

**ISSUES RAISED BY *FRIENDS OF THE EARTH*
V. *LAIDLAW ENVIRONMENTAL SERVICES*:
ACCESS TO THE COURTS FOR
ENVIRONMENTAL PLAINTIFFS**

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This article was written before the Supreme Court decided Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. The author then added a postscript in which he associates the actual opinions in Laidlaw with the issues discussed in the article.

INTRODUCTION

I would like to take up the issues raised in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,¹ a case now pending decision in the Supreme Court. *Laidlaw* raises a host of important issues, any one of which could be the basis for the Court's decision. In Part I, I will describe briefly the most significant facts in *Laidlaw* and the most salient characteristics of the prior decisions of the district court and the Fourth Circuit. Upon that bare bones description of the case, I will amplify in subsequent parts of the article where particular facts or characteristics of the lower court decisions are noteworthy in evaluating issues raised by the case. In Part II, I will predict the manner in which the Supreme Court would decide the case if it were to arise in the context of one of the many relatively stable areas of law. I will describe a hypothetical unanimous opinion in which the Court simply applies recent precedents in deciding to reverse the Fourth Circuit. In Part III, however, I will explain why I doubt that the Court will dispose of the case in such a routine manner. *Laidlaw* raises broad issues with respect to the allocation of power among the branches of the federal government and between the federal government and the States. The Court's recent decisions demonstrate that many Justices perceive a need to make radical

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1. 149 F.3d 303 (4th Cir. 1998).

changes in these areas of law. *Laidlaw* provides a vehicle through which the Justices can, and probably will, continue their vigorous debate about the permissible roles of Congress, the Executive Branch, the federal courts, and the States. In Part IV, I will describe the conflicting models of government that are competing for the support of a majority of Justices. I will also explore the reasons why the doctrinal debates surrounding cases like *Laidlaw* have become complicated, confused, and highly indeterminate in outcome. Finally, in Part V, I will discuss five major issues that the Court might choose to address in the process of deciding *Laidlaw*. Even if the Court decides *Laidlaw* without addressing any of those issues, it is virtually certain to have occasion to address each of the five in one of the scores of other cases coming up through the lower courts, where these issues have been robustly contested.

I. THE FACTS AND OPINIONS BELOW

Laidlaw operates a hazardous waste incinerator that discharges wastewater into the Tyger River in South Carolina.² *Laidlaw* has a National Pollutant Discharge Elimination System (NPDES) permit that authorizes it to discharge wastewater containing only specific quantities of toxic substances—including mercury—and that requires it to monitor and report its emissions.³ Any violation of an NPDES permit is a violation of the Clean Water Act (CWA), carrying the potential to subject the permit holder to a declaratory judgment, an injunction, and/or civil penalties.⁴

On April 10, 1992, Friends of the Earth sent a letter to *Laidlaw*, the Environmental Protection Agency (EPA), and the South Carolina Department of Health and Environmental Control (DHEC) noti-

2. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 956 F. Supp. 588, 592 (D.S.C. 1997).

3. See *id.* at 593.

4. See Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1311, 1365(a) (1994). Section 1365(a) states, in pertinent part, that any citizen may commence suit:

against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (a) an effluent standard or limitation under this Act or (b) an order issued by the Administrator or a State with respect to such a standard or limitation....

§ 1365(a) goes on to say:

The district courts shall have the jurisdiction, without regard to the amount in controversy of the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

fying all three of its intent to file a “citizen suit” against Laidlaw in sixty days.⁵ Friends of the Earth stated it planned to allege that Laidlaw was engaged in ongoing violations of the CWA by repeatedly violating its NPDES permit. Such a 60-day notice letter is a statutory prerequisite to filing a complaint under the provision of the CWA that authorizes citizen suits.⁶ On June 9, 1992, the DHEC filed a complaint against Laidlaw in a state court,⁷ alleging that Laidlaw was violating its permit. That complaint was accompanied by a proposed consent decree in which the DHEC and Laidlaw would agreed to settle the case on specified terms.⁸ The state court approved the consent decree on June 10, 1992.⁹

Friends of the Earth filed a citizen suit against Laidlaw on June 12, 1992,¹⁰ alleging that Laidlaw was engaged in ongoing violations of its permit, including hundreds of violations relating to mercury restrictions and hundreds of violations of the monitoring and reporting requirements.¹¹ Friends of the Earth submitted affidavits of several of its members alleging that they were injured by Laidlaw’s violations. The affidavits described that the members used the Tyger River downstream of Laidlaw’s point of discharge and that the members had curtailed their uses because of concerns about the potential adverse effects of Laidlaw’s violations on human health and on fish.¹² Laidlaw filed a motion to dismiss the citizen suit on grounds that Friends of the Earth lacked standing.¹³ The district court denied that motion.¹⁴

Laidlaw also filed a motion to dismiss Friends of the Earth’s citizen suit on the basis that the DHEC was “diligently prosecuting” Laidlaw for its violations of its permit.¹⁵ The CWA prohibits citizen suits when the EPA or a state agency with jurisdiction is diligently

5. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 890 F. Supp. 470, 477 (D.S.C. 1995).

6. See 33 U.S.C. § 1365(b)(1)(A) (1994).

7. See *Laidlaw*, 890 F. Supp. at 477.

8. See *id.*

9. See *id.*

10. See *id.*

11. See *id.* at 477-78.

12. See Brief of Petitioner at 6, *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167 (No. 98-822).

13. See *id.* at 6.

14. See *id.*

15. See *Laidlaw*, 890 F. Supp. at 474.

prosecuting a party for alleged violations of the Act.¹⁶ After conducting a seven-day evidentiary hearing, the district court denied Laidlaw's motion.¹⁷ It concluded that the DHEC was not diligently prosecuting Laidlaw.

After conducting a hearing on the merits, the district court issued an order in 1997 in which it found that Laidlaw had violated the mercury limits in its permit 489 times, the monitoring requirements 420 times, and the reporting requirements 503 times.¹⁸ The court found that 13 of the mercury violations, 13 of the monitoring violations, and 10 of the reporting violations occurred after Friends of the Earth had filed its citizen suit.¹⁹ The district court denied Friends of the Earth's request for injunctive relief on the basis that Laidlaw had come into substantial compliance with its permit between the time Friends of the Earth filed its complaint and the time the district court issued its order on the merits.²⁰ The district court ordered Laidlaw to pay \$405,800 in civil penalties, however.²¹

Friends of the Earth filed an appeal in the Fourth Circuit in which it argued that the civil penalties imposed by the district court were inadequate.²² Laidlaw filed an appeal in which it again argued that Friends of the Earth lacked standing and that its suit was statutorily barred because the DHEC was diligently prosecuting Laidlaw.²³ The Fourth Circuit did not address any of the issues raised by the parties. Instead, it reversed the district court on the basis that the case had become moot once the district court rejected Friends of the Earth's request for injunctive relief and Friends of the Earth had correspondingly declined to appeal that aspect of the district court's decision.²⁴ The Fourth Circuit arrived at its mootness conclusion by explaining that one of the three constitutionally required elements for plaintiffs' standing had fallen away—namely, redressability.²⁵ Because the plaintiffs were only appealing the sufficiency of the civil

16. See 33 U.S.C. § 1365(b)(1)(B).

17. See *Laidlaw*, 890 F. Supp. at 497.

18. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 956 F. Supp. 588, 600-01 (D.S.C. 1997).

19. See *id.* at 601.

20. See *id.* at 611.

21. See *id.* at 610.

22. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 149 F.3d 303, 305-06 (4th Cir. 1998).

23. See *id.* at 305.

24. See *id.* at 306-07.

25. See *id.* at 306.

penalties paid below—penalties which had been paid entirely to the United States Treasury—the court found that a ruling on this claim would provide no judicially cognizable redress to any arguable injury suffered by a citizen/plaintiff as a result of Laidlaw’s violations of the CWA.²⁶ The Fourth Circuit referenced the Supreme Court’s 1998 holding in *Steel Company v. Citizens for a Better Environment*,²⁷ reiterating that: (1) a court lacks jurisdiction to entertain a complaint when the court cannot impose a remedy that will redress a plaintiff’s injury; and, (2) a civil penalty paid to the U.S. cannot redress the injury caused to a private citizen by a defendant’s violation of a statute.²⁸

II. A HYPOTHETICAL ROUTINE RESOLUTION OF *LAIDLAW*

The Court could dispose of the issues raised in *Laidlaw* in a wide variety of ways. Under one possibility, the Court could simply apply the reasoning in two of its recent decisions—its 1998 decision in *Steel Company* and its 1987 decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*²⁹ If the Court were to take that approach, it could issue a relatively brief unanimous opinion in which it reversed the Fourth Circuit and held that Friends of the Earth’s suit was not in fact moot.

The Fourth Circuit relied on *Steel Company* to support its holding that Friends of the Earth’s suit was moot.³⁰ *Steel Company* does not support that holding for two reasons. First, the Court in *Steel Company* did not entertain or invoke a mootness argument. Instead, the Court rejected the plaintiffs’ appeal because it found that they lacked standing.³¹ Traditionally, standing questions and mootness questions have required the application of different tests.

Second, the standing-based holding in *Steel Company* does not apply to a case like *Laidlaw*. In *Steel Company*, the six-justice majority began by reciting the three-part test for determining whether a private plaintiff has Article III standing to sue a defendant for allegedly violating a federal statute. As an “irreducible constitutional minimum,” the plaintiff must prove that: (1) he has suffered a judi-

26. *See id.*

27. 523 U.S. 83 (1998).

28. *See Laidlaw*, 149 F.3d at 306-07.

29. 484 U.S. 49 (1987).

30. *See Laidlaw*, 149 F.3d at 306-07.

31. *See Steel Co.*, 523 U.S. at 109-10.

cially-cognizable injury, (2) caused by the defendant's violations, and, (3) the injury is capable of being redressed by a court.³²

In *Steel Company*, the majority held that the plaintiff lacked standing because he alleged "only past infractions of [an environmental statute], and not a continuing violation"³³ Two of the Justices who joined in the six-justice majority opinion wrote a separate concurring opinion in which they emphasized the importance of the distinction between an unredressable past violation and "a continuing or imminent violation" that would be redressable.³⁴ Thus, while some of the *reasoning* in the majority opinion in *Steel Company* might be interpreted broadly to apply to any citizen suit in which the plaintiff seeks civil penalties, the holding applies only to a plaintiff who alleges that the defendant engaged in "wholly past" violations of an environmental statute. *Laidlaw* is easily distinguishable as a case in which the plaintiff alleged (and proved) that the defendant was engaging in continuing violations of an environmental statute.

