

PANEL DISCUSSION

ENVIRONMENTAL CITIZEN SUITS: STANDING AND
MOOTNESS AFTER *LAIDLAW*

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INTRODUCTION

One of the genuine curiosities of federal law in the United States is the tendency to transform ordinary civil litigation into an extraordinary 'case-within-a-case.' One case deals with the substantive legal policies allegedly at stake, and the other, with justiciability, which is to say, the propriety of the particular request for federal court action. Congressional policy concerns typically play a central role in the "substantive case," which must be the product of an affirmative grant of constitutional authority to legislate. The policy concerns of the Supreme Court justices dominate the 'justicability case,' presumably because of the Court's special concern for policing Article III. Although the analogous 'play-within-a play' proved to be a hit in *A Midsummer Night's Dream*, *Hamlet*, and *Kiss Me, Kate*, just to name a few examples,¹ the judicial version usually gets mixed reviews. One problem is that sometimes the justiciability controversy overwhelms the substantive dispute, as in *Friends of*

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¹ See ROBERT J. NELSON, *PLAY WITHIN A PLAY: THE DRAMATIST'S CONCEPTION OF HIS ART: SHAKESPEARE TO ANOUILH* (1958), for other examples.

the Earth v. Laidlaw Environmental Services, Inc.,² a private enforcement action brought pursuant to the Clean Water Act (the "Act").³ The four opinions barely mention the substantive concerns of the Act and are devoted to justiciability issues – standing and mootness. Thus, the decision provides nothing new about the objectives of the Clean Water Act but does provide current information about the justices' views on private enforcement of the Act.

In 1986 Laidlaw Environmental Services, Inc.⁴ ("Laidlaw") purchased a hazardous waste incinerator facility in Roebuck, South Carolina. Shortly after the purchase, Laidlaw asked the South Carolina Department of Health and Environmental Control ("DHEC") for a permit authorizing Laidlaw to discharge treated water into the North Tyger River, and a permit was issued effective January 1, 1987. Early in 1992, Friends of the Earth ("FOE") and Citizens Local Environmental Action Network ("CLEAN") sent a letter to Laidlaw, indicating that they planned to file suit to enforce the terms of the permit. Laidlaw's lawyer then asked the DHEC to bring suit itself to enforce the permit. The two organizations acted according to the citizen suit provisions of the Clean Water Act,⁵ which permit private enforcement of the Act but require a sixty-day written notice to the potential defendant.⁶ Laidlaw also responded in accordance with the same section, which further provides that diligent public enforcement will bar private action.⁷ The DHEC did bring suit and on June 9, 1992, the last day before the notice period ran, the DHEC and Laidlaw settled, with the agreement that Laidlaw would pay a fine of \$100,000 and make an effort to comply with the permit.⁸ Three days later FOE and CLEAN filed suit against Laidlaw in the local district court, alleging noncompliance with the permit and asking for declaratory and injunctive relief and an award of civil penalties to the United

² 528 U.S. 167, 120 S. Ct. 693 (2000).

³ Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251-1387 (1994).

⁴ The defendant company will be referred to as "Laidlaw" throughout, though the company has since changed its name to Safety-Kleen (Roebuck), Inc. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 120 S. Ct. 693, 701 (2000).

⁵ See Clean Water Act § 505, 33 U.S.C. § 1365 (1948) (amended 1987).

⁶ *Id.* § 505(a), (b).

⁷ *Id.* § 505(b).

⁸ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 890 F. Supp. 470, 480 (D.S.C. 1995).

States.

Laidlaw moved for summary judgment, arguing that the plaintiffs' lack of standing and the DHEC's prior action barred private enforcement. Laidlaw's motion was denied. On January 22, 1997, the district court entered judgment on the merits. The court found that Laidlaw had violated the discharge permit but had achieved substantial compliance by August 1992.⁹ Additionally, the court held that Laidlaw had an economic benefit from the discharge violations of \$1,092,581 but fined Laidlaw only \$405,800.¹⁰ The court denied injunctive and declaratory relief because Laidlaw had come into substantial compliance with the discharge permit before judgment.¹¹ FOE and CLEAN appealed the award of the fine, arguing that the amount was insufficient, but they did not appeal the denial of injunctive and declaratory relief. Laidlaw cross-appealed, arguing that the plaintiffs lacked standing and that the DHEC suit and settlement barred the plaintiffs' action.

