S. Ct. at 1018.

64. *See id.*

65. *Id.* at 1019. *But see infra* note 125 and accompanying text.

66. *See Steel Co.*, 118 S. Ct. at 1018-19.

67. *See id.*; *see also id.* at 1019.

68. *Id.*; *see infra* notes 107-12 and accompanying text (arguing that this holding, while it purports to be a holding on redressability, in fact is a holding on injury-in-fact).

69. *Steel Co.*, 118 S. Ct. at 1018 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992)).

The Court also found CBE's claim for injunctive relief insufficient.[70] Although injunctive relief normally addresses a plaintiff's injury directly, CBE alleged only past violations.[71] Injunctive relief is always prospective.[72] The Court thus found that in order for injunctive relief to provide a remedy for its harm, CBE must have alleged current violations or the probability of future violations.[73] Indeed, such alleged injury could have been remedied by injunctive relief.[74] Even if The Steel Company had claimed it was in compliance despite the allegations, CBE could have employed the well-known doctrine that voluntary cessation does not render a case moot.[75] Without such allegations, however, the voluntary cessation argument was inapplicable. The Court therefore found CBE's failure to allege current or future violations fatal to its claim of redressability.

The Court's main point was that whatever remedy the plaintiff requests must directly redress the injury alleged: "Relief that does not remedy the injury suffered cannot bootstrap a

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70. *See id.* at 1019-20.

71. *See id.* at 1019.

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.* at 1019-20. The United States argued as amicus curiae that plaintiffs' complaint could be construed to allege the possibility of future injury: "The complaint alleges that '[t]he safety, health, recreational, economic, aesthetic and environmental interests of [respondent's] members and their right to know about such releases have been, are being, and will be adversely affected by [petitioner's] actions in failing to file timely and required reports under EPCRA.'" Brief for the United States as Amicus Curiae Supporting Respondent at 24, *Steel Co.*, 118 S. Ct. at 1003 (1998) (No. 96-643).

Because the complaint alleged ongoing or possible future injury, the United States argued under the voluntary cessation doctrine that future injury by the defendant should be presumed. *See id.* at 28. That doctrine "protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'" Gwaltney v. Chesapeake Bay Found., Inc., 484 U.S. 49, 67 (1987) (quoting United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1952)). Under the doctrine, the defendant bears an extremely heavy burden to prove that "no reasonable expectation" exists of repeated wrongs. *Id.* at 66. If the defendant cannot meet this burden, the case will not be dismissed as moot. *See id.*

The *Steel Company* Court rejected this argument, construing CBE's complaint as alleging no ongoing or future injury. *See* 118 S. Ct. at 1020. CBE based its brief for the Court on EPCRA's authorization of suit for wholly past violations and made no argument for continuing or possible future violations. *See* Brief for the Respondent, *Steel Co.*, 118 S. Ct. at 1003 (1998) (No. 96-643). Justice Scalia noted that while it is true that a defendant cannot escape suit over allegations of ongoing violations simply by stopping his bad activities until the case is declared moot, the plaintiff must have made those allegations "particular and concrete." *Id.* Only when the defendant is allegedly violating the law at the time suit is brought and stops violating in response to the litigation itself does the voluntary cessation doctrine apply. *See id.*

plaintiff into federal court."[76] Because CBE had no redress for its injuries, it had no Article III standing.[77] The Court therefore did not reach the question of whether EPCRA authorizes suit for past violations: EPCRA, Justice Scalia said, would "have to wait another day."[78]

B. *Concurring Opinion: The Court Needlessly Addressed the Constitutional Question*

The majority and the concurring justices differed primarily in their characterizations of the question, "Does EPCRA allow citizen suits for past violations?" In his concurrence, Justice Stevens defined the question as one of jurisdiction under the statute.[79] Such a jurisdictional question is a threshold inquiry, just as standing is a threshold inquiry.[80] According to Justice Stevens, the Court could and should have resolved the case by determining whether EPCRA gives the federal courts jurisdiction over suits for past violations of EPCRA rather than by assessing Article III standing; in answering the standing question, the Court needlessly analyzed a constitutional question.[81] Justice Stevens found that EPCRA does not allow suits for wholly past violations and thus that the federal courts had no jurisdiction over CBE's suit.[82] The constitutional question was avoided, and yet Justice Stevens reached the same result as did the majority.[83]

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76. *Steel Co.*, 118 S. Ct. at 1019.

77. *See id.* at 1020.

78. *Id.*

79. *See id.* at 1021. Justice Stevens was joined by Justice Souter as to Parts I, III, and IV, and by Justice Ginsburg as to Part III. Thus, Justices Souter and Ginsburg agreed with Justice Stevens that the case should be dismissed based on the interpretation of EPCRA (Part III) though neither joined Justice Stevens' lengthy discussion of the majority's standing analysis (Part II).

80. *See id.* at 1021-22.

81. *See id.* (Stevens, J., concurring) (citing Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring)). *Ashwander*'s doctrine is familiar: "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." 297 U.S. at 347. The doctrine highlights the intricate interrelation between standing and statutory jurisdiction, an interrelation that Justice Stevens emphasized in *Steel Company*. If the plaintiff has no standing, the Court has no jurisdiction to answer the statutory question. But if the statute does not confer jurisdiction on the Court, the Court unnecessarily addressed the constitutional question of standing when it avoided the statutory question. Thus, in either approach the Court must engage in an act that to some extent involves an arrogation of power. The question is which approach minimizes that arrogation.