While *Laidlaw* is easily distinguishable from *Steel Company*, its resolution seems to be governed a fortiori by the Court's 1987 decision in *Gwaltney*.³⁵ In that case, the plaintiffs filed a citizen suit against Gwaltney alleging that Gwaltney had engaged in violations of the CWA by violating its NPDES permit.³⁶ The plaintiffs were able to prove only that Gwaltney had engaged in "wholly past" violations of the CWA.³⁷ The Court concluded that the citizen-suit provision of the CWA was intended only to authorize citizen suits that will deter a defendant from engaging in future violations of the CWA and that, consequently, a citizen suit could not have such a deterrent effect when it alleges only past violations.³⁸

The Court went on, however, to hold that the district court had jurisdiction to consider the complaint, even though the plaintiffs had been unsuccessful in proving that Gwaltney was engaged in a continuous violation of the CWA, because the plaintiffs had a good faith belief that Gwaltney was engaged in continuous violations at the time plaintiffs filed their complaint.³⁹ The Court held that such a good

32. *See id.* at 102-04.

33. *Id.* at 109.

34. *See id.* at 110.

35. 484 U.S. 49 (1987).

36. *See id.* at 54.

37. *See id.* at 55-56.

38. *See id.* at 56-63.

39. *See id.* at 64-65.

faith belief is sufficient to confer jurisdiction on a court.⁴⁰ The Court continued by noting that defendants like Gwaltney, who are not in fact engaged in continuous violations of the CWA, can seek dismissal of a citizen suit based on “principles of mootness.”⁴¹ The Court further commented, however, that “the defendant, must demonstrate that it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur’” in order to obtain an order of dismissal based on mootness.⁴²

Justice Scalia’s concurring opinion on behalf of three Justices expressed the view that a good faith belief that a defendant is engaging in a continuing violation of the CWA is not sufficient to confer jurisdiction on a court.⁴³ In the view of the concurring Justices, a plaintiff must prove a continuing violation in order to satisfy the jurisdictional predicates applicable to a citizen suit under the CWA.⁴⁴ The concurring Justices emphasized, however, that a permittee remains in violation of the CWA once it has violated the CWA unless it has “put in place remedial measures that clearly eliminate the cause of the violation.”⁴⁵ The concurring Justices went on to explain the relationship between standing and mootness:

It does not suffice to defeat subject-matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed. Subject matter jurisdiction “depends on the state of things at the time of the action brought;” if it existed when the suit was brought “subsequent events” cannot “oust” the court of jurisdiction.⁴⁶

Thus, in the opinion of the concurring Justices, the outcome-determinative question should be whether “the defendant was in a state of compliance when this suit was filed.”⁴⁷

If the Court decides simply to apply *Steel Company* and *Gwaltney*, it will issue a unanimous decision in which it distinguishes *Steel Company* as a case involving “wholly past violations” and applies the reasoning of either the majority opinion or the concurring opinion in *Gwaltney* as the basis to reverse the Fourth Circuit and to hold that

40. *See id.* at 65.

41. *See id.* at 66.

42. *Id.* at 66 (quoting *United States v. Phosphate Export Ass’n, Inc.*, 393 U.S. 199, 203 (1968)).

43. *See id.* at 67-68 (Scalia, J., concurring).

44. *See id.* at 69 (Scalia, J., concurring).

45. *See id.*

46. *Id.* (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)).

47. *Id.*

the case is not moot. Under the reasoning in the majority opinion in *Gwaltney*, Friends of the Earth clearly had standing, and the district court clearly had jurisdiction, because 1) Friends of the Earth had a good faith belief that Laidlaw was engaging in a continuous violation of the CWA at the time it filed its complaint and, 2) the case had not become moot because the district court did not make a finding that it was “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” Equivalently, under the reasoning of the concurring opinion in *Gwaltney*, Friends of the Earth clearly had standing, and the district court clearly had jurisdiction, because the district court found that Laidlaw was engaged in a continuing violation of the CWA at the time Friends of the Earth filed its complaint. The district court found that Laidlaw did not come into “substantial compliance” with its permit until two months after Friends of the Earth filed its complaint⁴⁸ and that Laidlaw continued to commit sporadic violations throughout the years during which the case was being litigated.⁴⁹

The above is one possible Supreme Court resolution of the issues raised by *Laidlaw*. It is the resolution I would predict if the case had arisen in one of many contexts in which the law is relatively stable and predictable. However, it is an unlikely resolution, given the extraordinarily dynamic and ideologically-charged context in which *Laidlaw* emerges. Some of the Justices might write an opinion of the type I have just described. Other Justices would be likely to see *Laidlaw* as an opportunity to further their agendas with respect to one or more of three broad issues: 1) the meaning and effects of the Case or Controversy clause in Article III; 2) the meaning and effects of the Take Care clause in Article II; and/or 3) the meaning and effects of the principles of federalism implicit in the structure and history of the Constitution.

III. THE CONTEXT IN WHICH *LAIDLAW* ARISES

Laidlaw strongly implicates the relationships among the three branches of the federal government, as well as the relationships between the federal government and the states. The Supreme Court has made dramatic changes in both of these areas of law in recent years—often in five-to-four decisions.⁵⁰ Several Justices—perhaps a major-

48. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 956 F. Supp. 588, 611 (D.S.C. 1997).

49. See *id.* at 601.

often in five-to-four decisions.⁵⁰ Several Justices—perhaps a majority—disagree strongly with the basic philosophies of government on which the prevalent doctrines in these areas of law have been premised in the past. Because of their deliberate endeavors, doctrine in these areas has proven extraordinarily dynamic and unpredictable. Every term of the Court brings surprising new twists. The confusing doctrinal debates mask a much broader dispute about competing models of government.

The Court has issued over one hundred opinions involving standing to obtain access to the courts over the past two decades.⁵¹ The Court increasingly uses the law of standing to define the permissible relationships among the branches of government.⁵² Most standing disputes have been resolved by five or six-justice majorities of ever-shifting composition.⁵³ Some of the most important cases have no majority opinion, thereby forcing the reader to speculate about the nature and extent of the disagreements between the Justices who joined in a plurality opinion and the Justices who joined in a concurring opinion.⁵⁴ The resulting body of law is not a model of clarity or consistency. The Court alters the law of standing every term.⁵⁵

The basic elements of what has come to be considered the black letter law of constitutional standing have a remarkably brief and questionable pedigree—not to mention a constantly shifting content. As a matter of course, the Court has begun each of its modern standing opinions with the statement that the Case or Controversy clause of Article III requires a plaintiff to establish at a minimum: 1) injury-in-fact, 2) caused by the defendant, and 3) redressable by a court.⁵⁶ The Court has treated each element as if it were a well-settled and long-standing interpretation of Article III. Yet, each of these requirements is relatively new. The Court first announced the injury-

50. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress's attempt to regulate the presence of guns in areas surrounding public schools exceeds the scope of its powers under the Commerce Clause). See also *infra* notes 68-70 and accompanying text.

51. See generally KENNETH C. DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW*, ch. 16 (3d ed. 1994 & 1999 Supplement).

52. See Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 *DUKE L.J.* 1170, 1186-88 (1993).

53. See Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 *N.C. L. REV.* 1741, 1750-58 (1999).

54. See, e.g., Pierce, *supra* note 52, at 1171-88 (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

55. See Pierce, *supra* note 53, at 1750-58.

56. See, e.g., *Steel Co.*, 523 U.S. at 102-05.

in-fact requirement in 1970,⁵⁷ and it first announced the causation and redressability requirements in 1973.⁵⁸ Each requirement also enjoys little, if any, support in text, history, or pre-1970 precedents. Numerous scholars have searched in vain for evidence that the Case or Controversy clause actually requires any of the three elements the Court now necessitates.⁵⁹

More recently, the Court has redefined each of the three requirements in ways that give them much more powerful effects in some contexts, and it has applied them in ways that work significant reallocations of power among the executive, legislative, and judicial branches. Thus, for instance, in 1992 the Court first relied on Article III reasoning as the basis to hold that federal courts lack jurisdiction to consider particular statutorily-authorized causes of action,⁶⁰ and the Court's 1998 decision in *Steel Company* was the first case in which the Court relied on lack of redressability as the sole basis to reject jurisdiction to consider a statutorily-authorized cause of action.⁶¹ In each of these recent cases, the majority or plurality decision resulted in a reduction of power for both the judicial and legislative branches and a centralizing of power in the executive branch.⁶²

The Court regularly changes the vital substance of each of the three elements of the Article III standing test.⁶³ The nature of the injury, causal relationship, and redressability requirements varies both over time and depending on the litigation context in which the requirements are implicated.⁶⁴ Thus, for instance, politically conservative Justices have tended to erect powerful barriers to standing for environmentalists, prisoners, and labor unions, but to be far more accommodating to banks, trade associations, and landowners.⁶⁵ The more politically liberal Justices have exhibited the opposite tenden-

57. See *Barlow v. Collins*, 397 U.S. 159 (1970).

58. See *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

59. See, e.g., Raoul Berger, *Standing to Sue in Public Actions; Is it a Constitutional Requirement?* 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

60. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

61. 523 U.S. 83 (1998).

62. See *Pierce*, *supra* note 52, at 1186-88.

63. See *Pierce*, *supra* note 53, at 1750-58.

64. See *DAVIS & PIERCE*, *supra* note 51, at §§16.4 and 16.5.

65. See *id.* at ch. 16; *Pierce*, *supra* note 53, at 1750-58. See also John D. Echeverria & Jon T. Zeidler, *Barely Standing: The Erosion of Citizen "Standing" to Sue and Enforce Environmental Law* at 6-7 (Envtl. Policy Project, Georgetown University Law Ctr., June 1999).

cies. Lower court judges mirror these tendencies, granting broad access to those whose interests they embrace and limiting access to those whose interests they do not share. Thus, for instance, judges who were appointed by Democrat Presidents vote to grant standing to environmental plaintiffs four times as frequently as judges who were appointed by Republican Presidents.⁶⁶

Laidlaw also raises an important federalism question—in what circumstances, if any, is it appropriate for a federal judge to evaluate the actions of a state agency and to conclude that it is not “diligently prosecuting” an enforcement action? Federalism may be the only major area of law that is even more volatile and unpredictable than standing at present. Since the Court’s surprising 1995 decision in *United States v. Lopez*,⁶⁷ the Court has decided several more cases involving the relationships between the federal government and the States.⁶⁸ In each case, a five-justice majority pronounced new federalism precedent by curtailing the powers of the federal government in particular arenas and correspondingly increasing the powers of the States in those realms. In its most recent federalism decision—the 1999 decision in *Alden v. Maine*—the Court based its holding not on any *provision* of the Constitution but on the “structure” and “history” of the Constitution.⁶⁹ Now that the Court has recognized a free-standing source of States’ rights not linked to any constitutional text, it becomes impossible to predict the scope of States’ rights that the Court will deem “implicit” in the Constitution.

