

FRIENDS OF THE EARTH, FOES OF FEDERALISM

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I

In its January 2000 decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,¹ the United States Supreme Court re-empowered environmental interest groups to enforce the nation's environmental laws through public fines, whether or not the plaintiff-enforcers have suffered any tangible injury. Six members of the Bench joined Justice Ruth Bader Ginsburg's opinion for the Court. Only Justice Antonin Scalia dissented, joined by Justice Clarence Thomas.

Laidlaw has almost uniformly been viewed as something of a surprise because it breaks a string of restrictive environmental standing decisions.² Equally surprising, the decision was issued against the background of highly publicized events that have reminded us of the costs and dangers attendant to empowering unelected, unaccountable law enforcers to do the public's business. An effectively unremovable Independent Counsel nearly brought down the President of the United States. Tort lawyers have exacted some \$240 billion from tobacco producers and their consumers, effectively imposing a tax no citizen or elected official ever voted for. Gun manufacturers, managed health care providers, and other industries have been targeted with similar litigation campaigns.

Misgivings over unleashing law enforcers from executive control should apply with even greater force to advocacy groups that enforce environmental laws as "private attorneys general." Unlike the real Kenneth Starr, the "green" Ken Starrs are not appointed by anyone, and they conduct their law enforcement business without public scru-

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1. 528 U.S. 167 (2000).

2. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

tiny or government supervision. And, unlike the multimillionaire anti-tobacco lawyers who are doing the bidding of the (elected) state attorneys general and legislatures they bought and paid for, ecological law enforcers lack any measure of public accountability. In short, environmental citizen suits involve—centrally, not incidentally—the delegation of governmental authority to private parties and the diversion of public funds into private hands.

Laidlaw, however and alas, roundly ignores questions of public accountability and responsibility. This, too, is a surprise: the Supreme Court's conservative-centrist majority has generally placed a premium on public accountability and responsibility. The Court's federalism jurisprudence is the most prominent illustration of these themes. In treating environmental citizen suits as utterly unproblematic, the *Laidlaw* majority breaks with more than a few environmental standing decisions.

Most attorneys and legal scholars probably think of standing and federalism issues as separate fields, and, perhaps, the Justices, too, compartmentalize constitutional law in that fashion. As shown below, however, standing and federalism are in fact quite closely connected. (Indeed, *Laidlaw* itself involved a non-trivial federalism issue, albeit one the Supreme Court chose to ignore.)³ Legal taxonomy alone cannot explain why *Laidlaw* studiously avoids the issue of political responsibility that plays a central role in the Court's federalism decisions. Nor, this paper argues, can this departure be attributed to a judicial perception of environmental values and their private enforcers as uniquely important, efficient, or irreplaceable. The *Laidlaw* majority makes no mention of environmental values and treats citizen suits as simply an interest group vehicle.

What seems to be at work in *Laidlaw* is judicial caution—to my mind, excessive caution. In re-asserting constitutional norms that enhance political responsibility, the Court has often lacked the nerve to confront entrenched political coalitions and their congressional patrons. Environmental citizen suits enjoy firm congressional support, and they serve as an institutional support system for potent interest groups. Confronted in *Laidlaw* with that reality, the centrist Justices backed off. In so doing, they underestimated and perhaps undermined the force of the Court's agenda for a more responsible government.

3. See *infra* notes 34-38 and accompanying text.

II

Laidlaw was one among hundreds of citizen suits brought by environmental advocacy organizations under the Clean Water Act. The suit was filed in 1992 over numerous violations of a permit governing the discharge of pollutants from a wastewater treatment site into the North Tyger River in South Carolina.⁴ Three plaintiff-organizations submitted affidavits and testimony of several of their members, who averred that their “concerns” over water pollution near the Laidlaw site had prompted them to refrain from certain recreational activities. Although the District Court (ruling on the defendants’ summary judgment motion) could find “no demonstrated proof of harm to the environment,”⁵ the Supreme Court concluded that the plaintiffs’ averments established the sort of “particularized injury” required to support standing.⁶ Moreover, the Supreme Court determined that private citizen-plaintiffs have standing to seek statutory civil penalties, payable to the U.S. Treasury, for environmental violations, so long as the penalties are likely to deter future violations that might injure the plaintiffs and unless intervening factors have rendered the case moot.⁷ The Court then remanded the case for further consideration of the mootness question.