82. *See Steel Co.*, 118 S. Ct. at 1031-32.

83. *See id.* at 1021 (Stevens, J., concurring). Justice Stevens went on to argue

C. *Majority Response: Justice Stevens Would Have the Court Act* Ultra Vires

The majority disagreed with Justice Stevens on virtually every point. In a discussion Justice Scalia described as a "long front walk" to the threshold question of standing,[84] the Court asserted that Justice Stevens was incorrect in describing the past violations question as one of whether EPCRA conferred jurisdiction on the federal courts or provided a cause of action.[85] According to the Court, Justice Stevens' analysis rested on whether the elements of a violation of EPCRA had been established.[86] But whether such elements had been established is a merits question rather than a jurisdictional question.[87] Article III requires that, prior to any analysis of the merits, a court must inquire into its jurisdiction.[88] To decide whether EPCRA allows suit for past violations before the plaintiff has shown Article III standing is to violate Article III.[89]

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that the question of whether CBE could sue could be characterized as a question of whether CBE had stated a cause of action, thus seeming to endorse the practice of hypothetical jurisdiction. *See id.* at 1024. Hypothetical jurisdiction has been used by the First, Second, Ninth, Eleventh and D.C. Circuits over the last decade. This doctrine allowed a court to decide a merits question before a jurisdictional question if the merits question was easier to answer, and the same party prevailed on the merits as would prevail if jurisdiction were to be denied. *See id.* at 1012. In fact, Justice Stevens stated that he took no position on the doctrine of hypothetical jurisdiction. "The doctrine . . . is irrelevant because this case presents us with a choice between two threshold questions that are intricately interrelated— as there is only a standing problem if the statute confers jurisdiction over suits for wholly past violations." *Id.* at 1026-27. The Court did not disagree that statutory standing questions can be decided before Article III standing, or even that a merits question can be decided before a statutory standing question. *See id.* at 1013 n.2. Justice Stevens reasoned that the Court must logically then allow a merits analysis to be given priority over an Article III analysis. *See id.* at 1025 n.12. Justice Scalia replied that "broken circles" appear often in "life and the law," and that allowing a merits question to precede an Article III question would open the federal courts to all comers. *Id.* at 1013 n.2. Justice Stevens, however, did not himself argue for answering merits questions before Article III questions; he merely pointed out that the Court's logic seemed to require such a result. *See id.* at 1025 n.12. Justice Scalia's response thus seems somewhat disingenuous.

84. *Id.* at 1016.

85. *See id.* at 1011.

86. *See id.*

87. *See id.* According to the Court, Justice Stevens' analysis of whether the plaintiff had presented a cause of action was even more transparently a merits question. *See id.* at 1012.

88. *See id.* at 1012, 1016.

89. *See id.* Justice Scalia took this opportunity to reject outright the doctrine of hypothetical jurisdiction. "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Id.* at 1016. Justice Stevens argued that this very ruling is *ultra vires* in that the question was not properly before the Court.

III

DISCUSSION

Steel Company predictably extends the standing doctrine of *Lujan* and other standing cases.[90] Presented with a choice between a broader or a narrower interpretation of redressability, many scholars expected the Court to choose the narrower.[91] Given CBE's failure to allege ongoing or possible future violations, the outcome is unsurprising. *Steel Company* does, however, reflect the larger turmoil surrounding Article III standing doctrine. Commentators have pointed out that standing doctrine is mystifying and even "incoherent."[92] Such incoherence both makes plaintiffs less certain about their prospects for successful lawsuits and adds unnecessary argument to cases as parties debate the meaning of the doctrine. The holding in *Steel Company* contributes to that incoherency: the language in the decision is subject to widely varying interpretations, and many subsequent cases have therefore gone

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See id. at 1026. Justice Stevens may have had more votes on this point than did Justice Scalia. As the Fifth Circuit has pointed out, the holding on hypothetical jurisdiction does not seem to have received a majority of votes: Justices Breyer, Stevens, Souter, and Ginsburg expressed disagreement with an absolute rejection of hypothetical jurisdiction. Although Justice O'Connor said at the beginning of her concurring opinion (which Justice Kennedy joined) that she joined the Court's opinion, she penned an equivocal passage concerning the doctrine of hypothetical jurisdiction. *See infra* note 131 and accompanying text. United States v. Texas Tech Univ., 171 F.3d 279, 287 n.11 (5th Cir. 1999) (citations omitted). The Supreme Court has since described *Steel Company* as holding that the doctrine of hypothetical jurisdiction had been rejected. *See* Ruhrgas AG v. Marathon Oil Co., 119 S. Ct. 1563, 1566-67 (1999) (unanimous opinion); *see also, e.g.*, Axess Int'l, Ltd. v. Intercargo Ins. Co., 183 F.3d 935, 943-44 (9th Cir. 1999) (same); Fidelity Partners, Inc. v. First Trust Co., 142 F.3d 560, 565 (2d Cir. 1998) (same); Seaborn v. Florida, 143 F.3d 1405, 1407 n.2 (11th Cir. 1998) (*Steel Company* "squarely rejected" the doctrine of hypothetical jurisdiction); Martin v. Kansas, Nos. 98-3102, 98-3118, 1999 WL 635916 (10th Cir. Aug. 19, 1999) (finding that *Steel Company*'s rejection of the doctrine of hypothetical jurisdiction requires that the state's claim of Eleventh Amendment immunity be addressed before the court may reach the merits of the plaintiff's claim). *But cf.* Parella v. Retirement Bd., 173 F.3d 46 (1st Cir. 1999) (distinguishing *Steel Company* and finding that answering the Eleventh Amendment question would mean reaching an unnecessary constitutional question).

90. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 568 (1992); Renne v. Geary, 501 U.S. 312, 319-20 (1991).

91. *See, e.g.*, Jim Hecker, *Citizen Standing to Sue for Past EPCRA Violations*, [1997] 27 Envtl. L. Rep. (Envtl. L. Inst.) 10,561 (suggesting that dicta in *Gwaltney*, 484 U.S. at 70-71, indicated Court would rule against citizen standing in *Steel Company*).

92. Fletcher, *supra* note 8, at 221 (1988); *see also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 107 (2d ed. 1988); Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 11-22 (1982); Fallon, *supra* note 11; Cass R. Sunstein, *What's Standing After Lujan?*, 91 MICH. L. REV. 163, 223 (1992).

much further than seems warranted in denying standing to citizen plaintiffs.[93]

Such interpretation problems may simply represent the usual evolution of doctrine in a judicial system that relies on precedent and stare decisis. But the eagerness of some lower courts to read *Steel Company* expansively highlights the deeper problem with the decision. When the Court purports to use standing doctrine to restrain its own power but actually goes further than is necessary so that it creates new doctrine, the Court exceeds its powers and exacerbates rather than defuses constitutional tension. *Steel Company* has not only increased the mystification of standing doctrine but has also undermined its very purpose.

A. Steel Company *is the Predictable Successor to Recent Standing Cases*

The Court has retreated dramatically over the last quarter-century from the more expansive view of standing presented in cases such as *Flast v. Cohen*[94] and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.[95] Cases such as these have focused primarily on narrowing the scope of cognizable injury-in-fact. The year after *SCRAP* was decided, Justice Powell lamented that "the concept of particularized injury has been dramatically diluted [by *SCRAP*]."[96] In *Whitmore v. Arkansas*, the Court described *SCRAP* as a case whose interpretation of injury-in-fact "surely went to the outer limit of the law."[97] *Lujan v. Defenders of Wildlife*, the most notable of recent standing cases, rejected a definition of injury-in-fact that would have included hypothetical or conjectural injuries.[98]

Redressability has played a less prominent role in standing jurisprudence, having emerged as a separate requirement under the "case or controversy" doctrine only in the last quarter century.[99] Those cases that have addressed the plaintiff's claim for redress have hewn closely to the line established in the

93. *See supra* note 9 and *infra* Part III.B.1. The Court has granted certiorari in *Laidlaw*, 119 S. Ct. 1111 (1999), and in the 1999-2000 term should resolve at least some of the conflicting interpretations of *Steel Company*.

94. 392 U.S. 83 (1968).

95. 412 U.S. 669 (1973).

96. United States v. Richardson, 418 U.S. 166, 194 (1974) (Powell, J., concurring).

97. 495 U.S. 149, 159 (1990).

98. *See* 504 U.S. at 560 (citing *Whitmore*, 495 U.S. at 155).

99. *See* Allen v. Wright, 468 U.S. 737, 753 n.19 (1984).

injury-in-fact cases. *Lujan* itself contains a plurality opinion rejecting the plaintiff's claim for Article III standing on redressability grounds: the chance that the relief requested would remedy the alleged injury was too remote.[100] *Renne v. Geary*, decided the year before *Lujan*, similarly hinted that the Court would reject claims for remedy that had little promise of actually redressing the harm claimed by the plaintiff.[101]

Accordingly, *Steel Company* fits comfortably within current standing doctrine. CBE's claim for standing seems to have had even less chance of surviving the redressability analysis than those made by the plaintiffs in *Lujan* and *Renne*. In those cases, the Court found the possibility of redress *too remote* to support Article III standing. In *Steel Company*, the Court found that the relief requested by CBE had *no* possibility of redressing the alleged injury.[102]

B. Steel Company *Demonstrates the Difficulty the Court Has in Applying Standing Doctrine to Maintain Separation of Powers*

Precisely because it fits well with its much-criticized predecessors, *Steel Company* exemplifies the internal contradictions in standing doctrine. The decision adds to the general confusion in two respects. First, the Court's assessment of redressability has met with widely varying interpretations in the lower courts. Some of these courts have gone out of their way to deny standing, applying *Steel Company* to numerous different environmental statutes and to factual situations that differ greatly from the one presented in *Steel Company*. The variation in the lower courts is due at least in part to the limited analysis provided in *Steel Company*. Second, *Steel Company* shows that the Court may actually have used standing to take on power rather than spurn it.

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100. *See* 504 U.S. at 568. In *Lujan*, the Court found, as a *factual* matter, that it was unlikely that an injunction requiring the United States to withdraw its support from the projects in question would have any effect on the projects or their impact on the threatened species. *See id.* at 571 & n.6. Thus the remedy available through the federal courts would not address plaintiffs' claimed injury. Of course, the *Lujan* Court had already found that injury insufficient to satisfy Article III. *See id.* at 564-67.