The Justices have been engaged in a continuous, robust debate about the constitutionally permissible relationships among the branches of the federal government since 1992⁷⁰ and in a continuous, robust debate about the constitutionally permissible relationships between the federal government and the States since 1995.⁷¹ *Laidlaw* raises issues that are central to both of those debates. The Justices who are trying to decrease the power of the judicial and legislative branches by centralizing power in the executive branch and those trying to decrease the power of the federal government vis a vis the

66. See *Pierce*, *supra* note 53, at 1758-63.

67. 514 U.S. 549 (1995).

68. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank v. Florida Prepaid Post Secondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

69. See 527 U.S. at 724.

70. See *supra* notes 51-66 and accompanying text.

71. See *supra* notes 67-69 and accompanying text.

States are likely to see *Laidlaw* as yet another vehicle to further one or both of those agendas.

The federalism debate is relatively easy to follow, but the debate concerning the permissible allocation of power among the branches of the federal government has become confused and difficult to track. The source of the confusion is apparent. Congress has been attempting through recent legislation to implement a model of government that some of the Justices would accept as constitutionally-permissible. Troublesome is the fact that other Justices—perhaps a majority—would and do reject that model as allowable under the Constitution. The participants in this debate about competing models of government frame their arguments with reference to the law of standing—a cluster of legal doctrines that have only a tangential relationship to the fundamental issues that divide them.

IV. COMPETING MODELS OF GOVERNMENT

The Fourth Circuit decided *Laidlaw* on the basis of mootness.⁷² Mootness is closely related to standing. Both are rooted in the Case or Controversy clause of Article III.⁷³ The Supreme Court resolves constitutional standing cases by analyzing injury, causation, and redressability.⁷⁴ When Congress enacted the statutory provision under which Friends of the Earth sued *Laidlaw*, it also had an eye to the judicial concepts of injury, causation, and redressability. Congress' conception of those three issues differed dramatically from the ways in which the Court thinks about those issues, however (albeit that the Court's thoughts are not always entirely consistent over time). The Court requires the plaintiff to establish injury, causation, and redressability on a "particularized" basis,⁷⁵ while Congress was attempting to address those issues on a more generalized basis.

Friends of the Earth sued *Laidlaw* pursuant to the citizen suit provision of the CWA.⁷⁶ Congress has included similar provisions in all major federal environmental statutes,⁷⁷ as well as in the False

72. See 149 F.3d at 306-07.

73. See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

74. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-05 (1998).

75. See *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883, 899 (1990).

76. See 33 U.S.C. § 1365.

77. See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994) Resource Conservation and Recovery Act, 42 U.S.C. §§ 6972, 9659 (1994). Endangered Species Act, 16 U.S.C. § 1540(g) (1994); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1) (1994); *but see*

Claims Act (FCA).⁷⁸ Congress's goal in each case was to encourage private citizens to assist agencies in enforcing public laws. Each of the statutes provides one form of incentive to private parties—the private party plaintiff can recover its lawyer's fees from the defendant if it prevails.⁷⁹ The analogous provision of FCA includes an additional incentive—the private plaintiff is awarded a share of the civil penalties assessed against the defendant.⁸⁰

In each case, Congress was trying to address an “injury” of sorts. In the case of the CWA, for instance, Congress was trying to deter emitters of pollution from discharging pollutants that will harm the public in a variety of ways—for example, by making rivers unhealthy for swimming, boating, or fishing. Congress assigned the EPA and state agencies the task of determining the causal relationships between emissions of pollutants and various types of injuries to the general public. In many cases, the EPA or a state water quality agency is required to set the permissible levels of emissions of pollutants from a particular source at levels which, when combined with emissions from all other sources, will avoid injuries of various types to the parts of the river downstream of each source.⁸¹ Neither Congress nor the permitting agencies care about what the Supreme Court refers to as a “particularized” demonstration that specific emissions from a specific source cause specific harm to specific individuals. Their focus is on the general relationships between emissions of pollutants and water bodies that are used by the general public. Thus, for instance, a permitting agency, acting on instructions from Congress, limits emissions of mercury from a specific source based on its belief that emissions above that level, when combined with emissions from many other sources, are likely to cause injuries of some type to at least some unknown people who use the waters downstream of the point of discharge. Neither Congress nor the agencies know, or care about, the particularized relationships—for example, whether emissions of mer-

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994 & Supp. V 1999) (has no citizen-suit provision).

78. See 31 U.S.C. § 3730(b)(2) (1994).

79. See, e.g., 33 U.S.C. § 1365(d); (“The court, in issuing any final order . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.”).

80. See 31 U.S.C. § 3730(d)(2). This type of “incentivized” citizen suit is known as a *qui tam* action. See also *infra* Part V.D (discussing the history and characteristics of *qui tam* actions).

81. See Richard J. Pierce, Jr., *Causation in Government Regulation and Toxic Torts*, 76 WASH. U. L.Q. 1307, 1333-35 (1998).

cury from a particular source in excess of a particular level will cause particular injuries to particular, identifiable persons.

Yet, in the context of citizen suits, some on the Court reject as constitutionally impermissible the public law model that was the basis for the citizen-suit provision that Congress included in the CWA and the generalized determinations of injury and causation that were the basis for the decisions of permitting agencies. Those Justices apply instead a private law model that requires the plaintiff to prove that he will suffer a particular injury as a result of a particular emission from a particular source.⁸² As a result, judicial decisions in this area often address the critical issues of injury and causation in ways that are completely inconsistent with the ways in which Congress and regulatory agencies address those issues.

The debates between those who accept the public law model and those who reject that model become even more confused in the context of redressability. Congress was attempting to create remedies that would “redress” injuries caused by water pollution when it included a citizen-suit provision in the CWA. Consistent with the public law model it was applying, Congress included remedies that it felt would redress injuries to the general public. Thus, for instance, Congress authorized private citizens to sue firms that violate the CWA in order to supplement scarce public enforcement resources and to render more effective the provisions of the CWA that are designed to avoid injuries to the public. It instructed courts to impose civil penalties against firms violating the CWA at the behest of private citizens as a means of deterring firms from harming the public.

Congress was attempting to create a remedy that would further its goal of general deterrence. The congressional reasoning was simple and compelling. If polluters have cause to fear that a court might impose penalties on them for violating the CWA at any time at the behest of any citizen who detects a violation and files a citizen suit, they will be dissuaded from violating the CWA. Until the Supreme Court’s decision in *Steel Company*, the Fourth Circuit had accepted and applied that reasoning in resolving redressability disputes.⁸³

Some Justices do indeed accept and apply the rationale of redressability in the public law model, but others reject it as constitu-

82. See *Pierce*, *supra* note 52, at 1174-77 (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

83. See, e.g., *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988). The Fourth Circuit panel that decided *Laidlaw* concluded that *Steel Company* overruled *Simkins*. See 149 F.3d 303, 306 n.4.

tionally impermissible.⁸⁴ To them, the general deterrent effect of a remedy available to a private citizen is irrelevant in deciding whether a court may consider a citizen's complaint. To the Justices who reject the public law model, a remedy counts as redress for an injury only if it specifically deters a specific firm from acting in a manner that will injure the plaintiff.⁸⁵ The briefs and oral argument in *Laidlaw* are laced with debates about the deterrent effects of civil penalties. Those debates are often confusing, and sometimes incoherent, because some participants are referring to general deterrence while others are referring to specific deterrence.

It is easy to see how the potential imposition of civil penalties serves as a powerful general deterrent to all firms that are tempted to violate the CWA. It is much more difficult—perhaps impossible—to argue persuasively that civil penalties deter a specific firm from violating the CWA. Once penalties are imposed, based necessarily on past violations, they may not deter the firm from violating the CWA. Their only effects are to punish that firm for its past behavior, and to deter all firms from engaging in similar behavior in the future. Yet, some Justices are convinced that only specific deterrence can satisfy the redressability requirement of Article III.

The confused debate about what suffices to satisfy the three elements of constitutional standing—*injury, causation, and redressability*—tends to mask the contours of the real debate. Beneath the confusing doctrinal debate lies a much more important philosophical debate. By including citizen-suit provisions in public law statutes, Congress adopted a model of government in which citizens can be, and are, empowered to use the courts to enforce public laws. At least four scholarly studies have attempted to prove that the Framers of the Constitution embraced that model,⁸⁶ but some Justices hold the conviction that the Framers rejected that model.

Under the leadership of Justice Scalia, a group of Justices numbering somewhere between four and six has taken the position that only the President can enforce a public law; a private citizen can only vindicate his own private rights.⁸⁷ The Court's recent environ-

84. *See Steel Co.*, 523 U.S. 83, 106-07 (“Justice Stevens thinks it is enough . . . that the punishment will deter the risk of future harm Obviously, such a principle would make the redressability requirement vanish.”).

85. *See id.* at 106-09.

86. *See supra* note 59 (collecting sources).

87. Four Justices clearly embraced this view in *Lujan v. Defenders of Wildlife*, but it is not at all clear that the two concurring Justices agreed. *See Pierce, supra* note 52, at 1171-88.

mental standing opinions—each of which was authored by Justice Scalia—contain several suggestions to this effect.⁸⁸ Justice (then-judge) Scalia described his views most clearly and comprehensively, however, in a 1983 article in *Suffolk Law Review*.⁸⁹ In that article, he explained in detail the bases for his belief that only the executive branch can enforce a public law. So far, Justice Scalia has convinced a majority of his colleagues to go about halfway toward adopting his view of the Constitution. I have no doubt that he will continue to press for further changes in doctrine until the Court has embraced his entire theory. *Laidlaw* provides him another opportunity to further that goal. *Laidlaw* also provides Justice Scalia an opportunity to advance his strong theory of States' rights. Justice Scalia is unlikely to resist all of those openings. The truly interesting questions are how he will attempt to change the law in *Laidlaw* and whether he will be successful in doing so.