Laidlaw presented the Supreme Court’s liberal wing with a rare opportunity to reverse a decade of decisions restricting environmental standing. Such an opportunity, one would think, might carry with it a reminder of the important public purposes of environmental citizen suits. However, in contrast to the lofty pronouncements on “civic participation” and “environmental values” that characterized the standing decisions of the environmental era some three decades ago,⁸ Justice Ginsburg’s opinion is laconic, even pedantic, and makes no mention of principles or public purposes.⁹

4. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 956 F. Supp. 588, 592 (D.S.C. 1997).

5. See *id.* at 602 (“permit violations at issue in this citizen suit did not result in any health risk or environmental harm.”).

6. See *Laidlaw*, 528 U.S. at 183-84.

7. See *id.* at 185-87.

8. The *locus classicus* is Judge Skelly Wright’s pronouncement in *Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (“Our duty is to see that important legislative purposes, heralded in the halls of Congress, are not misdirected in the vast hallways of the federal bureaucracy.”).

9. A handful of Supreme Court decisions run counter to my predictions concerning the declining significance of environmental values in the case law. See MICHAEL S. GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW* 67 (1996) (analyzing *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995)). While *Laidlaw*’s outcome may suggest a renaissance of ecological values, its

To an extent, the majority opinion's tone simply reflects the author's judicial temperament. Ginsburg's more loquacious colleagues, however, obviously had an opportunity to concur and expostulate on the important purposes of citizen suits. They failed to do so even though Justice Scalia's dissent very much invites, if not compels, a reply at the level of constitutional principle. Justice Scalia sharply criticized the majority for accepting as a constitutionally recognizable "injury in fact" environmental "concerns" which, in the case at hand, demonstrably lacked a basis in fact.¹⁰ Mere apprehensions, it appears, now suffice to confer standing. The majority fails to respond to this criticism.¹¹

Similarly, the majority claims that the deterrent effect of public penalties can redress an injury to private litigants. Yet more implausibly, the majority avers that the Supreme Court's precedents bar the private enforcement of public penalties only when the penalties are sought for wholly past (rather than continuing) violations.¹² Justice Scalia makes a compelling argument in his dissent that the enforcement of quintessentially public fines amounts to a wholesale transfer of public authority to private advocacy groups.¹³ Again, the majority declines to respond and to defend its obviously problematic position.

The majority's silence illustrates that environmental citizen suits have for some time been a policy in search of a purpose. When intro-

tenor and logic do not.

10. See *Laidlaw*, 528 U.S. at 198-99 (Scalia, J., dissenting).

11. The *Laidlaw* majority consistently refers to the plaintiffs alleged injuries as "concerns." See *id.* at 183-84. Attempting to give meaning to this with the weasel word, the majority distinguishes the individual plaintiffs' "entirely reasonable" fears from mere "subjective apprehensions," *Id.* at 184. The fact that those fears were proven to be baseless does not bother the majority. For purposes of constitutional standing, it appears to make no difference whether the plaintiff's harm is real or just his imagination running away with him.

12. If the incidental benefit that plaintiffs derive from the general deterrent effect of public fines suffices to confer standing, the "redressability" prong of traditional standing analysis has lost its purpose of separating the plaintiff from the world at large. Wholly unpersuasive is the majority's contention that *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), contemplates or permits such a latitudinarian approach and bars only the private collection of fines for wholly past violations. See *Laidlaw*, 528 U.S. at 188. *Steel Co.* distinguishes wholly past violations from continuing violations with respect to standing to obtain *injunctive* relief—appropriately so, because in that context, the timing matters. See 523 U.S. at 108-09. In contrast, the question of whether *civil penalties* will or will not deter future misconduct and so "redress" a plaintiff's alleged injury has absolutely nothing to do with the timing of the underlying violations. *Steel Co.* holds—categorically, correctly, and prior to any discussion of wholly past versus on-going violations—that civil penalties payable to the Treasury cannot redress a private injury. See *id.* at 106 ("[T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not.") (citation omitted).