101. 501 U.S. 312, 319 (1991) (arguing that a separate California statute, whose constitutionality was not being litigated, may prevent relief of plaintiff's alleged injury even if the challenged statute was struck down by the Court).

102. *See Steel Co.*, 118 S. Ct. at 1018-20; *see also infra* Part III.B.1.

1. Steel Company's *Holding Provides Insufficient Guidance to the Lower Courts*

Narrowly read, *Steel Company* is a reasonable decision. CBE claimed remedies, such as declaratory relief, that were unwarranted given the facts of the case.[103] The outcome in *Steel Company* was reasonable. It is the analysis leading to that outcome that is problematic. The Court understandably gave only brief attention to the claims for declaratory and injunctive relief and for attorney fees; the Court's brief analysis of the claims for civil penalties, however, was insufficient.

The Court ultimately dismissed CBE's complaint because the civil penalties were not payable to CBE but to the U.S. Treasury.[104] The Court noted that CBE could therefore receive only "psychic satisfaction" from the vindication of the rule of law, from the knowledge that the Treasury gets paid, or from the punishment of the violator.[105] "[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."[106]

But to say civil penalties provide only psychic satisfaction does not explain in concrete terms why civil penalties cannot redress the claim made by CBE— that the organization and its members were harmed by The Steel Company's failure to file its EPCRA reports on time.[107] Instead, the Court restated its well-

103. Declaratory relief, for example, is obviously unnecessary when the defendant admits its violation. *See id.* at 1018.

104. *See id.*

105. *Id.* at 1019.

106. *Id.*

107. One very common argument that civil penalties *do* redress a citizen plaintiff's injury is that the penalties deter future violations, either by the same defendant (specific deterrence) or by other potential defendants (general deterrence). Justice Stevens referred to this argument in his concurrence, *see Steel Co.*, 118 S. Ct. at 1029, and Justice Scalia purported to address it in the general discussion of civil penalties, *see id.* at 1018. Arguably, CBE had no claim to specific deterrence because it had not alleged that The Steel Company was continuing to violate or would in the future violate EPCRA. As to general deterrence, monetary penalties have a well-known deterrent effect; the question is whether deterring other potential violators remedies CBE's alleged injury. Because CBE framed its injury solely in terms of the harm caused by The Steel Company, CBE could not coherently claim that general deterrence would address that harm. If, however, a plaintiff wishing to sue solely for past violations had alleged as part of his injury the fear that other companies would imitate the defendant, general deterrence would address this injury and would satisfy the redressability component of Article III. Such a harm would probably not satisfy the injury-in-fact component, however. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983).

At least one other possible connection exists between a particular injury and a civil penalties remedy. Seeing a wrongdoer pay penalties for one's own particular injury seems a sharply different kind of satisfaction than the generalized feeling of

known position that a citizen's interest in the vindication of the rule of law is not cognizable under Article III.[108] One can easily imagine arguments that the Court would have made in demonstrating the inability of CBE to gain redress with civil penalties: because CBE did not allege possible future violations by The Steel Company or any other facility obligated to file reports under EPCRA, civil penalties can deter no one. The problem is that the Court made no such argument.

In doing so, the Court created numerous problems for the lower courts. Because the Court did not make clear why civil penalties failed to address CBE's claimed injury, the lower courts have little guidance as to whether the facts of the cases before them require the same outcome. In *Friends of the Earth v. Laidlaw*, the Fourth Circuit denied civil penalties under the Clean Water Act, reasoning that *Steel Company* forbade them.[109] The court stated that, because the court below had denied injunctive and declaratory relief, and the plaintiff had failed to appeal those rulings, the remaining appeal of the amount of the civil penalties had been mooted under *Steel Company*: the plaintiff could no longer obtain relief.[110] The court reached this conclusion despite the plaintiff's proof that the defendant's violations were ongoing at the time the suit was filed and despite the very different statutory context.[111] The district courts have made similar rulings.[112] Such rulings arguably have arisen because the *Steel Company* decision does not sufficiently specify

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vindication in the rule of law to which the Court pointed. Whether such satisfaction is cognizable under Article III is a different question than the one the Court answered. By failing to address this possibility, the Court may be avoiding an inquiry into the psychology of retribution, but it already makes that inquiry in determining that civil penalties can only provide a "psychic satisfaction" of seeing right done.

108. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 754-55 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 482-83 (1982).

109. 149 F.3d 303, 306-07 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999).

110. *See id.*

111. *See id.* at 308.

112. *See, e.g.*, Dubois v. USDA, 20 F. Supp. 2d 263, 266-67 (D.N.H. 1998) (applying *Steel Company* and *Laidlaw*, and finding that the grant of an injunction earlier in the ongoing Clean Water Act litigation mooted the plaintiffs' claim for civil penalties because the plaintiffs had not challenged the efficacy of the injunction and thus had no claim that civil penalties were necessary to deter future violations). The *Dubois* argument implies that one can *never* obtain civil penalties for specific deterrence: if the court enjoins the behavior, no deterrence is needed, and if the court feels an injunction is unwarranted, civil penalties would probably be unwarranted too. *But cf.* Natural Resources Defense Council v. Southwest Marine, 28 F. Supp. 2d 584, 586 (S.D. Cal. 1998) (finding *Steel Company* inapplicable to cases involving ongoing violations; "[i]n fact, much of the language in *Steel Co.* can properly be regarded as dicta.").

which aspects of CBE's factual situation led to the conclusion that CBE lacked standing to sue.

