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EDITOR'S NOTE*

On March 2-3, 2000, the *Duke Environmental Law & Policy Forum* sponsored and hosted a symposium entitled "Citizen Suits and the Future of Standing in the 21st Century: From *Lujan* to *Laidlaw* and Beyond." In the following double-issue of the *Duke Environmental Law & Policy Forum*, we are pleased to present papers resulting from that conference.

The symposium was designed to offer a handful of the nation's most respected legal and economic scholars an opportunity to discuss the nature of citizen-suit standing after the Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*[1] The *Laidlaw* decision marked a clear turn in the twisting road courts have followed in the development of standing doctrine for citizen suits.[2] The conference thus provided a forum for discussion on the

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1. 528 U.S. 167 (2000). Incidentally, the timing of the conference was nearly perfect as the Supreme Court handed down its decision in the *Laidlaw* case on January 12, 2000, only a month and a half before the conference was held.

2. Citizen suits are lawsuits in which private citizens sue on behalf of the public. Many environmental statutes confer upon citizens this ability, most notably the Clean Water Act, the Clean Air Act, and the Endangered Species Act. *See* Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365(a) (1994); Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. § 7604(a) (1994); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1994); *but see* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994 & Supp. V 1999) (containing no citizen-suit provision).

Despite these legislatively conferred rights, the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), raised the bar a citizen-plaintiff must clear in order to bring suit on behalf of the public. In *Lujan*, the Court held that a plaintiff bringing a citizen suit must suffer an "injury in fact" that is "actual" or "concrete" to have standing in federal court. *See id.* at 560, 573-74; *see also id.* at 573 (stating that the injuries pled by the Defenders of Wildlife were "abstract" and "noninstrumental"). Most citizen-suit provisions, however, explicitly

status of current standing law and what legacy the "path followed" has left for future standing analysis.

Gene R. Nichol, Dean of the University of North Carolina School of Law, delivered the conference's opening address. Dean Nichol spoke on the "impossibility of *Lujan's* project."[3] In particular, Dean Nichol explained that the *Lujan* Court's decision to restrict a citizen's ability to bring suit on behalf of the public interest was not consistent with either statutory law or legislative purpose.[4] Dean Nichol then discussed the value of the *Laidlaw* decision for future citizen suits. In short, Dean Nichol stated, "*Laidlaw* is right in its

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confer the right to bring such suits to "any person" or "any citizen." *See*, *e.g.*, Clean Air Act, 42 U.S.C. § 7604(a) ("any person may commence a civil action . . . ."); Clean Water Act, 33 U.S.C. § 1365(a) ("any citizen may commence a civil action . . . ."). The *Lujan* Court combined the constitutional requirement of "injury in fact" to this statutorily granted standard. The *Laidlaw* Court, however, reversed its path and decided that the legislatively conferred requirements for standing were appropriate.

3. *See* Gene R. Nichol, *The Impossibility of* Lujan*'s Project*, 11 DUKE ENVTL. L. & POL'Y F. 193 (2001).

4. "*Lujan*'s project," as explicated by Dean Nichol, was to move away from legislative history and intent and return to strict constitutional construction. The goal of this movement was to remove the possibility of having citizens serve as "private attorneys general." The "project" was advocated by Justice Scalia, and is encapsulated in Justice Scalia's concurring opinion in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). In that case, Justice Scalia criticized the Court for its examination of legislative history. He stated: "Committee Reports are [unreliable] not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not." *See id*. at 617 (Scalia, J., concurring). Justice White, joined by the other seven Justices, responded in the majority opinion by pointing out that "the Court's practice of utilizing legislative history reaches well into its past." *See id*. at 610 (citing Wallace v. Parker, 31 U.S. (6 Pet.) 680, 687-90 (1832), which investigated the legislative history behind a law granting land to soldiers in compensation for their service).