V. ISSUES THE COURT MIGHT ADDRESS IN *LAIDLAW*

I will now discuss five issues raised by *Laidlaw* that could be the basis for a decision in which the Court makes a major change in law. Those issues are: 1) mootness, 2) redressability, 3) injury and causation, 4) the meaning of the "Take Care" clause, and 5) the federalism concern raised by the district court's interpretation of "diligent prosecution." The Court could use *Laidlaw* as a vehicle to debate any of those issues. Even if the Court chooses not to address any of those issues in deciding *Laidlaw*, each is worthy of discussion, because each is already the subject of lively debate in the circuit courts. Thus, it is virtually certain that the Court will have occasion to address each in the near future.

A. *Mootness*

The Fourth Circuit held that the district court lacked jurisdiction to impose penalties on *Laidlaw* at the behest of Friends of the Earth because the case became moot once the district court denied the plaintiff's request for injunctive relief and the plaintiff declined to take its appeal.⁹⁰ The Supreme Court could uphold the Fourth Circuit on mootness grounds, but only if it changes the law of mootness. The

88. See *Steel Co.*, 523 U.S. at 105-06; *Lujan*, 504 U.S. at 560.

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

90. See *Laidlaw*, 149 F.3d 303, 306-307 (4th Cir. 1998).

Fourth Circuit relied on lack of redressability as the basis for its mootness holding.⁹¹ Redressability is a requirement for standing, but the Court has never held that lack of redressability is a sufficient basis to dismiss a case as moot. Instead, the Court has held that a case is moot only if the defendant demonstrates that “it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”⁹² The district court made no such finding. In fact, Laidlaw continued to violate the CWA sporadically during the course of the proceedings before the district court.⁹³ Thus, the Supreme Court could uphold the Fourth Circuit on mootness grounds only by working a significant change in the standard for mootness.

Some Justices might welcome the opportunity to change mootness law. Like standing, mootness is based on the Case or Controversy Clause of Article III. The Court has referred to mootness as “the doctrine of standing set in a time frame.”⁹⁴ The Court has made major changes in standing law in the last decade,⁹⁵ but it has not made analogous changes in mootness law. The resulting legal regime is a bit strange. It is hard to obtain standing, but it is easy to avoid mootness. This result is particularly strange since the Court has said that a plaintiff must be able to establish standing at any stage of a case to avoid dismissal based on lack of standing.⁹⁶ Thus, in theory, a case that is not “moot,” under the principles of mootness doctrine, can yet be dismissed on the basis that the plaintiff no longer has standing because one of the three elements of standing doctrine has ceased to exist. The Justices who have transformed the law of standing during the last decade might see *Laidlaw* as a welcome opportunity to change the law of mootness to create a better fit with the new law of standing.

I hope that the Court does not use *Laidlaw* as a vehicle to change the law of mootness. There are good reasons to retain a law of mootness that makes it hard for a defendant to obtain a dismissal based on mootness grounds. This is an issue that Friends of the Earth argued

91. *See id.* at 306-07. It is also possible that the Court could uphold the Fourth Circuit on mootness grounds on the basis of a change of facts since the Fourth Circuit issued its opinion. Laidlaw has ceased all operations at the facility that is the subject of the dispute. *See* Brief of Respondent at 24, *Laidlaw*, 528 U.S. 167 (No. 98-822).

92. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987).

93. *See Laidlaw*, 956 F. Supp. 588, 601 (D.S.C. 1997).

94. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

95. *See* DAVIS & PIERCE, *supra* note 51, at ch. 16.

96. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

particularly effectively in its brief. Since I cannot improve on that argument, I will quote it:

Standing serves a gatekeeping function. It serves to keep cases that are not justiciable out of the courthouse. Mootness, on the other hand, does not serve the same gatekeeping function. By the time mootness is an issue, the case has been brought and litigated, often for years. This Court's holdings making it extremely difficult for a case to be dismissed as moot serve to protect the rights and resources of the parties and the courts.

Moreover, the wasting of time and resources could become a vicious circle if a case were easily dismissed due to the voluntary cessation of the illegal conduct. In such circumstances, defendants would be free to resume illegal conduct, cease such conduct during suit to avoid the consequences of the suit, resume the illegal conduct when the case was dismissed as moot, and so on.⁹⁷

As the United States pointed out in its amicus brief,⁹⁸ the change in mootness law urged by *Laidlaw* would give every defendant a powerful incentive to prolong the litigation until it is finally in compliance or, conversely, to delay compliance until the litigation is about to conclude. It also would deter private parties from bringing enforcement actions. The defendant could moot any case by coming into compliance just before a court issues a decision against the defendant. That, in turn, would preclude the plaintiff from recovering its litigation costs as a prevailing party.

Of course, even if the Court uses *Laidlaw* as a vehicle to make mootness law identical to standing law, it could not uphold the Fourth Circuit's mootness holding without changing the law of standing to some extent. Some Justices would welcome the opportunity to do that as well. Alterations to standing doctrine could take place in one of three ways: 1) a change in the redressability requirement; 2) a change in the injury and/or causation requirements; or, 3) a change in interpretation of the "Take Care" clause in Article II.

B. *Redressability*

The Fourth Circuit based its mootness holding on the Court's discussion of redressability in *Steel Company*.⁹⁹ *Laidlaw* is easily distinguishable from *Steel Company*, but the Court certainly could use

97. Brief of Petitioner at 23-24, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000) (No. 98-822).

98. See Brief Amicus Curiae of the United States in Support of Petitioners at 15-19, *Laidlaw*, 528 U.S. 167 (No. 98-822).

99. See *Laidlaw*, 149 F.3d at 306-07 (discussing *Steel Company v. Citizens for a Better Env't*, 523 U.S. 83, 101-05).

Laidlaw as a conduit to increase the stringency of the redressability requirement in citizen-suit cases. The *Steel Company* majority distinguished between suits alleging “wholly past” violations and suits alleging continuing violations. It concluded that wholly past violations are not redressable, while continuing violations are.¹⁰⁰

The *Steel Company* majority distinguished among remedies in discussing redressability, however. It stated that: “[i]f respondent had alleged a continuing violation, the injunctive relief requested would remedy that alleged harm.”¹⁰¹ The *Steel Company* majority suggested that civil penalties can never redress a private plaintiff’s injury because they are not payable to the plaintiff.¹⁰² It also suggested that the general deterrent effect of civil penalties is constitutionally inadequate to redress a private plaintiff’s injury. Moreover, the majority referred to, and rejected, the argument of Justice Stevens that civil penalties could redress a private plaintiff’s injury because they “deter the risk of future harm.”¹⁰³

The Fourth Circuit relied on these passages from *Steel Company* to support its holding that Friends of the Earth could not maintain its action for civil penalties once the district court denied its request for injunctive relief and Friends of the Earth declined to appeal that decision.¹⁰⁴ Laidlaw devoted much of its brief to its argument that civil penalties can never redress a private plaintiff’s injury. If a majority of the Court continues to reject the public law model on which citizen suits are premised—and the general deterrence rationale that logically accompanies the public law model—the Court could easily embrace Laidlaw’s argument. In its briefs and at oral argument, Friends of the Earth experienced great difficulty attempting to explain how a civil penalty imposed against a particular firm that is no longer violating the statute deters that firm from committing future violations.¹⁰⁵ I hope the Court rejects Laidlaw’s redressability argument, not because I believe that civil penalties further the goal of specific deterrence, but because I believe it is enough that they further the goal of

100. See 523 U.S. 83, 108-09 (1998).

101. *Id.* at 108.

102. See *id.* at 106-09.

103. See *id.* at 107.

104. See *Laidlaw*, 149 F.3d at 106-07.

105. See Brief of Petitioners at 24-42, *Laidlaw*, 528 U.S. 167 (No. 98-822); Transcript of Oral Argument at 3-13, *Laidlaw*, 528 U.S. 167 (No. 98-822). Also see the confusing debate between Counsel for the United States and several Justices on the issue of whether a penalty imposed against a firm that is now in compliance can have a deterrent effect on that firm. See *id.* at 13-21.

general deterrence. My conception is based on my acceptance of the public law model as constitutionally permissible—an issue that I have addressed at length elsewhere.¹⁰⁶ However it is not clear that a majority of Justices agree with that proposition.

If the Court renders the redressability requirement more demanding by holding that civil penalties can never redress a private plaintiff's injury, it will force environmental plaintiffs to change their litigation tactics in citizen-suit cases. They will place much greater emphasis on obtaining declaratory and injunctive relief from district courts. Ironically, environmental plaintiffs' ability to succeed in pursuing this approach would be greatly enhanced by a hypothetical decision of the Court holding that civil penalties are unavailable to private plaintiffs. Longstanding common law principles provide that equitable remedies are available only when adequate remedies at law are unavailable.¹⁰⁷ Because the Court's hypothetical holding would render unavailable the legal remedy of civil penalties, it is easy to predict that many environmental plaintiffs would successfully circumvent a dismissal grounded in the constitutional inadequacy of civil penalties by seeking declaratory or injunctive relief instead.

The Court could render those efforts at circumvention far more difficult, however, by applying, and potentially expanding, its controversial 1983 holding in *City of Los Angeles v. Lyons*.¹⁰⁸ In *Lyons*, a five-justice majority held that a victim of an illegal police chokehold lacked standing to seek equitable relief because he was unable to prove that he personally was likely to be the victim of an illegal chokehold in the future, and thus, he could not obtain appropriate redress from a court by seeking a mere injunction against future actions.¹⁰⁹ Thus, the Court could interpret *Lyons* to deny standing to an environmental plaintiff to seek even an *equitable* remedy unless he can prove that he personally is likely to be a victim of the defendant's illegal pollution in the future. Environmental plaintiffs might experience great difficulty proving such a future likelihood of personal injury, depending on how the Court applies the injury and causation requirements in environmental standing cases. I will address that issue in the next section.

106. See, e.g., Pierce, *supra* note 53, at 1763-81; DAVIS & PIERCE, *supra* note 51, at §§ 16.11, 18.5; Pierce, *supra* note 52, at 1188-1201.

107. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-14 (1982).

108. 461 U.S. 95 (1983).