Also troubling is the possibility that *Steel Company* aids in conflating the elements of the standing test,[113] thus inviting further confusion in standing analysis and increasing uncertainty among prospective plaintiffs as to their ability to survive a standing challenge. The Court's rejection of civil penalties as a remedy rests ultimately on its rejection of generalized injury as a cognizable Article III injury, not on a careful analysis of why civil penalties fail to address the particularized injuries claimed by plaintiffs. Thus, *Steel Company* can be read as a *sub rosa* assessment that the particularized injury claimed by the plaintiffs amounted to nothing more than the kind of generalized injury the Court has rejected in the past.[114]

2. Steel Company *Fails to Satisfy Its Professed Goal of Maintaining the Separation of Powers*

As noted above, the *Steel Company* opinion has enabled some lower courts to exercise extensive power to deny standing to citizen suit plaintiffs. But more troublesome is the way in which *Steel Company* itself reveals an inappropriate exercise of judicial power. In choosing to answer the constitutional question of standing, the Court went further than it needed to resolve the controversy before it and thus undermined the very principles it meant to uphold.

The crux of the distinction appears in the Justices' disagreement over the status of the question, "Does EPCRA allow suit for past violations?"[115] The majority characterized this question as a merits question that may only be answered if the

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113. *See* Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) (noting that the redressability and causation prongs "were initially articulated by this Court as 'two facets of a single causation requirement'"). Richard Pierce notes the tendency of the federal courts to conflate the prongs of the standing test, especially the causation and redressability prongs. *See* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993) (describing two prongs of standing analysis as "functionally equivalent"). It is telling that the definitive casebook on the federal courts treats both causation and redressability in a single section without specifying in many of the case summaries which prong led to the outcome. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 145-51 (4th ed. 1996).

114. This portion of the discussion owes much to conversations with Michael Wall.

115. As discussed above, *see supra* Part I.B, this question— not the standing question— was the question addressed in the opinions below.

court has proper jurisdiction. Justice Stevens, joined by Justice Souter, characterized the question as a jurisdictional question so "intricately interrelated" with the question of standing that either might be answered first.[116] Justice Stevens' concurrence invoked the *Ashwander* doctrine, which requires avoiding constitutional questions when possible, to support answering the statutory question first.[117]

Both the majority and the concurrence relied on doctrines that at bottom ensure the maintenance of constitutional boundaries between the branches. But the majority and concurrence took contradictory approaches to the question presented in *Steel Company*. A closer examination of the implications of *Steel Company* shows that Justice Stevens has the better argument. Rather than justifying the standing analysis made by the majority in *Steel Company*, the separation of powers maxim argues for answering the statutory question first.

First, the majority took several steps that technically violate the very principles that *Steel Company* is meant to uphold. Justice Stevens pointed out that the discussion of hypothetical jurisdiction addresses a question not properly before the Court.[118] If Article III limits the Court's power by requiring that the parties are adverse enough to "sharpen[] the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions,"[119] the Court should not have addressed the hypothetical jurisdiction question at all: it was not briefed by the parties, and thus the Court did not have the benefit of opposing advocates to clarify the issues.[120]

Second, the majority criticized Justice Stevens' analysis for its look to the text of the statute to determine whether it provides for suits for past violations.[121] Justice Scalia noted that to interpret the statute is to rule on the merits, and the Court therefore may not look at the text of the statute until the plaintiff

116. *Steel Co.*, 118 S. Ct. at 1027. Justice Ginsburg did not join the part of Justice Stevens' opinion using the phrase "intricately interrelated." She nevertheless concurred in resolving the case by dismissing under the statute.

117. *See id.* at 1021.

118. *See id.* at 1026-27.

119. *Id.* at 1025-26 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

120. *See id.* at 1026. The Court can of course always raise the question of its own jurisdiction *sua sponte*, but to raise that question in this case would require only the standing or statutory jurisdiction analysis. Justice Stevens argued that the Court should not have overruled the First and Ninth Circuits' doctrine of hypothetical jurisdiction without briefing by the parties.

121. *See id.* at 1011-12.

has demonstrated standing.[122]

But as Justice Stevens pointed out,[123] the Court itself looked to the text of EPCRA to determine what redress is available to CBE.[124] Responding to Justice Stevens' criticism, Justice Scalia justified the Court's inquiry into the statute by saying "it involves us in a construction of the statute only to the extent of rejecting as frivolous the contention that costs incurred for respondent's own purposes, not in preparation for litigation (and hence sufficient to support Article III standing) are nonetheless 'costs of litigation' under the statute."[125]

No matter how reasonable the Court's rejection of CBE's claim for attorney fees, the Court's move to the text of the statute is problematic. If the determination of redressability requires a look at the text of the statute, even if only a limited look, the difference (on which Justice Scalia relied so heavily) between the standing analysis and the statutory analysis shrinks. As Justice Stevens correctly stated, the Court was actually faced with "a choice between two threshold questions that are intricately interrelated"[126] rather than one merits question and one non-merits question. If the Court must look at the statute in either case,[127] the Court cannot so easily dismiss Justice Stevens' approach as an illegitimate look to the merits. Something else is needed to guide the choice.