Although Justice Scalia did not gain a majority with his opinion in *Mortier*, his theory of strict constitutional construction did make its way into standing law in the '90s. *See*, *e.g.*, *Lujan*, 504 U.S. 555. In fact, "*Lujan*'s project" played a major role in standing cases until *Federal Election Commission v. Akins*, 524 U.S. 11 (1998) (involving a suit filed against the FEC for failure to provide information guaranteed under the Federal Election Campaign Act of 1971). In *Akins*, the plaintiff's standing depended on a legislatively conferred right of standing. Before finding sufficient traceability of injury, the Court found that the congressionally conferred standing met the injury in fact requirement, stating:

> The "injury in fact" that respondents have suffered consists of their inability to obtain information . . . that, on respondents' view of the law, the statute requires that [the FEC] make public. There is no reason to doubt their claim that the information would help them . . . to evaluate candidates for public office, especially candidates who received assistance from [the FEC], and to evaluate the role that [the FEC's] financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular.

Akins, 524 U.S. at 21.

essential answer" that public law should not be re-made through standing doctrine.[5]

After Dean Nichol's address, the first panel of speakers discussed and analyzed recent standing cases. All of the panel participants either argued or filed briefs in the *Laidlaw* or *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*[6] cases. Professor Jonathan Baert Wiener of the Duke University School of Law and the Nicholas School of the Environment moderated this panel. Bruce J. Terris of Terris, Pravlik & Millian, L.L.P. was the first speaker. Mr. Terris argued on behalf of Friends of the Earth, Inc. in the *Laidlaw* case before the Supreme Court and in the *Gaston Copper* case before the Fourth Circuit. Mr. Terris spoke on the purpose of standing law as seen by a practitioner. He proposed that the principles of standing law, as the Supreme Court succinctly stated in *Baker v. Carr*,[7] had been ignored in *Lujan*-era jurisprudence. Indeed, Mr. Terris stated he thought that standing as it existed post-*Lujan* did not come close to its principles. Mr. Terris submitted that the *Laidlaw* decision, however, might make it easier for courts to adhere to these principles in future standing cases.

Following Mr. Terris, Donald A. Cockrill, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., spoke on his view of the *Laidlaw* decisions. Mr. Cockrill argued on behalf of Laidlaw Environmental Services, Inc. in the *Laidlaw* case before the Supreme Court and Fourth Circuit.[8] Mr. Cockrill discussed the impact *Laidlaw* would have on future environmental defendants. He proposed that the 7-2 Supreme Court decision may, in effect, mean that future Clean Water Act violators will be held strictly liable for their permit violations.

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5. *See* Nichol, *supra* note 3, at 194.

6. 179 F.3d 107 (4th Cir. 1999), *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000) (involving citizen-suit claims under the Clean Water Act). In the original *Gaston Copper* decision, the Fourth Circuit held that without proof of the traceability of specific permit violations to specific injuries suffered by the plaintiffs, no one could claim an injury sufficient to obtain standing. The *en banc* rehearing of *Gaston Copper* occurred after the Supreme Court decided the *Laidlaw* case. The result was a decision that conformed more to the language of the Clean Water Act and the *Laidlaw* decision. The court held that merely having a "sufficient personal stake" was adequate to meet the standing requirement. *See Gaston Copper*, 204 F.3d at 153.

7. 369 U.S. 186 (1962). In *Baker v. Carr*, a case involving the ability of citizens to bring equal protection suits on behalf of the public, the Court stated: "Have the appellants *alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues* upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing." *Id*. at 204 (emphasis added).

8. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 149 F.3d 303 (4th Cir. 1998).

The next speaker was Harold W. Jacobs, of Nexsen, Pruet, Jacobs & Pollard, L.L.C., who argued on behalf of *Gaston Copper Recycling Corp.* before the Fourth Circuit. Mr. Jacobs spoke on the facts that surrounded the *Gaston Copper* decision. In his speech, Mr. Jacobs posed the question that in light of *Laidlaw*, "are proximity to a polluting plant—and that the pollution offends one—the only issues that need to be proved to bring a successful Clean Water Act case?"