13. See *Laidlaw*, 528 U.S. at 209-10 (Scalia, J., dissenting).

duced into American law, such lawsuits were advertised as a means of enhancing public participation in environmental decision-making and of curing an alleged law enforcement deficit.¹⁴ Both arguments have proven untenable. The participants in citizen suits aren't ordinary citizens; they are lawyers and advocates. The enforcement pattern may have advantages (such as professionalism and expertise), but it renders the participatory rationale preposterous. As for the enforcement deficit, not one more-than-anecdotal study in three decades has shown that citizen suits actually improve environmental policy, never mind the environment. Much of the empirical evidence suggests the opposite:¹⁵ There is no reason to believe that the enforcement of a centralized command and control regime by a gaggle of private attorneys general, whose enforcement priorities lack a connection to environmental harms and benefits, will produce efficient results.¹⁶

Laidlaw itself illustrates that citizen suits have nothing to do with their (once-) proffered rationales. It is a "citizen" suit in name only: the individual citizen-plaintiffs participated only because, and to the extent that, the environmental interest groups who brought the case needed to satisfy the pleading requirements. The environmental harm consisted principally of the defendants' monitoring and record-keeping violations, along with unintentional violations of a carelessly drafted permit whose stringency far exceeded federal requirements. Far from being a habitual lawbreaker, the company undertook serious compliance efforts.¹⁷ The possibility of future environmental harm from *Laidlaw's* treatment plant is remote: the facility was closed some time before the Supreme Court granted *certiorari*. By the time the case reached the Supreme Court, it had shed its thin environmental veneer and revealed its naked purpose: money.

14. See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990).

15. See, e.g., R. SHEP MELNICK, *REGULATION AND THE COURTS* (1983); Jonathan H. Adler, *Stand Or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001); Greve, *supra* note 14.

16. Private enforcement might be efficient if (a) violations of the rules that are being enforced (such as the permit system of the Clean Water Act) were an adequate proxy for environmental harm and (b) it were possible to direct private enforcers through appropriate incentives toward welfare-enhancing enforcement actions. The first of these stringent conditions does not obtain as a matter of empirical fact. See William F. Pedersen, *Turning the Tide on Water Quality*, 15 ECOLOGY L.Q. 69, 72-82 (1988) (noting that the Clean Water Act permit system has no regulatory link to water quality). The second is impossible to satisfy. See Greve, *supra* note 14, at 343-45.

17. See Richard J. Pierce, Jr., *Issues Raised by Friends of the Earth v. Laidlaw Environmental Services: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENVTL. L. & POL'Y F. 207 (2001).

Once substantive policy rationales have fallen by the wayside, the defense of citizen suits collapses into an unqualified assertion of legislative supremacy. Congress, the argument runs, has established citizen suits as a principal means of environmental law enforcement, and nothing in the Constitution should induce the federal courts to second-guess that policy choice. “Congress has found,” the *Laidlaw* majority avers, “that civil penalties in Clean Water Act cases . . . deter future violations. This congressional determination warrants judicial attention and respect.”¹⁸

Whatever congressional “findings” may exist on the question of whether public penalties—payable to the U.S. Treasury—can redress a private injury, they aren’t cited in Justice Ginsburg’s opinion. In any event, they would have no bearing on the constitutional standing question. Congress can waive “prudential” standing limitations (such as the zone of interest test) that, in the absence of legislative action, would prompt a judicial denial of standing to sue. No legislative finding, determination, or statute, however, can possibly abrogate the constitutional standing minima of Article III.¹⁹ The question in *Laidlaw* was whether the plaintiffs had satisfied the constitutional minima. Justice Ginsburg’s appeal to judicial deference begs that question.

In permitting Congress to define the boundaries of Article III standing, the *Laidlaw* Court sanctions an interest group bargain, rather than a public purpose. In an empirical study ten years ago, I concluded that citizen suits constitute a system of transfer payments to environmental interest groups.²⁰ Private environmental law enforcement is effectively limited to a cartel of interest groups, who are drawn into the enforcement market by the availability of attorney’s fees and civil penalties. While the penalties are technically payable to the U.S. Treasury, both the enforcers and the defendants gain from negotiating a private transfer payment in lieu of a (higher) penalty payment. Thus, the availability of civil penalties enables environ-

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

19. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992):

[T]here is absolutely no basis for making the Article III injury turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be disregarding a principle fundamental to the separate and distinct role of the Third Branch. (emphasis added).

The principle applies regardless of whether the constitutional minima are those of “concrete injury” or, as in *Laidlaw*, of redressability. For a well-argued but, to my mind, ultimately unpersuasive defense of judicial deference on the point at issue, see Harold J. Krent, *Laidlaw: Redressing the Law of Redressability*, 12 DUKE ENVTL. L. POL’Y F. 85 (2001).

20. See GREVE, *supra* note 14.

mental interest groups to divert public fines to private uses.²¹ This diversion is the most unambiguous empirical effect of citizen suits and, there being no other plausible explanation for the policy, quite probably their intended congressional purpose.