109. See *id.* at 104-05.

This potential application of *Lyons* to environmental plaintiffs highlights an odd feature of the remedy-based reasoning of the Fourth Circuit in *Laidlaw*. In *Lyons*, the majority held that the plaintiff lacked standing to seek an equitable remedy in part because he had access to the legal remedy of damages.¹¹⁰ Yet, in *Laidlaw*, the Fourth Circuit held that the plaintiffs lacked standing to seek the legal remedy of civil penalties because they were no longer seeking an equitable remedy.¹¹¹ Will a majority of Justices apply this circular reasoning to support a holding that environmental plaintiffs lack standing to seek *any* statutorily-authorized remedy? The answer to that question, like all others in this area of law, probably depends on whether a majority of Justices accept or reject the permissibility of the public law model on which citizen-suit provisions are based. By my count, three Justices accept that model, four reject it, and two are still undecided.¹¹²

C. Injury and Causation

The Fourth Circuit “assume[d] without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact.”¹¹³ The Court is not bound by that assumption, however. It could use *Laidlaw* as a vehicle to revisit, and to revise, the requirements for injury and causation in environmental cases. The district court made a finding that the Court could exploit as the basis for a holding that the plaintiffs did not prove that defendant’s conduct caused them injury in fact.

At an early stage in the proceeding, the district judge held that Friends of the Earth had standing.¹¹⁴ He based that holding on a combination of four types of evidence: 1) affidavits of members stating that their uses of the Tyger River downstream of Laidlaw’s discharges were adversely affected in various ways by Laidlaw’s illegal discharges of mercury; 2) scientific studies that demonstrated that mercury is extremely toxic in fish and humans; 3) evidence that Laidlaw had exceeded its permissible emissions of mercury by as much as thirteen-fold on hundreds of occasions; and 4) evidence of fish kills in the

110. *See id.* at 108-11.

111. *See* 149 F.3d at 306.

112. I base my beliefs primarily on the views expressed in the several opinions in *Lujan*, 504 U.S. 555, and *Steel Company*, 523 U.S. 83.

113. *Laidlaw*, 149 F.3d at 306 n.3.

114. He announced that holding orally. *See* Brief of Petitioner at 6, *Laidlaw*, 528 U.S. 167 (No. 98-822).

Tyger River downstream of Laidlaw. At the conclusion of the trial of the merits of the case, however, the judge found that “there has been no showing of any significant harm to the environment in this case.”¹¹⁵ He based that finding on several recently-completed studies conducted both by Laidlaw and by the DHEC,¹¹⁶ indicating no harm to fish or to water quality as a result of Laidlaw’s violations. The Court could choose to rely on this finding as the basis for a holding that Friends of the Earth lacked standing to sue Laidlaw because it did not prove that Laidlaw’s conduct caused any judicially cognizable injury to the plaintiffs.

If the Court does not address this issue in *Laidlaw*, it almost certainly will soon address it in the context of one of the many other cases that raise this issue. For instance, a divided panel of the Third Circuit held that environmental plaintiffs lacked standing on this basis in *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*,¹¹⁷ as did a divided panel of the Fourth Circuit in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*¹¹⁸

Justices who reject as constitutionally impermissible the public law model on which citizen suits are premised might find a holding based on injury and causation attractive. These two related concepts are infinitely malleable. The Court could easily define them in a manner that creates a nearly insurmountable obstacle to any environmental plaintiff. The Court could hold that a plaintiff must prove that he has suffered a specific injury attributable to a specific illegal act committed by the defendant. In the vast majority of cases, an environmental plaintiff could never satisfy such a demanding requirement. Injuries attributable to water pollution, for instance, are caused by the complicated interactions of hundreds of emissions of pollutants into water bodies. In the typical case, no one can isolate the adverse effects of a single illegal discharge on an identifiable individual.

I have commented on this dilemma at considerable length elsewhere.¹¹⁹ I oppose creation of such demanding tests of injury and causation in environmental standing cases because: 1) the Court does not apply them in other types of standing cases,¹²⁰ 2) courts lack the

115. 956 F. Supp. 588, 600 (D.S.C. 1997).

116. *See id.* at 600, 602-03.

117. 123 F.3d 111 (3d Cir. 1997).

118. 179 F.3d 107 (4th Cir. 1999), *reh’g en banc granted*, August 3, 1999.

119. *See Pierce*, *supra* note 81, at 1332-39.

120. *See Pierce*, *supra* note 53, at 1777-81.

institutional competence to make such determinations,¹²¹ 3) courts would have to devote substantial scarce resources to potentially long trials to resolve intractable injury and causation disputes,¹²² and 4) in many cases, an agency has already resolved the injury and causation issues in the process of issuing a permit.¹²³ A Justice would not likely find my objections persuasive, however, if he or she believes that all citizen suits are constitutionally impermissible.

D. *The Take Care Clause*

Justice Scalia believes that the Constitution permits only the executive branch to enforce a public law. He has expressed and explained this view both in his 1988 dissenting opinion in *Morrison v. Olson*¹²⁴ and in his 1983 article in *Suffolk Law Review*.¹²⁵ It is easier and more logical to support this view with reference to the Take Care clause in Article II than with reference to the Case or Controversy clause in Article III. The Take Care clause provides that the President “shall take care that the laws be faithfully executed.” For reasons that Justice Scalia articulated most fully in his *Suffolk* article, he interprets the Take Care clause to command that only the President has the power to execute the laws.

Justice Scalia’s views were considered idiosyncratic when he first announced them in 1983. Moreover, those views were rejected by a seven-justice majority in the Court’s 1988 decision in *Morrison v. Olson*.¹²⁶ In 1992, however, Justice Scalia wrote an opinion on behalf of a four-justice plurality in which he relied in part on the Take Care clause to support a holding that an environmental plaintiff lacked standing.¹²⁷ Moreover, subsequent events may have eroded support for the reasoning and holding of the majority in *Morrison v. Olson* and may have persuaded some Justices to accept instead the views expressed in Justice Scalia’s dissenting opinion. Many commentators have expressed the view that the Starr-Lewinsky impeachment debacle and the subsequent refusal of Congress to extend the life of the institution of the independent counsel have vindicated Justice Scalia’s

121. See *Pierce*, *supra* note 81, at 1333-37.

122. See *id.* at 1337-39.

123. See *id.* at 1333-35.

124. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

125. See Scalia, *supra* note 89.

126. 487 U.S. 654.

127. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

view that such an executively unaccountable law enforcement institution is unconstitutional.¹²⁸

In 1999, the Fifth Circuit relied on the Take Care clause to support its holding that *qui tam* actions are unconstitutional.¹²⁹ Consistent with Justice Scalia's views, the Fifth Circuit held that only the Attorney General or someone subject to her plenary control can enforce a federal public law. The Supreme Court has agreed to address that issue in the context of another case on its docket for the 1999-2000 Term.¹³⁰

Even if the Court upholds the validity of *qui tam* actions, it might still rely on the Take Care clause as the basis to hold that the citizen suits authorized by federal environmental statutes are unconstitutional. At the oral argument in *Laidlaw*, Justice Scalia engaged in a colloquy with Counsel for Laidlaw on this issue.¹³¹ Justice Scalia first noted that the Court has never decided whether *qui tam* actions are constitutional. He then asked counsel for Laidlaw if this case amounted to "*qui tam* squared." Counsel responded: "I'll agree with that, although I'm not sure I understand it."¹³²

Justice Scalia's reference was to two factors that could form the basis for reasoning in a pair of opinions that upholds the validity of *qui tam* actions, and yet find citizen suits under environmental laws unconstitutional. *Qui tam* actions have two characteristics that are not shared by citizen suits brought under environmental statutes. First, *qui tam* actions have a long and distinguished pedigree. They antedated the Constitution both in England and in the colonies, and they were authorized in twenty-three statutes that were enacted by the first four Congresses.¹³³ Second, a *qui tam* relator (the private initiator of the action) is entitled to thirty per cent of the damages he recovers on behalf of the government.¹³⁴ Consequently, a *qui tam* rela-

128. See, e.g., Benjamin Wittes, *A Kiss of Death for Independent Counsels*, WASH. POST, Aug. 11, 1998, at A21; Jeff Rosen, *Kenneth Starr, Trapped*, N.Y. TIMES, June 1, 1997, §6 (Magazine), at 42.

129. See *Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514 (5th Cir. 1999). *Qui tam* actions are defined *supra* note 80 and accompanying text.

130. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, U.S. No. 98-1828, argued Nov. 29, 1999. [Editor's note: the citation to the now decided case is 120 S. Ct. 1858 (2000)].

131. See Transcript of Oral Argument at 23, *Laidlaw*, 528 U.S. 167 (No. 98-822).

132. *Id.*

133. See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989).

134. For a familiar example under the federal law, see the False Claims Act, 31 U.S.C. § 3730(d)(2) (1994).

tor always has a clear personal stake in the outcome of a case. He is “injured” by an unfavorable disposition of his complaint, in the sense that he is deprived of a statutorily-created right to receive a large sum of money. Thus, without striking down bounty-based suits as such, Justice Scalia could hold that citizen-suit provisions in environmental statutes are unconstitutional because the plaintiff receives no bounty and, hence, has no stake in the outcome of the case.

I disagree with Justice Scalia’s expansive interpretation of the Take Care clause for reasons I have set forth at length elsewhere.¹³⁵ Justice Scalia’s interpretation is inconsistent with the language of the clause, historical practice, and the Court’s past interpretations of the clause.¹³⁶ There is no doubt, however, that Justice Scalia holds his views with conviction and that he will continue to try to persuade his colleagues to adopt his views. The Court will address the relationship between the Take Care Clause and environmental citizen suits at some point—perhaps in its opinion in *Laidlaw*.

E. *Federalism and “Diligent Prosecution”*

The Court might use *Laidlaw* as a vehicle to address the relationship between the federal government and the States, rather than the relationships among the branches of the federal government. Beginning in 1995, a five-justice majority has been aggressively redefining the permissible relationships between the federal government and the States.¹³⁷ Each opinion has moved the boundary significantly toward the interests of the States. Some of the holdings are based on questionable reasoning and have little, if any, basis in the language of the Constitution.¹³⁸

Laidlaw raises a federalism issue that the Court might see as an attractive alternative basis for upholding the Fourth Circuit. Like all citizen-suit provisions, the citizen-suit provision in the CWA authorizes a citizen suit only if the EPA or the state with jurisdiction is not “diligently prosecuting” the defendant.¹³⁹ The DHEC was prosecuting *Laidlaw* at the time Friends of the Earth filed its suit, but the district

135. See Richard J. Pierce, Jr., *Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1.

136. See *id.*

137. See *supra* notes 66-70 and accompanying text.

138. See *Alden v. Maine*, 527 U.S. 706, 724 (1999) (holding that state sovereign immunity exists not because of any language in the Constitution but because of its “structure” and “history”).