Next to speak was Kenneth P. Woodington of the South Carolina Attorney General's office. Mr. Woodington filed the amicus brief on behalf of the State in favor of Laidlaw Environmental Services, Inc. Mr. Woodington discussed the State's unique position in the Laidlaw case: the State argued that neither the State nor its agencies should be subject to federal litigation once compliance had been reached through State administrative action.[9] South Carolina thus was arguing, in effect, in favor of Laidlaw violating its state-issued permits.

Mr. Woodington was followed by Justin Smith of the Environmental & Natural Resources Division of the Department of Justice (DOJ), who spoke about DOJ's general perspective on citizen suits. Finally, Jim Hecker, an Environmental Enforcement Attorney for Trial Lawyers for Public Justice, spoke on the amicus brief his organization assisted the petitioning environmental organizations in drafting for the *Laidlaw* case. Mr. Hecker noted that the petitioning environmental groups had anticipated that the mootness issue would be the focus of the litigation, rather than the standing issue.

The following morning, a panel of six scholars discussed the history of standing jurisprudence from *Lujan* to *Laidlaw*. Professor Thomas D. Rowe, Jr. of the Duke University School of Law moderated this panel.

The first featured speaker of the morning panel was Professor Richard J. Pierce, Jr., of the George Washington University School of Law. Professor Pierce discussed his accord with the argument posed by Dean Nichol in his opening address. In particular, Professor Pierce agreed that the *Lujan* decision had moved toward a standard of near molecular traceability. The *Laidlaw* decision marked a clear step away from that standard. Professor Pierce cautioned, however, that the *Laidlaw* decision cannot be counted as a permanent victory

9. *See generally* Brief Amicus Curiae of the State of South Carolina in Support of Respondent, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000) (No. 98-822).

quite yet. Rather, Professor Pierce posited that because of the make-up of the current Court, combined with the long list of inconsistent standing decisions, it will be five to ten years before the impact of *Laidlaw* can be fairly assessed.[10]

Professor William W. Buzbee of the Emory University School of Law spoke next and presented his paper[11] on the relation of standing law to legislative judgments of statutory purpose. Professor Buzbee asserted that the sequence of cases leading to *Laidlaw* in fact may show that the *Laidlaw* case is not as far removed from previous judicial opinions as it may seem.

John D. Echeverria, the Director of the Environmental Policy Project and Adjunct Professor of Law at the Georgetown University Law Center, followed Professor Buzbee. Professor Echeverria presented his paper[12] which closely examines the *Laidlaw* decision and asks: what theory of standing will take place as a result of *Laidlaw*? Professor Echeverria speculated that *Laidlaw*'s theory of standing should hinge on the hypothesis that Article III prevents legislation that creates rights of action.

Dr. Michael S. Greve, the Executive Director of the Center for Individual Rights then presented his paper[13] on the link between standing and federalism. Dr. Greve argued that the Court in *Laidlaw* backed off from congressional interests and was too cautious in its judgment.

Next to speak was Robert V. Percival, Director of the Environmental Law Program and Professor at the University of Maryland School of Law. Professor Percival presented the argument that *Laidlaw* did not affect a fundamental change in the law of

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10. Professor Pierce contributed an article to this issue that was written in advance of the *Laidlaw* decision and predicts the outcome of the case by analyzing previous standing decisions. Professor Pierce's article includes a postscript in which he discusses the impact of the Court's *Laidlaw* decision. *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).

11. William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247 (2001).

12. John D. Echeverria, *Critiquing* Laidlaw*: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 DUKE ENVTL. L. & POL'Y F. 287 (2001).

13. Michael S. Greve, Friends of the Earth*, Foes of Federalism*, 12 DUKE ENVTL. L. & POL'Y F. 167 (2001). Dr. Greve is now the John G. Searle Scholar at the American Enterprise Institute.

standing.[14] Rather, Professor Percival argued that *Laidlaw* simply departed from the application of the private law model to assess litigants' standing.