While *Laidlaw* itself did not involve a transfer payment from defendant to plaintiff (which would have terminated the case), the Court was certainly aware of that widespread practice: the empirical findings just mentioned are cited and summarized in Justice Scalia's dissent.²² Yet again, though, the majority did not bother to respond. Knowing full well that environmental citizen suits are essentially an interest group arrangement, the majority paid its "attention and respect" not to a congressional policy determination or value, but to congressional and interest group politics.

III

The judicial ratification of legislative and interest group bargains is a perfectly ordinary phenomenon, and the point of judicial deference vis-a-vis the Congress. Over the past five years, however, the Supreme Court has proven willing to enforce at least some constitutional limitations on such bargains. Federalism cases from *United States v. Lopez*²³ to last Term's decisions in *Kimel v. Florida Board of Regents*²⁴ and *United States v. Morrison*²⁵ illustrate the Court's assertiveness. *Laidlaw* breaks with the pattern.

The connections between federalism and standing are sufficiently close to have occurred to the *Laidlaw* Court during oral argument.²⁶ A cursory examination of a few common (and interrelated) themes—congressional supremacy, the role of private litigants, the scope of ex-

21. Here and in the original article, the point is not that environmental law enforcers have bad or illicit motives (although the incentive structure of citizen-suit provisions does not preclude profiteering). The central problem is that environmental law enforcers have no reliable, external measure of environmental harm. In choosing enforcement levels, targets, and remedies, they must therefore fall back on other criteria, and those can only be the internal costs and benefits to the organization.

22. See *Laidlaw*, 528 U.S. at 205-09 (Scalia, J., dissenting).

23. 514 U.S. 549 (1995) (holding that the Gun Free School Zones Act violates the Commerce Clause).

24. 528 U.S. 62 (1999) (holding that the Eleventh Amendment bars claims for damages under Age Discrimination in Employment Act).

25. 529 U.S. 598 (2000) (holding that the civil remedies provision of the Violence Against Women Act exceeded congressional power under the Commerce Clause and the Fourteenth Amendment).

26. Official Transcript at 7-8, *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167 (2000) (No. 98-822).

ecutive power, and the value of political responsibility—illustrates both the connections between the two areas and the ways in which *Laidlaw* deviates from the general run of the Supreme Court’s federalism cases.

A. *Congressional Supremacy*

As already noted, *Laidlaw* implies an assertion of congressional supremacy. In the federalism arena, that premise is no longer operative. The Tenth Amendment protects state governments from federal “commandeering;”²⁷ the Eleventh Amendment, from private lawsuits for damages. Even under the Commerce Clause and the Fourteenth Amendment—until recently, realms of virtually unlimited congressional authority—the Supreme Court has re-asserted its authority and determined that Congress may not create a Constitution parallel to the one we actually have.²⁸ *Laidlaw*, in contrast, would allow Congress to establish its own environmental Constitution.

Suppose Congress created a permanent Independent Ecological Counsel. Effectively un-removable, this Counsel would have roving authority to investigate, prosecute, and try lawbreaking without the concurrence and even over the objections of the Attorney General. Additionally, assume that Counsel had authority to swap the lawbreakers’ penalties to the Treasury for ecological “mitigation payments” in Fairfax County or for that matter Tahiti. While Justice Ginsburg does not suggest or endorse such a policy option, it would be fully consistent with her opinion in *Laidlaw*.

This lack of judicial imagination—the failure to consider *what else* Congress might do under an expansive judicial definition of its powers—separates *Laidlaw* from the Supreme Court’s federalism decisions. The Gun Free School Zones Act struck down in *United States v. Lopez* was a symbolic enactment, and hardly a menace to republican government. *Printz v. United States* invalidated certain provisions of the federal “Brady Act,” which commandeered state and local law enforcement officers, on an interim basis, to administer federal gun registration requirements; those requirements, too, were far too modest to eviscerate state and local government.²⁹ Both *Lopez* and *Printz* reveal a profound judicial suspicion of congressional schemes and intentions. The Supreme Court worried precisely about “what else” the

27. See *Printz v. United States*, 521 U.S. 898, 916 (1997).

28. See *Morrison*, 529 U.S. 598; *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Lopez*, 514 U.S. 549.

29. See *Printz*, 521 U.S. 898.

Congress might be tempted to do in the absence of some constitutional barrier to its Commerce Clause authority (in *Lopez*) and a hard and precise injunction against federal “commandeering” (in *Printz*).³⁰ That sensibility is wholly missing from the *Laidlaw* opinion.