139. See 33 U.S.C. § 1365 (b)(1)(B).

court concluded that the DHEC was not diligently prosecuting.¹⁴⁰ The Fourth Circuit did not address this issue, and Laidlaw addressed it only in passing in its brief. The State of South Carolina filed an amicus brief, however, in which it urged the Court to uphold the Fourth Circuit on the alternative ground that the district court erred in concluding that the DHEC was not diligently prosecuting Laidlaw. South Carolina did an admirable job of developing its argument. South Carolina's contention may even appeal to Justices who are not among the five Justices who have been making revolutionary changes in the law of federalism.

The district judge based his conclusion on a combination of procedural and substantive characteristics of the DHEC's enforcement action. Procedurally, the DHEC's action evinced symptoms of collusion. The DHEC filed its complaint against Laidlaw one day before the expiration of the mandatory 60-day waiting period after a citizen notifies a state agency of its intent to sue.¹⁴¹ The DHEC had no intention to sue Laidlaw until Laidlaw itself insisted that it do so.¹⁴² Even then, the DHEC agreed to file a complaint against Laidlaw only if Laidlaw prepared the actual complaint, filed the complaint on the DHEC's behalf, and paid the DHEC's filing fee.¹⁴³ Thus, in a very real sense, Laidlaw sued itself.

Substantively, the DHEC imposed a penalty on Laidlaw that was so low that Laidlaw still realized a substantial net economic benefit as a result of its decision not to comply with its permit.¹⁴⁴ The EPA urges state jurisdictional agencies to impose penalties that are high enough to preclude a violator from obtaining economic benefits as a result of its violations of its permit.¹⁴⁵ The district court concluded that the minimum penalty required to have that effect on Laidlaw was \$405,800, rather than the \$100,000 penalty the DHEC had imposed.¹⁴⁶

The DHEC's actions were not quite as suspicious and inexplicable as the above recounting would seem to suggest, however. The DHEC and Laidlaw were engaged in protracted debates, negotiations, and administrative hearings about its mercury emissions limit both before and during Laidlaw's litigation with Friends of the

140. *See* 890 F. Supp. 470, 497 (D.S.C. 1995).

141. *See id.* at 477.

142. *See id.* at 478.

143. *See id.* at 479.

144. *See id.* at 480-84.

145. *See id.* at 492-94.

146. *See* 956 F. Supp. 588, 610 (D.S.C. 1997).

Earth.¹⁴⁷ Laidlaw maintained that the DHEC had erroneously set an unjustifiably low limit on its mercury emissions. An Administrative Law Judge (ALJ) ultimately resolved that dispute in Laidlaw's favor.¹⁴⁸ Apparently, the DHEC had made some combination of interpretive errors and calculation errors that resulted in a decision to impose an unduly low mercury emissions limit.¹⁴⁹ The mercury emissions limit in Laidlaw's permit was lower than any other mercury emissions limit in the country and less than one percent of the level permitted by the EPA.¹⁵⁰ Compliance with *that* limit would create a discharge stream easily in compliance with the Safe Drinking Water Act criteria applicable to potable water.¹⁵¹ This provides some elucidation concerning the district court's finding that Laidlaw's violations had no adverse effects on the environment.

The DHEC ultimately accepted the ALJ's decision and agreed to increase Laidlaw's permissible level of mercury emissions.¹⁵² Throughout the period in which Laidlaw and the DHEC were attempting to resolve that dispute, Laidlaw was also working with the DHEC staff in an effort to reduce its mercury emissions to maintain strict compliance with the atypically low limit in its permit.¹⁵³ Laidlaw devoted significant resources to that effort and implemented several different control technologies before it found a combination that worked.¹⁵⁴

Thus, when the DHEC filed its complaint and proposed consent decree, it knew both that Laidlaw's violations may well have been caused in part by the unduly low mercury emissions limit the DHEC had imposed on Laidlaw and that Laidlaw had been expending considerable resources in its continuing attempts to comply with that limit. Given the totality of the circumstances, the DHEC's otherwise suspicious series of actions in the enforcement proceeding against Laidlaw becomes understandable.

The district court's approach in applying the diligent prosecution standard seems unduly intrusive and disrespectful of South Carolina's exercise of discretionary judgment in performing a regulatory func-

147. *See id.* at 596.

148. *See id.* at 597.

149. *See id.*

150. *See* Brief Amicus Curiae of the State of South Carolina in Support of Respondent at 3, *Laidlaw*, 528 U.S. 167 (No. 98-822).

151. *See id.*

152. *See* 956 F. Supp. at 597.

153. *See id.* at 598-99.

154. *See id.*

tion that Congress and the EPA have assigned to South Carolina. Even in the context of federal court review of federal agency decisions, the Supreme Court has held that an agency's enforcement decisions are presumptively committed to the unreviewable discretion of the agency¹⁵⁵ unless the organic statute that is the basis for the enforcement decision specifically calls for judicial review.¹⁵⁶ That presumption of unreviewability is based on the Court's recognition that exercises of enforcement discretion are extremely complicated and necessarily depend on consideration of many criteria that are uniquely accessible to the agency.¹⁵⁷ The complicated context in which the DHEC acted against Laidlaw illustrates the impropriety of judicial intrusion on agency exercises of enforcement discretion.

The presumption of unreviewability of exercises of enforcement discretion can only be rebutted by a statutory provision that couples mandatory language with a justiciable standard.¹⁵⁸ It is not at all clear that "diligent prosecution" would qualify as a justiciable standard for the purposes of authorizing a federal court to review a federal agency's exercise of its enforcement discretion. It follows a fortiori that such a standard would be inadequate to justify federal court second-guessing of a state agency's exercise of its enforcement discretion. It appears that the district court engaged in just such an impermissible intrusion with respect to the DHEC's enforcement action against Laidlaw. Principles of federalism and comity clearly recognized in federal environmental statutes limit federal courts to deferential review of state exercises of enforcement discretion, and those principles preclude federal courts from second-guessing such agency decisions.¹⁵⁹ It is at least arguable that the "diligent prosecution" standard is too vague to provide a meaningful standard for federal courts to engage in detailed scrutiny of good faith state exercises of enforcement discretion, and therefore, the courts must abstain based on the doctrine of non-justiciability.

155. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

156. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 26 (1998).

157. See *Chaney*, 470 U.S. at 831-32.

158. See *id.* at 833.

159. See *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999) (holding invalid the EPA's common practice of "overfiling," i.e., filing a separate enforcement proceeding against a violator when it concludes that a state agency did not impose an adequate penalty). See also *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (declaring that principles of federalism preclude a federal court from entertaining an action against a state official when there is an available state court remedy); *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434 (6th Cir. 1997) (emphasizing that even when Congress specifically authorizes exclusive federal court review of state agency actions, review is "very limited" and cannot involve "second-guessing").

I can imagine the Court issuing a decision in *Laidlaw* in which it upholds the Fourth Circuit on the federalism ground discussed above, as urged by South Carolina. Such a decision might even be unanimous. It would require the Justices to engage in a multi-step reasoning process that each of the Justices has embraced in several cases. In step one, the Court recognizes that states are separate sovereigns to which principles of comity and federalism apply.¹⁶⁰ In step two, the Court recognizes that agency enforcement decisions are presumptively unreviewable exercises of enforcement discretion.¹⁶¹ In step three, the Court recognizes that the “diligent prosecution” standard is so ambiguous as to allow for any range of judicial review standards, from a “de novo” substituting of its own judgment for that of the agency, based solely on the record before the court, to a deferential “quick look” review designed to identify only extreme bad faith or collusion by the state regulator.¹⁶² In step four, the Court resolves the linguistic ambiguity by applying a combination of the avoidance canon—whereby a court should interpret an ambiguous statute to avoid raising serious constitutional concerns¹⁶³—and the clear statement rule—whereby a court should not attribute to Congress an intent to interfere with the performance of duties committed to the discretion of a sovereign State unless Congress has clearly authorized such interference.¹⁶⁴ In step five, the Court adopts a construction of “diligent prosecution” that authorizes federal court review of state agency exercises of enforcement discretion only in a narrow class of extreme cases.

CONCLUSION

By now it should be apparent that I simply do not know how the Court will decide *Laidlaw*. In Parts II thru V, I have described the basic elements of six hypothetical majority opinions that address

160. See, e.g., *supra* note 69 and sources cited.

161. See, e.g., *Chaney*, 470 U.S. 821 (1985) (stating that the “recognition of the existence of [agency] discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement”).

162. The Supreme Court has not addressed this issue. The lower courts have adopted a variety of interpretations of the “diligent prosecution” standard, as the district court’s discussion of the case law demonstrates. See *Laidlaw*, 890 F. Supp. 470, 485-95 (D.S.C. 1995). See also *supra* note 159 (discussing *Harmon Indus., Inc. v. Browner*, 191 F.3d 894).

163. See *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (demonstrating a five-to-four divide of the Justices with respect to the circumstances in which the avoidance canon applies).

164. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

some of the many important issues raised by *Laidlaw*. Obviously, the Court could decide *Laidlaw* by writing any of those opinions or countless combinations and permutations of them. I hope that the Court writes an opinion that combines the elements of both the opinion described in Part II and those in Part V.E. However, my track record in predicting the Court's actions in this area of law is poor, I should confess. A majority of the present Justices seem to reject as constitutionally impermissible those models of government that I believe to be entirely consistent with the Constitution.

I am confident about only two attributes of the Court's opinion in *Laidlaw*. First, the opinion will be another in a long series of cases in which the Justices continue their debate with respect to competing models of government. It may resolve one or two issues, but it will raise new issues and leave unresolved many of the questions that are already being debated in lower courts. Second, it will present its discussion of the issues in a manner that will tend more to obscure than to illuminate the questions most ardently debated. It is important for all participants in this major debate on the competing models of government to penetrate the typically obscure and arcane doctrinal language in order to understand the broad implications of adopting one of the divergent models vying for the support of a majority of Justices over another.