Separation of powers does in fact provide the guidance. Even though both the *Ashwander* and standing doctrines rest on separation of powers concerns, a closer look demonstrates that in *Steel Company*, the *Ashwander* analysis would have been the better one. The Court's standing analysis actually amounted to advice to Congress about how to write statutes. When the Court found that civil penalties could not redress CBE's injury, the

122. *See id.* at 1016.

123. *See id.* at 1027 n.16.

124. *See id.* at 1019.

125. *Id.* at 1019 n.9. Justice Scalia does not explain how costs incurred in preparation for litigation are sufficient to support Article III standing in the absence of some independent and judicially cognizable injury. Without such injury, a plaintiff who sues based on her injury due to costs incurred in preparing to sue would seem to be "bringing suit for the costs of bringing suit." *Id.* at 1019.

126. *Id.* at 1027.

127. One could argue that the Court did not look at the statute at all in its crucial determination that civil penalties cannot redress CBE's injury. Admittedly, the disagreement between Justices Stevens and Scalia over peeking at the statute focuses on the attorney fees provision of EPCRA and does not involve the other claims for redress made by CBE. But the very reasons Justice Scalia used to defend his brief peek at EPCRA's Section 326(f) were just as useful to Justice Stevens in his brief peek at Sections 326(a), (d), and (c).

Court actually determined whether Congress properly structured EPCRA's citizen suit provision under Article III.[128]

This question need be reached, however, only if EPCRA actually allows suit for wholly past violations; if Congress did not intend for such suits to occur, it is immaterial whether civil penalties redress a claim for wholly past violations. When the Court nevertheless reached the redressability question, it essentially issued an advisory opinion. It told Congress that if it should decide to pass a statute allowing suit for wholly past violations,[129] then civil penalties are insufficient under Article III to provide citizen standing.

Steel Company therefore presents a paradox. Both the standing question and the statutory question require the Court to go beyond its allotted power to resolve the case. The statutory question, the majority argued, should not be answered unless the plaintiff has standing. The standing question, Justice Stevens argued, should not be answered unless Congress intended for citizens to be able to sue for wholly past violations; that is, constitutional questions should be avoided where possible.

Both the majority and concurring opinions rest ultimately on

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128. It may be that any time the Court reaches a redressability question, it necessarily must assess Congress' success or failure in staying within Article III. One can attempt to hypothesize a situation where the plaintiff's claim fails for lack of redressability. For example, a plaintiff may sue for injunctive relief against water pollution when she has moved away from the river into which the pollution flows. But such hypotheticals usually are best recast as questions about injury-in-fact (if she has moved away from the river, she has no concrete and particular injury from the pollution).

129. The Clean Air Act was amended in 1990 to provide suit for repeated past violations. 42 U.S.C. § 7604(a)(1) (1994). The Eastern District of Pennsylvania recently applied *Steel Company* to Section 7604(a)(1):

> While the CAA concept of past violations is seemingly at tension with the constitutional standing requirement in *Steel*, we find that the two concepts can be reconciled where past violations may meet the redressability requirement of standing only if they have the possibility of being repeated in the future. In other words, a plaintiff may assert random past violations of the CAA and satisfy the redressability requirement by a presumption that there is a potential ongoing compliance problem or a possibility that such violations may be repeated.
>
> . . . .
>
> While Defendants admittedly violated the terms of their federal [Prevention of Significant Deterioration] permit with respect to [certain] limitations in the past, any future violations of this permit are impossible because it is rescinded.

Local Envtl. Awareness Dev. Group v. Exide Battery Corp., No. CIV. 96-3030, 1999 WL 124473, at *15 (E.D. Pa. Feb. 19, 1999).

a concern to restrain the Court's power. Once that becomes clear, the paradox becomes less paradoxical. The choice is not between addressing a forbidden merits question (and therefore acting *ultra vires*) and addressing a straightforward jurisdictional question. The choice is between two jurisdictional questions that are "intricately interrelated."[130]

More members of the *Steel Company* Court recognized this than is at first apparent. Justice O'Connor wrote separately to emphasize that "the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in 'reserv[ing] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.'"[131] She was joined by Justice Kennedy. Justice Breyer similarly wrote separately, stating

> I further agree that federal courts often and typically should decide standing questions at the outset of a case. That order of decision (first jurisdiction then the merits) helps better to restrict the use of the federal courts to those adversarial disputes that Article III defines as the federal judiciary's business. But my qualifying words "often" and "typically" are important. The Constitution, in my view, does not require us to replace those words with the word "always." The Constitution does not impose a rigid judicial "order of operations," when doing so would cause serious practical problems.[132]

These statements recognize that standing doctrine is the Court's interpretation of the "case or controversy" clause, not immutable constitutional doctrine. The Court should assess standing when standing doctrine furthers the purposes of the clause, including the constraints it applies to the exercise of judicial power. But when that assessment leads the Court to make an advisory opinion on a constitutional question, the Court should instead attempt to resolve the case on other grounds. Because it fails to do this, *Steel Company* has troublesome implications for subsequent Article III issues.