B. *Private Litigation*

The Supreme Court’s federalism cases seek to curb private litigation or, more precisely, congressional attempts to mobilize private litigants for federal purposes. That objective is most transparent in Eleventh Amendment cases that provide states with sovereign immunity protection against damage suits under federal statutes.³¹ It also underlies the invalidation of the Religious Freedom Restoration Act in *City of Boerne v. Flores* and cases that narrowly construe private rights of action under federal law.³²

To be sure, the federalism cases just mentioned protect state and, to some extent, local governments, rather than private defendants like *Laidlaw*. But the Court’s solicitude for the dignity of the states cannot fully explain the difference between those cases and *Laidlaw*. For one thing, much environmental citizen litigation is conducted against state and local governments.³³ Moreover, Richard Pierce has observed that *Laidlaw* itself raises a serious federalism issue—which the Court chose to ignore.³⁴

Having received the plaintiffs’ notice of intent to sue, *Laidlaw* persuaded the state of South Carolina to initiate an enforcement action in state court. The parties settled that lawsuit for a \$100,000

30. See, e.g., *Printz*, 521 U.S. at 926-28 (rejecting as insufficiently precise and effective a distinction that would permit federal reliance on state officials for law enforcement but not for policy-making functions); *Lopez*, 514 U.S. at 564 (“[I]f we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.”).

31. See, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (1999) (Age Discrimination in Employment Act); *Alden v. Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (holding that the federal patent and trademark statutes cannot validly abrogate states’ sovereign immunity); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that the Indian Gaming Regulatory Act does not abrogate states’ sovereign immunity).

32. See *City of Boerne*, 521 U.S. 507; see also *Blessing v. Freestone*, 520 U.S. 329 (1997) (holding that the Social Security Act provisions mandating certain state actions concerning enforcement of child support obligations unenforceable through private litigation).

33. It is an interesting speculation whether *Laidlaw* might have come out differently, had the defendant been, say, a municipal waste treatment facility. State defendants, of course, are off the hook in any event, since they enjoy sovereign immunity from (citizen) suits for civil fines.

34. See *Pierce*, *supra* note 17.

penalty and the company's promise to make "every effort" to comply with its permit obligations. Under the citizen-suit provision of the Clean Water Act (and most other such provisions), a "diligent" state enforcement action bars citizen suits.³⁵ Environmental advocacy groups nonetheless sued in federal court, claiming that the state's prosecution was not diligent and its settlement with Laidlaw, effectively collusive. The District Court allowed the lawsuit to proceed.

Laidlaw's actions were plainly calculated to bar a citizen suit. For example, Laidlaw's attorneys wrote the state court complaint against the company and even paid the filing fee. As Pierce has pointed out, however, the record indicates that South Carolina was in fact quite serious about bringing the Laidlaw facility into compliance.³⁶ Judicial permission of a citizen suit under such circumstances suggests a free-wheeling second-guessing of the state's enforcement discretion.

If this does not seem problematic, suppose an environmental statute authorized "affected" citizens to sue a state or a local government directly (for injunctive and other relief, such as civil fines) and, after a sixty-day notice period, to demand the "diligent" enforcement of federal law. Under such a provision, it is very unlikely that plaintiffs could state a claim upon which relief may be granted.³⁷ The import of the *Laidlaw* litigation, though, is precisely that the same result can be achieved in a more round-about way—that is, through citizen suits that force the (state) government's hand.³⁸ Although not explicitly holding so, the Supreme Court's decision suggests that Congress may authorize citizen-plaintiffs to press state governments into exercising their enforcement authority—to exercise it in the first instance, and to exercise it in a particular fashion.

C. Executive Power

In considering the rather trivial federal "commandeering" provisions of the Brady Act, the *Printz* majority argued that federal commandeering would ultimately enable Congress to circumvent and

35. See Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365 (1994).

36. See Pierce, *supra* note 17, at 232-33.

37. See *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430-32 (1987) (holding that a right must be "sufficiently specific and definite" to be capable of judicial enforcement). It seems doubtful that a private right to "diligent law enforcement" would meet that standard. If so, the hypothetical provision presents an Article III case or controversy problem.