POSTSCRIPT: THE ACTUAL DECISION

The Court decided *Laidlaw* on January 12, 2000, long after this article was written.¹⁶⁵ A seven-justice majority reversed the Fourth Circuit. Two Justices dissented and two Justices wrote brief concurrences. To some extent, each of the issues discussed in Parts II and V were addressed by the Court. The majority definitively resolved several major issues and created a considerable amount of new law. In many ways, the majority opinion represents a major setback for Justice Scalia's attempt to persuade his colleagues that the Constitution prohibits a private party from enforcing a public law. Before *Laidlaw*, I counted four to six Justices who seemed to be sympathetic to Justice Scalia's view.¹⁶⁶ After *Laidlaw*, I can count only two to three Justices who appear sympathetic to his view. The debate among the Justices does not conclusively resolve all of the issues raised by *Laid-*

165. 528 U.S. 167 (2000).

166. I based my beliefs primarily on the opinions in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

law, however. It is safe to predict that the Court will continue the debate about many of those matters in future cases. I will now describe the opinions in *Laidlaw* with reference to the issues discussed in Parts II and V of this article.

A. *Mootness*

In Parts II and V.A, I noted that the Court traditionally has applied different tests for standing and mootness, and that the Fourth Circuit had applied the standing test to support its mootness-based holding. I raised the question of whether the Court would undertake an effort to change mootness law to correspond with standing law. Contrastingly, I suggested that the Justices might use *Laidlaw* to avowedly defend the retention of distinct tests for standing and mootness. They did.

The majority retained the traditional mootness doctrine making it hard for a defendant to obtain a dismissal based on mootness once a plaintiff has established standing.¹⁶⁷ The majority recognized that mootness law and standing law “differ in respects critical to the proper resolution of this case,” even though both bodies of law are based on the Case or Controversy clause of Article III.¹⁶⁸ They reaffirmed that dichotomy on the strength of certain policy arguments made by Friends of the Earth and the United States and which had been accepted in many of the Court’s earlier opinions:

[A] defendant’s voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice If it did, courts would be compelled to leave the defendant free to return to its old ways. . . . In accordance with this principle, the standard . . . for determining whether a case has been mooted by the defendant’s voluntary conduct is stringent: A case might become moot if subsequent events [other than voluntary cessation] make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.¹⁶⁹

The majority also retracted an arguably inconsistent dictum it had included in some prior opinions. The Court had previously described mootness as “the doctrine of standing set in a time frame.”¹⁷⁰ The majority characterized that description as confusing and “not comprehensive.” Given the rest of the majority’s discussion of moot-

167. See 528 U.S. at 189-91.

168. See *id.* at 180.

169. *Id.* at 189 (citations omitted).

170. United States Parole Comm’n v. Geraghty, 445 U.S. 388, 397 (1980).

ness, “not comprehensive”¹⁷¹ seemed to be a euphemism for “totally inaccurate.”¹⁷²

The dissenting opinion, written by Justice Scalia and joined in by Justice Thomas,¹⁷³ objected to some aspects of the majority’s discussion of the mootness issue. Justice Scalia did “not disagree with the conclusion that the Court reaches” on the mootness issue.¹⁷⁴ He also recognized that “mootness has some added wrinkles that standing lacks.”¹⁷⁵ Justice Scalia objected, however, to the majority’s rejection of the definition of mootness as “standing set in a time frame.”¹⁷⁶ He expressed the view that the Court’s prior definition is accurate except in the context of “voluntary cessation.”¹⁷⁷ He also characterized the “voluntary cessation doctrine [as] nothing more than an evidentiary presumption”¹⁷⁸ With the exception of that presumption, Justice Scalia argued that the requirements for standing and mootness are appropriately identical.¹⁷⁹ He then concluded his discussion of mootness by asserting that the plaintiff must be able to demonstrate “the requisite personal interest” throughout the lawsuit in order to avoid dismissal based on either mootness or lack of standing.¹⁸⁰

Justice Scalia’s goal in his discussion of mootness is apparent. He is attempting to retain (or to resurrect) the definition of mootness as “standing set in a time frame.” By characterizing the voluntary cessation doctrine as a mere evidentiary presumption, Justice Scalia is trying to lay the foundation for a holding in a subsequent case whereby a defendant could rebut that presumption by showing that he is no longer injuring the plaintiff. That would create a legal regime in which mootness and standing are identical with the exception of an easily rebutted presumption. Justice Scalia’s approach seems to be entirely inconsistent with the reasoning in the majority opinion, how-

171. See 528 U.S. at 189-90.

172. Indeed, the majority seems to have moved the law of mootness partly down the path urged in Evan Lee’s excellent article, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992). As Professor Lee points out, the Court had never suggested that mootness was based on Article III until it so-stated in dicta contained in a footnote in a 1964 opinion, and there is no evidence that the Framers intended that the Case or Controversy Clause create, or determine the contours of, a mootness doctrine.

173. *Laidlaw*, 528 U.S. at 198 (Scalia, J., dissenting).

174. *Id.* at 210 (Scalia, J., dissenting).

175. *Id.* at 213 (Scalia, J., dissenting).

176. See *id.* at 212 (Scalia, J., dissenting).

177. See *id.* at 212-14 (Scalia, J., dissenting).

178. *Id.* at 213 (Scalia, J., dissenting).

179. See *id.* at 213-14 (Scalia, J., dissenting).

180. See *id.* at 214 (Scalia, J., dissenting).

ever. The majority's discussion of the "voluntary cessation doctrine" as an important policy-based element of the law of mootness¹⁸¹ demonstrates a very different viewpoint than Justice Scalia's characterization of that doctrine as a mere rebuttable evidentiary presumption.

B. *Redressability*

In Part II.B, I noted that the Fourth Circuit based its holding on the Court's discussion of redressability in *Steel Company*, which discussion was clearly susceptible to differing interpretations. I suggested the possibility that the Justices might use *Laidlaw* as a vehicle to debate redressability. They did.

The majority opinion discussed redressability at length and changed the redressability requirement in ways that will make it much easier for private citizens to enforce public laws.¹⁸² The majority distinguished *Steel Company* as a case in which the Court relied on redressability only to support a narrow holding that civil penalties cannot redress an injury caused by a "wholly past" violation of a statute.¹⁸³ By distinguishing *Steel Company* on that basis, and by holding that the plaintiffs had standing in *Laidlaw*, the majority necessarily repudiated the dicta in *Steel Company* in which that opinion seemed to imply that civil penalties paid to the Treasury can never redress a private plaintiff's injury.¹⁸⁴ Five Justices had appeared to accept that reasoning in *Steel Company*, but only two Justices continued to approve of it in *Laidlaw*. The other seven Justices explicitly rejected it. Indeed, the *Laidlaw* majority concluded with the flat assertion that "it is wrong to maintain that citizen plaintiffs . . . never have standing to seek civil penalties."¹⁸⁵

The *Laidlaw* majority also engaged in a broader discussion of redressability. The majority announced two basic principles. First, "all civil penalties have some deterrent effect."¹⁸⁶ Second, the Court will not second-guess congressional determinations that a statutorily-authorized sanction will produce some deterrent effect.¹⁸⁷

The majority's treatment of redressability is a major victory for those who believe that it is constitutionally permissible for Congress

181. *See id.* at 189-93.

182. *See id.* at 185-89.

183. *See id.* at 187-88.

184. *See supra* notes 99-103 and accompanying text.

185. *Laidlaw*, 528 U.S. at 185.

186. *Id.*

187. *See id.* at 185-86.

to authorize private parties to enforce public laws. The dicta in *Steel Company* suggested the possibility that redressability would become an insurmountable obstacle to implementation of that perspective. After *Laidlaw*, redressability may disappear completely as a source of concern for those pursuing statutorily-authorized awards on behalf of the government. Indeed, Justice Scalia chastised the majority for creating “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.”¹⁸⁸

C. *Injury and Causation*

In Part V.C, I noted that the district court had found that Laidlaw’s violations had not caused any environmental harm. I suggested the possibility that the Justices might use that finding as the basis for a debate about the contours of the injury and causation requirements for standing. They did.

The majority rejected Laidlaw’s argument that the district court’s finding of “no harm” was inconsistent with a conclusion that the plaintiff had standing. The majority noted that “the relevant showing . . . is not injury to the environment but injury to the plaintiff.”¹⁸⁹ It then ruled that the member affidavits submitted by the plaintiff were sufficient to establish injury caused by Laidlaw’s violations.¹⁹⁰ The affidavits described the affiants’ reductions in recreational uses of the Tyger River attributable to their knowledge that Laidlaw was violating its permit and to their concerns that those violations were creating hazards to human health and to fisheries resources. The majority characterized the affiants’ concerns as “reasonable,” and held that changes in behavior based on reasonable fear that violations engaged in by the defendant are having harmful effects on water quality are sufficient to establish a concrete injury.¹⁹¹

Justice Scalia expressed strong disagreement with the majority’s treatment of injury and causation.¹⁹² In his view, the affidavits were fatally deficient in two ways. First, the affiants should have been required to prove the adverse effects with particularity¹⁹³—for example, how many times would an affiant have used the river but for Laid-

188. *Id.* at 209 (Scalia, J., dissenting).

189. *Id.* at 181.

190. *See id.* at 181-84.

191. *See id.*

192. *See id.* at 198-202 (Scalia, J., dissenting).

193. *See id.* at 198-201 (Scalia, J., dissenting).

law's violations? Second, the affiants should have been required to prove that their changes in conduct were based on real water quality problems caused by Laidlaw's violations, rather than mere beliefs that Laidlaw's violations were causing environmental harm.¹⁹⁴ To Justice Scalia, the district court's finding of no environmental harm rendered it impossible for the affiants to prove that they were injured by Laidlaw's violations.¹⁹⁵ Justice Scalia concluded his discussion of injury and causation with the assertion that: "[i]f 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."¹⁹⁶ That is a fair portrayal of the effect of the majority's treatment of injury and causation. Before the decision in *Laidlaw*, many courts were applying interpretations of the injury and causation requirements that: 1) forced plaintiffs to incur high costs by presenting voluminous evidence on injury and causation in lengthy and complicated hearings on standing, and 2) made it practically impossible for plaintiffs to meet their burden of proof on the two issues.¹⁹⁷ *Laidlaw* should bring that practice to a halt.

D. *The Take Care Clause*

In Part V.D, I conjectured that the *Laidlaw* case could provide an occasion for the Justices to debate the merits of Justice Scalia's theory that the Take Care clause in Article II precludes anyone but the Executive Branch from enforcing a public law. It is difficult to characterize the opinions in this respect.