C. *Practical Implications of* Steel Company

Steel Company has been expansively interpreted in the months since the decision was released, but that expansive

130. *Steel Co.*, 118 S. Ct. at 1027 (Stevens, J., concurring).
131. *Id.* at 1020 (O'Connor, J., concurring) (citation omitted).
132. *Id.* at 1020-21.

interpretation is incorrect. *Steel Company* does, of course, foreclose almost all citizen enforcement for wholly past EPCRA violations (that is, citizen suits where no allegations of continuing or possible future injury has been made).[133] This particular aspect of *Steel Company* raises concerns about federal regulation of the environment. Because EPA's limited resources make government enforcement improbable, *Steel Company* gives industry little incentive to file the inventory and release forms required by EPCRA.[134]

Moreover, *Steel Company* may make enforcement of other environmental laws more difficult, not simply because its standing analysis will be transferred to other statutory contexts, but also because EPCRA provides information useful in implementing other environmental statutes. For example, a community informed through EPCRA about toxic chemicals at a particular facility may push for changes in the facility's operation that reduce toxic chemicals that must be dealt with under the Resource Conservation and Recovery Act,[135] the Clean Air Act,[136] or the Clean Water Act.[137]

Steel Company does not, however, foreclose all citizen suits for civil penalties under EPCRA or other statutes. The text of *Steel Company* does not justify the interpretations given in subsequent cases such as *Friends of the Earth v. Laidlaw*,[138] as

133. One can imagine a factual situation where a company owns several chemical facilities in the same area, and thus a suit for past violations under EPCRA would survive the redressability analysis with an argument for specific deterrence. Most other EPCRA suits for wholly past violations (and with no allegations of ongoing or possible future violations) would be dismissed for lack of standing under a *Steel Company* analysis.

134. While some companies may still file the forms in the interest of public relations, others may choose not to file for precisely the same reason— deciding that the future cost of a citizen suit that can be dismissed for lack of standing is less than the present cost of an alarmed community. A company can fail to comply, receive the sixty-day notice letter, and then file the forms; if the person or group filing the citizen suit then tries to go ahead with the lawsuit, the company can move to dismiss for lack of standing. Jim Hecker has argued that this incentive structure may also lead to greater toxics releases, because the public filing of inventories may generate pressure on companies to reduce and/or recycle their toxic materials. *See* Hecker, *supra* note 91. A firm that does not file does not experience that pressure.

As discussed below, *see infra* Part III.A, this situation can be remedied simply by alleging ongoing or possible future violations. Given the bad faith demonstrated by a company's deliberate failure to file, allegations of possible future violations should be easy to make. After all, The Steel Company apparently failed to file its EPCRA reports simply because it had no knowledge of the requirement.

135. 42 U.S.C. §§ 6921-6939e (1994).

136. 42 U.S.C. §§ 7470-7671q (1994).

137. 33 U.S.C. §§ 1251-1387 (1994).

138. 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999).

other lower courts have recognized.[139] The Court granted certiorari in *Laidlaw* in March 1999 to resolve the confusion in the lower courts.[140] Whether the Court expands or narrows the reach of *Steel Company* remains to be seen. In the meantime, plaintiffs bringing citizen suits now know to expect *Steel Company* arguments under any environmental citizen suit provision, and thus have taken steps to make the appropriate allegations in their complaints to obviate such arguments.[141] The remainder of this Casenote reviews some of the steps recommended by the environmental plaintiffs' bar.

1. *If Possible, Allege Ongoing Violations or the Possibility of Future Violations*

Whether or not one agrees with the Court's reasoning in *Steel Company*, lower courts will certainly apply it to dismiss suits for wholly past violations under EPCRA. *Steel Company* therefore removes much of the incentive defendants might have had to settle lawsuits for wholly past violations of EPCRA.

Significantly, *Steel Company* denies standing *only* to the plaintiff who sues solely for past violations of EPCRA.[142] A plaintiff alleging ongoing violations or possible future violations can satisfy the redressability standard outlined in *Steel Company*. Justice Scalia stated in dicta that "if respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm."[143] Thus an environmental plaintiff may survive the standing test by alleging ongoing or future injury.

Such allegations may be insufficient to maintain a claim for civil penalties, however. Some cases subsequent to *Steel Company* have held that, even with allegations of ongoing violations, a citizen suit plaintiff has no standing for civil penalties.[144] In *Dubois v. USDA*, the court found that because

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139. *See* San Francisco BayKeeper v. Vallejo Sanitation and Flood Control Dist., No. CIV-S-96-1554, 1999 U.S. Dist. LEXIS 2211 (E.D. Cal. Mar. 1, 1999); Local Envtl. Awareness Dev. Group v. Exide Corp, No. CIV-96-3030, 1999 WL 124473 (E.D. Pa. Feb. 19, 1999); NRDC v. Southwest Marine, 28 F. Supp. 2d 584 (S.D. Cal. 1998).

140. *See* 119 S. Ct. 111 (1999).

141. Practitioners have exchanged strategies for opposing *Steel Company*-driven motions to dismiss at conferences such as the Public Interest Environmental Law Conference at the University of Oregon Law School, March 3-5, 1999.

142. *See* 118 S. Ct. at 1019.