38. One might object that a state can always choose not to bring an enforcement action and to let a citizen suit go forward. Either way, however, the citizen suit will have forced the state to cede control over its enforcement program.

emasculate the Executive.³⁹ Why have a United States Department of Justice if state and local law enforcers can be pressed into federal service?⁴⁰

Citizen suits pose the same problem, except more so. The federal officials who are entrusted with the enforcement of environmental laws are subject to congressional oversight and budget control. They are accountable to the Executive and, ultimately, to the public, and their enforcement priorities and incentives will, at least to some extent, reflect public preferences. None of this is true of self-appointed public citizens. Earlier standing cases indicated serious judicial misgivings about the effects of citizen standing on executive power.⁴¹ The *Laidlaw* Court, in contrast, steered clear of the executive power question—in a manner so strained as to border on the comical.⁴² Had the Court considered the issue, it would still have reached the same result.⁴³

D. *Political Responsibility*

As noted, the Supreme Court's recent federalism cases evidence a judicial preoccupation with political responsibility and accountability. Shared, "cooperative" authority produces an irresponsible, meddling government and, at the same time, disenfranchises citizens, who can no longer identify the culprits behind government schemes (much less vote them out of office). The point emerges most clearly in Tenth Amendment cases. *Printz* states it as follows:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And

39. See *Printz v. United States*, 521 U.S. 898, 917-18 (1998).

40. *Printz* is not based entirely, and probably not even primarily, on this argument. However, it is not too much to read the opinion of the Court as an implicit endorsement of the "unitary executive" celebrated in Justice Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). See Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 226 ("[O]ne might read *Printz* [. . .] as an attempted end run around the Court's rejection of [Scalia's] extreme unitarian position in *Morrison v. Olson*").

41. See *Allen v. Wright*, 468 U.S. 737, 760 (1984); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992).

42. During oral argument, the Court assured itself that plaintiff-appellants' counsel had not raised the issue in his petition for *certiorari*. Official Transcript at 8, *Laidlaw*, 528 U.S. 167 (No. 98-822). Competent attorneys are generally reluctant to raise constitutional defenses to their clients' position.

43. Justice Kennedy's brief concurrence suggests that he might have decided *Laidlaw* differently had Article II concerns been presented. See *Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring). However, no other Justice joined that concurrence.

even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.⁴⁴

The dissenters in *Printz* argued that the majority holding would entail an unintended consequence: by disabling the federal government from enlisting state officials in implementing federal programs, “the Court creates incentives for the National Government to aggrandize itself”⁴⁵—that is, to expand its own enforcement capabilities. Though not spelled out in *Printz*, the sur-reply is obvious: The federal government would be very reluctant to aggrandize itself, were it made to bear the political costs of its schemes.

The more ambitious the regulatory scheme, the greater the legislators’ inclination to divorce ambitions from responsibility—to take credit for aspirations and occasional accomplishments while avoiding blame for costs and dislocations. As even strong supporters of environmental values have shown, environmental regulation is rife with—and driven by—blame-shifting, political collusion, and irresponsibility.⁴⁶ *Within* that regime, the most egregious policy instrument is the citizen suit. Compared to a horde of “self-appointed mini-EPAs,”⁴⁷ the state implementation of conditional preemption statutes (and even the unelected, made-up bodies that have come to populate the environmental scenery, such as air quality management districts and the Ozone Transport Commission) look like models of political accountability. In *Laidlaw*, the quest for political responsibility stops at the water’s edge.

IV

The responsibility train of thought was set in motion by Justices O’Connor and Kennedy, whose earlier pronouncements provided the basis for Justice Scalia’s *Printz* opinion.⁴⁸ Justices O’Connor and

44. *Printz*, 521 U.S. at 929-30.

45. *See id.* at 959 (Stevens, J., dissenting); *see also id.* at 976-78 (Breyer, J., dissenting).

46. *See, e.g.*, John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY*. L.Q. 233 (1990); R. Shep Melnick, *Pollution Deadlines and the Coalition for Failure*, 75 *PUB. INTEREST* 123 (1984); David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 *UCLA L. REV.* 740 (1983).

47. *See Laidlaw*, 520 U.S. at 209 (Scalia, J., dissenting.) (“A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA.”).

48. Compare the passage quoted earlier with *New York v. United States*, 505 U.S. 144, 167 (1992) (holding that federal commandeering of state governments undermines political accountability) (opinion by O’Connor, J.), and with *United States v. Lopez*, 514 U.S. 549, 576-77 (“Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility

Kennedy, as well as Chief Justice Rehnquist, are members of the Supreme Court's federalist majority. In *Laidlaw*, all three signed an opinion that sets aside the constitutional values that drive their federalism campaign. Notwithstanding the contrast at this level of constitutional values and principles, however, *Laidlaw* fits the general pattern of the Supreme Court's federalism jurisprudence in a tactical sense.