The majority made no reference to Article II. In a brief concurring opinion, Justice Kennedy referred to "difficult and fundamental questions" raised under Article II when Congress purports to authorize private parties to exact public fines.¹⁹⁸ He stated that he was joining the majority opinion with the understanding that the Court was not addressing those questions, because they had not been adequately identified in the petition for certiorari, discussed in the briefs,

194. See *id.* at 199-201 (Scalia, J., dissenting).

195. See *id.* at 201 (Scalia, J., dissenting) (characterizing as a "sham" the majority's finding that the plaintiffs suffered an injury in fact "even in the face of a finding that the environment was not demonstrably harmed").

196. See *id.*

197. See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999); *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997). See also *Pierce*, *supra* note 81, at 1332-39.

198. See *Laidlaw*, 528 U.S. at 197 (Kennedy, J., dissenting).

or discussed by the Fourth Circuit.¹⁹⁹ Justices Scalia and Thomas made a similar observation in their dissenting opinion.²⁰⁰ Thus, as a formal matter, *Laidlaw* does not resolve the Article II issue.

As a practical matter, however, it is difficult to imagine how the majority could write a subsequent opinion embracing Justice Scalia's theory that would still be consistent with the majority opinion in *Laidlaw*. Justice Scalia accurately described the majority opinion as "permitting law enforcement to be placed in the hands of private individuals"²⁰¹ and as turning "over to private citizens the function of enforcing the law."²⁰² Moreover, the majority did address many of the concerns that underlie Justice Scalia's theory. The majority noted that "the federal government retains the power to foreclose a citizen suit by undertaking its own action" and that "the statute allows the Administrator of the EPA to 'intervene as a matter of right' and bring the Government's views to the attention of the court."²⁰³

E. *Federalism and "Diligent Prosecution"*

In Part V.E, I suggested the possibility that the Justices would use *Laidlaw* as a vehicle to debate a federalism issue—that is, whether a federal court's decision to evaluate in detail, and even second-guess, a state agency's exercise of enforcement discretion is consistent with the combination of the principles of federalism and the ambiguous "diligent prosecution" standard contained in the citizen-suit provisions of federal environmental statutes. The majority addressed that issue only in a purely descriptive footnote.²⁰⁴ Justice Scalia took on the issue in a lengthy footnote in which he noted that the Court had not resolved the issue, commented that the Fourth Circuit would be free to address it on remand, and expressed his sympathy with the argument.²⁰⁵

I assume that *Laidlaw* and South Carolina will accept Justice Scalia's invitation to develop this argument thoroughly in the remand proceeding before the Fourth Circuit. It seems to be the only remaining grounds upon which *Laidlaw* has any realistic prospect of

199. *See id.*

200. *See id.* at 209 (Scalia, J., dissenting).

201. *Id.* at 198 (Scalia, J., dissenting).

202. *Id.* at 209 (Scalia, J., dissenting).

203. *Id.* at 188 n.4.

204. *See id.* at 186 n.2.

205. *See id.* at 188 n.4.

success. I continue to believe that this argument has a good chance of being accepted by both the Fourth Circuit and the Supreme Court.

CONCLUSION TO POSTSCRIPT

The majority opinion in *Laidlaw* is a major victory for environmentalists, supporters of allowing private citizens to enforce public laws, and proponents of broad access to the courts. In fact, from the perspective of each of those groups, it is easily the most favorable decision handed down in the last decade. It almost certainly does not represent the Court's last word on the subject, however.

The Court has failed to be consistent in this area of decision-making. It could retract, recharacterize, or amend significantly almost any of the important statements in the majority opinion in *Laidlaw* in a future case, just as the *Laidlaw* majority retracted, recharacterized and amended significantly some of the most important statements in the majority opinions in *Lujan* and *Steel Company*. The Court has surprised me with at least one standing opinion contradicting its recent, prior opinions in each of the past eight terms.²⁰⁶ I have reached the point where I can no longer be surprised when the Court makes major changes in the law of standing over astonishingly brief periods of time.

The Court's most frequent method of changing the law of standing is to recharacterize its precedents. Thus, for instance, when a majority of Justices wanted to hold that banks had standing to review an agency decision favoring credit unions²⁰⁷—and were faced with a recent inconsistent decision in which a majority had held that a union lacked standing to obtain review of an agency decision favoring employers²⁰⁸—the majority distinguished the precedent by recharacterizing it as signifying a different proposition that the Court had entirely avoided in that prior opinion.²⁰⁹

The majority and dissenting opinions in *Laidlaw* engage in a fascinating battle of the footnotes²¹⁰ in which the Justices debate the

206. See *Pierce*, *supra* note 53, at 1750-58.

207. See *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998).

208. See *Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517 (1991).

209. See *Pierce*, *supra* note 53, at 1753-55, 1757-58.

210. Cf. 528 U.S. at 188 n.4 (discussing the fact that the *Linda R.S.* Court relied on the premise that a delinquent father would not be able to pay child support if imprisoned), and 528 U.S. at 203 n.1 (Scalia, J., dissenting) (disagreeing with the majority's characterization and instead quoted the Court's statement that "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative.") (quoting *Linda*

proper portrayal of one of the most frequently cited precedents in the modern law of standing—the Court’s 1973 decision in *Linda R.S. v. Richard D.*²¹¹ *Linda R.S.* was the first case in which the Court announced the causation and redressability requirements for Article III standing, and one of the few cases in which the Court has adopted interpretations of those requirements that render them virtually impossible to satisfy.²¹²

Linda R.S. was an unlikely vehicle to announce a major change in standing law. A Texas statute authorized criminal prosecution and potential incarceration of a father who refuses to make child support payments. Richard D. was such a father. Linda R.S. demanded that the local district attorney prosecute Richard D. He refused to do so, apparently because the child in question was illegitimate. Linda R.S. then sought an injunction that would compel the district attorney to prosecute Richard D. The Court could have simply dismissed the case by applying the centuries-old doctrine prohibiting a court from interfering with exercises of prosecutorial discretion.²¹³ Instead, a five-justice majority wrote an opinion in which it held that Linda R.S. lacked standing.

The majority concluded that there was no causal relationship between the district attorney’s decision refusing to prosecute and Richard D.’s refusal to pay, and that consequently, a judicial decision requiring the district attorney to prosecute would not be able to redress Linda R.S.’s injury.²¹⁴ In a critical passage, the majority reasoned that “if appellant were granted the requested relief, it would result only in the jailing of the child’s father. The prospect that prosecution will . . . result in payment of support can, at best, be termed only speculative.”²¹⁵ In other words, the majority considered it “speculative” whether an individual confronted with a choice between two years of incarceration and making child support payments would choose to make the payments. More broadly, the majority seemed to say that the longstanding belief that criminal law shapes conduct is “only speculative.” At the time, it was hard to take the majority’s bizarre reasoning with respect to causation and redress-

R.S. v. Richard D., 410 U.S. 614, 618 (1973)).

211. 410 U.S. 614 (1973).

212. See DAVIS & PIERCE, *supra* note 51, at 34-38.

213. See, e.g., *United States v. Batchelder*, 442 U.S. 114, 123-24 (1999); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868).

214. 410 U.S. at 617-619.

215. *Id.* at 618.

ability seriously. It seemed far more likely that the majority actually was motivated by its belief that courts rarely, if ever, should review exercises in prosecutorial discretion. Moreover, the majority opinion included numerous passages that tended to confirm the latter interpretation. To that end, the Court distinguished cases in which there is a statute “expressly conferring standing,”²¹⁶ referred to “the unique context of a challenge to a criminal statute,”²¹⁷ acknowledged “the special status of criminal prosecutions in our system,”²¹⁸ referenced “the Court’s prior decisions [that] hold that a citizen lacks standing to contest the policies of a prosecuting authority,”²¹⁹ and summarized its ultimate holding by declaring that “a private citizen lacks a judicially cognizable interest in the prosecution of another.”²²⁰

Justice Scalia relied heavily on *Linda R.S.* in his dissenting opinion in *Laidlaw*.²²¹ He treated the causation and redressability reasoning in *Linda R.S.* as if it were broadly applicable to all standing disputes. The majority responded in a long textural footnote.²²² It stated that the dissent’s “reliance is sorely misplaced.” It went on to characterize *Linda R.S.* as a decision limited to the unique context of an attempt to persuade a court to interfere with an exercise of prosecutorial discretion. The dissent responded in a footnote in which it referred to the majority’s characterization of *Linda R.S.* as “imaginative.”²²³

I am delighted that the majority has distinguished *Linda R.S.* as an opinion uniquely applicable to exercises of prosecutorial discretion. I have long argued that the case should be so interpreted.²²⁴ There is one problem, however. Whatever *Linda R.S.* was originally intended to mean in 1973, the Court has since relied on it in numerous opinions wherein the Court has obviously interpreted it as, in fact, applying to standing disputes of all stripes.²²⁵ Thus, the *Laidlaw* majority relied heavily on recharacterization of *Linda R.S.* as a means

216. *See id.* at 617.

217. *See id.*

218. *See id.* at 619.

219. *See id.*

220. *See id.*

221. *See* 528 U.S. at 203-04, 208-10 (Scalia, J., dissenting).

222. *See id.* at 188 n.4.

223. *See id.* at 203 n.1 (Scalia, J., dissenting).

224. *See* DAVIS & PIERCE, *supra* note 51, at 39.

225. *See, e.g.,* Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 107 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992); Warth v. Seldin, 422 U.S. 490, 500 (1975).

of distinguishing it and adopting a much broader interpretation of the causation and redressability requirements.

The problem with characterization and recharacterization of precedents as a technique of decision-making is that it can be used in perpetuity by any Justice or combination of Justices, thus resulting in a confusing body of law. Indeed, it is quite possible that Justice Scalia will be successful in persuading four of his colleagues to recharacterize *Linda R.S.* as a broadly applicable precedent in the next major standing case the Court decides. Therefore, I am unwilling to assume that the major victory for proponents of expansive standing deriving from *Laidlaw* will prove permanent. I foresee, for instance, that citizen plaintiffs will likely have to defend an assault on their standing led by Justice Scalia, based on his theory that the Take Care clause of Article II prohibits all congressional delegations of law enforcement authority to anyone but those within the plenary control of the President. At a minimum, the proponents of broad standing must be prepared to relitigate this issue many times over and to defend it against attacks from numerous directions.