The final speaker of the morning panel was Professor Steven L. Winter of Brooklyn Law School. Professor Winter presented his paper[15] on the inconsistency of Justice Scalia's standing theory with legal history and the rule of law. The *Laidlaw* decision, as Professor Winter discussed, does not mark a new step in the development of standing doctrine. Instead, Professor Winter asserted that the *Laidlaw* decision is grounded in a return to historical precedent. Indeed, Professor Winter pointed out that the decision in *Laidlaw* can find its historical roots in the jurisprudence of even the earliest American courts.

Professor Donald T. Hornstein of the University of North Carolina School of Law moderated the afternoon panel, which discussed the alternatives and future of standing jurisprudence. The first speaker of the afternoon panel was Jonathan H. Adler a Senior Fellow of Environmental Policy at the Competitive Enterprise Institute. Mr. Adler presented his paper[16] addressing whether liberalized standing rules advance environmental protection. Mr. Adler maintained that liberalized standing rules cannot be assumed to improve environmental quality. In fact, Mr. Adler contended that a system of property rights in environmental resources might better serve environmental goals than the current system of citizen-suit provisions.

Next to speak was Professor Andy H. Barnett of the Auburn University College of Business. Professor Barnett presented the paper[17] he co-authored with Professor Timothy D. Terrell of Wofford College, which analyzes the economics of citizen-suit provisions in environmental legislation. Professor Barnett introduced the concept

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14. *See* Robert V. Percival & Joanna B. Coger, *Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENVTL. L. & POL'Y F. 119 (2001).

15. Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155 (2001).

16. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001). Mr. Adler is now a law clerk for The Honorable David B. Sentelle, United States Court of Appeals for the District of Columbia Circuit.

17. A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen-Suit Provisions of Environmental Legislation*, 12 DUKE ENVTL. L. & POL'Y F. 1 (2001). Professor Barnett is now teaching at the American University of Sharjah, in the United Arab Emirates.

of standing as a property right and discussed the economics of allowing private persons to act as "private attorneys general." Professor Barnett also discussed the economic implications of the *Laidlaw* Court's determination of "concern" as being sufficient basis to grant standing to citizen-suit plaintiffs.

Karl S. Coplan, Co-Director of the Pace Environmental Litigation Clinic, Inc. and Associate Professor of Law at the Pace University School of Law, spoke next. Professor Coplan addressed the standing afforded to environmental organizations in light of *Laidlaw*.[18] Professor Coplan discussed the oddity of corporate for-profit interests being able to gain standing with greater ease than not-for-profit organizations. Professor Coplan noted that this dichotomy is in fact significantly different than what the Framers faced in the eighteenth century.

The next speaker was Professor Harold J. Krent of the Chicago-Kent College of Law, who presented his paper[19] on the effect the *Laidlaw* decision will have in determining the role Congress has in defining redressability. Professor Krent argued that courts should defer to congressional findings in deciding redressability, but that courts should not find—regardless of congressional determinations—redressability for plaintiffs claiming an interest in a suit unless the award provides compensation for a past injury or supplies sufficient deterrence to prevent future wrongdoing.

The final speaker of the afternoon panel was Professor Maxwell L. Stearns of the George Mason University School of Law. Professor Stearns presented his paper[20] on the application of the social choice model to statutory standing. In applying his social choice model, Professor Stearns suggested that collective decision-making may provide some explanation for the current nature of standing doctrine.

The *Duke Environmental Law & Policy Forum* would like to thank all of the participants in this conference. It is an honor to publish the papers resulting from this fantastic colloquium.

— Jonathan T. Ryan

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18. *See* Karl S. Coplan, *Direct Environmental Standing for Chartered Conservation Corporations*, 12 DUKE ENVTL. L. & POL'Y F. 183 (2001).

19. Harold J. Krent, Laidlaw*: Redressing the Law of Redressability*, 12 DUKE ENVTL. L. & POL'Y F. 85 (2001).

20. Maxwell L. Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321 (2001).