143. *Id.*

144. *See* Friends of the Earth v. Laidlaw, 149 F.3d 303, 305 (4th Cir. 1998) (defendant found to be in substantial compliance; denial of injunctive and declaratory

the plaintiffs had succeeded in obtaining injunctive relief to stop the defendant's continuing violations of the Clean Water Act, the claim for civil penalties was moot: with no continuing violations to deter, civil penalties could serve only to satisfy the plaintiffs' general interest in seeing those who violate the law punished.[145] The environmental plaintiff should try to forestall this outcome by emphasizing the remedy provided by civil penalties. The legislative histories of most of the environmental statutes make clear that Congress incorporated civil penalties for their deterrent effects.[146] Because the Court in *Steel Company* does not clarify whether civil penalties would redress an injury caused by ongoing or future violations, the environmental plaintiff should turn to previous cases, such as *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, where the Supreme Court upheld the award of civil penalties in citizen suits.[147]

2. *Distinguish EPCRA from Other Environmental Statutes*

Environmental plaintiffs must pay careful attention to the effect of *Steel Company* on suits under other statutes. Most environmental statutes have citizen suit provisions[148] similar to that in EPCRA, which allows civil penalties to be paid only to the U.S. Treasury.[149]

The Clean Air Act appeared to have the best chance of withstanding a *Steel Company* attack even for a suit for wholly past violations. In the 1990 Clean Air Act amendments, Congress made clear that it intended the Act to allow suits for past violations, as long as those violations are repeated (a single past violation is insufficient).[150] Congress also authorized judges to allocate up to $100,000 of any civil penalties awarded in a citizen suit to be used for beneficial mitigation projects to remedy

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relief not appealed); Dubois v. USDA, 20 F. Supp. 2d 263 (D.N.H. 1998); San Francisco BayKeeper v. Cargill, No. 96-02161 (N.D. Cal. Nov. 19, 1998) (partial grant of summary judgment).

145. *See* 20 F. Supp. 2d at 267 n.3.

146. *See, e.g.*, H.R. CONF. REP. NO. 1004, 99th Cong., 2d Sess. 138 (1986); S. REP. NO. 50, 99th Cong., 1st Sess. 29 (1985) (stating that amending the Clean Water Act to increase civil penalties for violations would enhance the deterrent effect of the penalties); S. REP. NO. 228, 101st Cong., 1st Sess. (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385 (same in context of Clean Air Act).

147. *See* 484 U.S. 49, 64 (1987).

148. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365 (1994); Solid Waste Disposal Act, 42 U.S.C. § 6972 (1994); Clean Air Act, 42 U.S.C. § 7604(g) (1994).

149. 42 U.S.C. § 11045(c) (1994).

150. *See id.* § 7604(a)(1).

environmental damage.[151] To the extent that such projects benefit the plaintiffs in the citizen suit, those plaintiffs receive direct redress *for their past injuries*. Thus, a Clean Air Act citizen suit requesting such relief should survive a standing challenge, even if only past violations are alleged.

This issue had been addressed in three district court decisions by the end of September 1999. Two of the courts found the Clean Air Act's beneficial mitigation provision insufficient to overcome a *Steel Company* challenge to redressability.[152] One court found sufficient possibility that the plaintiffs would receive some relief through a beneficial mitigation project that the plaintiffs satisfied Article III's redressability requirement.[153]

If *Steel Company* means that plaintiffs have standing to sue only to the extent that they can obtain personal redress, however, even the Clean Air Act's beneficial mitigation provision may prove a meager protection, allowing plaintiffs standing only for as many past violations as give rise to $100,000 in penalties. Even allegations of continuing or possible future violations may be insufficient. As discussed above, some courts have applied *Steel Company* to dismiss plaintiffs who alleged continuing or possible future injury.[154] A citizen suit plaintiff should therefore do whatever is possible to distinguish EPCRA from other environmental statutes and to emphasize the decisions that have narrowly construed *Steel Company*.[155]

CONCLUSION

Steel Company perpetuates the confusion caused by standing doctrine over the last twenty-five years.[156] Ironically,

151. *See id.* § 7604(g)(2).

152. *See* Anderson v. Farmland Indus., Inc., 45 F. Supp. 2d 863, 871 n.10 (D. Kan. 1999) (stating, without explanation, that a beneficial mitigation project was insufficient under *Steel Company*); Lead Envtl. Awareness Dev. Group v. Exide Corp., No. CIV-96-3030, 1999 WL 124473 (E.D. Pa. Feb. 19, 1999) (Van Antwerpen, J.) (finding the beneficial mitigation under the Clean Air Act too generalized to redress plaintiffs' injuries).

153. *See* United States v. LTV Steel Co., 187 F.R.D. 522, 526 (E.D. Pa 1998) (Cindrich, J.) ("The citizens suit provision of the CAA . . . provides for the establishment of a beneficial mitigation fund which could be structured to provide some measure of redress to [Group Against Smog and Pollution] members living or working in or near Hazelwood for LTV's alleged violations.").

154. *See, e.g.*, San Francisco BayKeeper v. Cargill, No. 96-02161 (N.D. Cal. Nov. 19, 1998). In granting certiorari in *Laidlaw*, the Supreme Court may well intend to clarify that *Steel Company* does not extend as far as the Fourth Circuit and other courts have extended it.

155. *See supra* note 9.

156. *See* Fletcher, *supra* note 8, at 221.

Steel Company also expands the reach of the Court in the name of limiting that reach. This Casenote has demonstrated that the majority's standing analysis is susceptible to the same separation of powers criticisms that the majority makes of Justice Stevens' concurrence. Justice Stevens more convincingly analyzed the Court's role in the constitutional structure by recognizing the complex interaction between statutory grants of jurisdiction and Article III constraints on the Court. This approach better ensures that the Court does not "make[] a sword out of [an Article III] shield"[157] and truly maintains the separation of powers intended by the Constitution.

157. *Steel Co.*, 118 S. Ct. at 1020.