Fearful that a full-blown federalism revival might provoke a political backlash, the Supreme Court has re-asserted federalism norms in a piecemeal, pragmatic and, at times, overtly constituency-driven fashion.⁴⁹ First, the Court has advanced federalism when the statutes at issue have been marginal, symbolic, and more akin to a legislative press release than an operational law. The Gun Free School Zones Act of *Lopez* fame, the Brady bill invalidated in *Printz*, and the civil remedies provision of the Violence Against Women Act that was invalidated in *United States v. Morrison* all fit this description.⁵⁰ Second, the Supreme Court has re-enforced federalism when Congress has ventured into new areas that had been left, and can safely be left, to the states. Crime control (the issue of *Lopez*) is the clearest example: unlike economic regulation, where a curtailment of national authority might spark a "race to the bottom" among the states, crime prevention poses no danger that the states, left to their own devices, will fail to regulate. (The federalism problem, if one exists, is that the states might over-regulate in an effort to "export" criminal activity to more lenient states.)⁵¹ Third, the Supreme Court has promoted federalism while leaving Congress alternative means of accomplishing its stated objectives. Tenth Amendment "commandeering" cases in particular only go to the unconstitutional means of federal regulation; the ends (such as gun registration, in *Printz*) are presumed constitutional, and may be pursued in some other, constitutional fashion (such as legislation under the Spending Clause). Finally, and most important, the Supreme Court has tended to advance federalism when the losing political coalitions are too marginal or disparate to marshal a concerted

would become illusory.") (Kennedy, J., concurring).

49. See MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 79-86 (1999).

50. See *United States v. Morrison*, 529 U.S. 598 (2000); *Printz*, 521 U.S. 898; *Lopez*, 514 U.S. 549.

51. See Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 *NOTRE DAME L. REV.* 167, 179-80 (1996).

counter-attack in Congress.⁵² In *Laidlaw*, the Court met an entrenched, potent constituency—and blinked.

The run of environmental standing cases confirms this analysis. Starting in 1987, the Supreme Court limited citizen suits to claims over on-going (rather than wholly past) violations.⁵³ Subsequently, the Court has insisted that environmental interest groups may challenge only final agency actions, as distinct from agency policies and deliberations;⁵⁴ *Lujan v. Defenders of Wildlife*⁵⁵ emphasized the constitutional obstacles to generalized citizen standing and imposed more stringent pleading requirements; and further limited, only two years ago, injunctive remedies in citizen suits over past violations.⁵⁶ While those decisions (especially *Lujan v. Defenders of Wildlife*) were emphatic about the constitutional considerations, they affected the actual pattern and practice of environmental interest litigation only at the margin. In *Laidlaw*, the Supreme Court confronted the hard political and economic core of environmental citizen standing—the exaction of transfer payments to environmental interest groups.⁵⁷ If plaintiffs had been denied standing in *Laidlaw*, environmental interest groups would have been frozen out of the enforcement process. Recognizing as much, the Court shrunk back and distinguished its precedents on narrow, disingenuous grounds.

Citizen suits are the warp and woof of a huge regulatory regime. Once heralded as a singularly important national commitment, that regime has since come to be recognized as an interest-group-ridden, monstrously inefficient bore.⁵⁸ Even so, the private enforcement of that regime seems unassailable. Professor Cass Sunstein, for a prominent example, has denounced citizen suits as “part and parcel of a largely unsuccessful system of command-and-control regulation”—only to peddle in the same breath (or at least article) legislative pro-

52. See Jeffrey Rosen, *Hyperactive*, THE NEW REPUBLIC, Jan. 31, 2000, at 20-21 (criticizing the Supreme Court’s tendency to target its federalism fire at marginal constituencies that lobby for symbolic enactments).

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

54. See *Lujan v. National Wildlife Fed’n*, 497 U.S. 871 (1990).

55. 594 U.S. 555 (1992).

56. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998).

57. National journalists and editorialists recognized that *Laidlaw* was essentially “about” keeping the legal world safe for environmental interest groups. See, e.g., William Glaberson, *Novel Antipollution Tool is Being Upset by Courts*, N.Y. TIMES, June 5, 1999, at A1; *A Win for the Environment*, WASH. POST, Jan. 16, 2000, at B6.

58. Compare Judge Wright’s famous pronouncement, quoted *supra* note 8, with Justice Scalia’s also-famous rejoinder: “A lot of heralded purposes ought to get lost or misdirected. . . . Yesterday’s herald is tomorrow’s bore.” Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

nly to peddle in the same breath (or at least article) legislative proposals to defend that part and parcel from Justice Scalia's wholesale assault.⁵⁹ In the same spirit, the *Laidlaw* majority bows to the will of Congress. Private environmental law enforcement has been around for so long, and its beneficiaries and their congressional patrons are so entrenched, that the thought of making do without it becomes unsettling or disorienting.

V

Considering the political hazards of re-establishing structural constitutional norms, much can be said for judicial pragmatism and incrementalism.⁶⁰ Precisely because citizen suits are the interest group detritus of since-subsided political passions, they have powerful defenders. A Supreme Court bent on a piecemeal restoration of responsibility-enhancing rules and doctrines should and perhaps must steer clear of such targets.⁶¹

Judicial caution, however, has a downside. Already, influential commentators have criticized the Supreme Court's federalism jurisprudence for a selective hostility to marginal constituencies.⁶² The Supreme Court may yet provide those critics with ammunition: a continued disavowal of the principles of political responsibility and accountability—when the chips are down—would suggest that those principles can't be all that important to begin with. In that event, the Court's piecemeal, painstaking federalism reconstruction would begin to look whimsical rather than incremental.

Similarly, a serious judicial agenda for federalism and, more broadly, for political responsibility must at some point challenge the voters and their elected representatives to re-examine cherished but, in the end, irresponsible and infantile preconceptions. Environmental regulation in particular rests on the premise that an infinitely complex, fragile, and precious environment can be protected only through a centralized, "Soviet-style" command-and-control scheme.⁶³ But we

59. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries' and Article III*, 91 MICH. L. REV. 163, 221, 233-35 (1992).

60. I have said some of it myself. See GREVE, *supra* note 49, at 81-82.

61. See Jeremy A. Rabkin's prescient observation: "The logic of Justice Scalia's articulation of standing requirements in *Lujan* may go beyond what the Court can actually insist upon because it goes beyond what Congress can accept." Jeremy A. Rabkin, *Government Lawyering: The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 201 (1998).

62. See Rosen, *supra* note 52.

63. See Richard B. Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1, 9-10 (1985) (criticizing the existing "Soviet-style centralized planning for

are suspicious of such schemes, and our politicians do not dare to endorse them. Hence, we have assuaged our collective conscience by combining a pretense of centralized environmental control with a pretense of concerned citizen participation. The result is neither policy coherence nor participation but an elaborate shell game of blame-shifting and credit-taking.

Pragmatic and circumspect though the Supreme Court has been in advancing federalism, recent decisions provide some indication that the Justices' increased confidence and resolve to assert constitutional norms even in anticipation of potent political opposition and public criticism. The civil remedies provision of the Violence Against Women Act at issue in *Morrison* was a feminist icon: still, the Court declared it unconstitutional. In its present Term, the Court will consider whether Congress may abrogate the states' Eleventh Amendment immunity under the Americans With Disabilities Act;⁶⁴ the prospect that the Court might curtail the scope of this well-nigh sacrosanct statute has already prompted journalistic alarm and invective.⁶⁵ Even environmental regulation may no longer be immune from the sweep of the Supreme Court's constitutional jurisprudence: in *Solid Waste Agency, Inc. v. United States Army Corps of Engineers*, the Justices will decide whether the Commerce Clause enables the federal government to regulate local, in-state wetlands whose sole connection to interstate commerce is to serve as a migratory bird habitat.⁶⁶

Even if—and especially if—the Supreme Court were to further advance its constitutional agenda in these cases, *Laidlaw* will in retrospect look like a missed opportunity. *Solid Waste Agency* will at most remove one tiny brick from a regulatory edifice built on political irresponsibility. *Laidlaw* was a chance to remove one of its cornerstones. The Justices' reluctance to take that step is understandable, but nonetheless regrettable.

the production of a clean environment”).

64. See *Garrett v. University of Ala. Bd. of Trustees*, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 529 U.S. 1065 (2000).

65. See, e.g., *Are the States Above the Law?* WASH. POST, Oct. 20, 2000, at A32 (characterizing the Supreme Court's sovereign immunity decisions as “perverse” and arguing that a finding of state immunity from damage suits under the Americans With Disabilities Act “would not just be harmful, but constitutionally indefensible”).

66. See *Solid Waste Agency, Inc. v. United States Army Corps of Eng'rs*, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000).