On July 16, 1998, the court of appeals issued a judgment vacating the district court's order and remanding with instructions to dismiss.¹² The court assumed without deciding that the plaintiffs had *initial* standing to bring the action but held that the plaintiffs *no longer* had standing.¹³ The court also held that the case had become moot because the plaintiffs had not appealed the denial of declaratory and injunctive relief and because the plaintiffs had no interest in the civil penalty, since it was payable to the United States government.¹⁴ Although the district court had made no determination about attorneys' fees, the court of appeals added a footnote stating that since FOE and CLEAN had, in its view, failed to obtain relief on the merits, no attorneys' fees or costs could be awarded.¹⁵

Laidlaw stated that the Roebuck incinerator facility was "closed, dismantled, and put up for sale" after the court of appeals had decided the case, but before the Supreme Court had issued its grant of certiorari.¹⁶ The Supreme Court granted cer-

⁹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 956 F. Supp. 588, 611 (D.S.C. 1997).

¹⁰ *Id.* at 610.

¹¹ *Id.* at 611.

¹² *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 149 F.3d 303, 307 (4th Cir. 1998).

¹³ *See id.*

¹⁴ *Id.* at 306-07.

¹⁵ *Id.* at 307 n.5.

¹⁶ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 120 S. Ct. 693, 703 (2000).

tiorari and reversed the Fourth Circuit.¹⁷ Justice Ginsburg delivered an opinion for the Court, which seems likely to encourage private enforcement of the Clean Water Act and, perhaps, other federal environmental protection statutes.¹⁸ Justices Stevens and Kennedy concurred in separate opinions, and Justice Scalia dissented in an opinion joined by Justice Thomas.¹⁹

I. THE "CITIZEN SUIT"

Citizen suit provisions originated in the Clean Air Act of 1970²⁰ and were eventually included in most federal environmental protection legislation.²¹ The legislative histories suggest that some advocates of the provisions considered private enforcement an alternative to agency action, while others viewed private enforcement only as a supplement to agency action.²² In any event, the federal Clean Water Act of 1972, the statute involved in *Laidlaw*, provided that "any citizen may commence a civil action on his own behalf"²³ for violation of the statute or of an order issued pursuant to the statute. For this purpose, "citizen" was defined as "a person or persons having an interest which is or may be adversely affected."²⁴ In addition, the statute included the notice and public enforcement provisions described above.²⁵

From the beginning, congressional action opening the door to private enforcement of environmental protection statutes by citizen suits was on a collision course with Supreme Court precedents. These precedents held, for prudential reasons, that citizens' general interest in enforcing federal law was not a sufficient reason to permit access to federal courts. In *Frothing-*

¹⁷ *Id.* at 693.

¹⁸ See *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 120 S. Ct. 693 (2000).

¹⁹ *Id.* at 712, 713-22.

²⁰ Clean Air Act of 1970, 42 U.S.C. § 7604 (1994).

²¹ See, e.g., Toxic Substances Control Act of 1976, 15 U.S.C. § 2619 (1994); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1994); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (1994); and Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659 (1994). See also Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311, 313 (1998) (listing the above acts).

²² Snook, *supra* note 21, at 317-18.

²³ 33 U.S.C. § 1365(a) (1994).

²⁴ *Id.* § 1365(g).

²⁵ *Id.* § 1365(b).

ham v. Mellon,²⁶ a taxpayer brought suit against the Secretary of the Treasury in the District of Columbia to prevent payments by the United States to Massachusetts, pursuant to an act of Congress designed to assist states in lowering maternal and infant mortality, and to guard the health of infants and mothers. The plaintiff claimed that the purpose of the statute was not national but local, that it imposed an unequal burden on industrial states such as Massachusetts, and that it violated the power of local governments reserved to the states by the Tenth Amendment.²⁷ The trial court dismissed the case, and the court of appeals affirmed.²⁸ The Supreme Court also affirmed the dismissal.²⁹ Justice Sutherland, writing for the Court, held that judicial power can only be invoked by a person who can show "that he has sustained or is immediately in danger of sustaining some direct injury, and not merely that he suffers in some indefinite way in common with people generally."³⁰ In *Ex parte Levitt*,³¹ the plaintiff filed a motion under the original jurisdiction of the Supreme Court, asking the Court to require Justice Hugo Black to show cause as to why he should be permitted to serve as an Associate Justice. The plaintiff claimed that Black's appointment violated a constitutional limit on the appointment of Senators to federal office and also that there was no vacancy on the Court for Justice Black to fill.³² The motion was denied in a per curiam opinion which stated, in part, that, "The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient."³³

In *Warth v. Seldin*,³⁴ various organizations and individuals brought suit in the local district court against a town and members of the town's several boards, claiming the defendants had excluded persons of low or moderate income from the town, in violation of the First, Ninth, and Fourteenth Amendments.³⁵ The district court dismissed the complaint and the court of ap-

²⁶ 262 U.S. 447, 479 (1923).

²⁷ *Id.*

²⁸ *Id.* at 478.

²⁹ *Id.* at 489.

³⁰ *Id.* at 488.

³¹ 302 U.S. 633 (1937).

³² *Id.*

³³ *Ex parte Levitt*, 302 U.S. 633, 634 (1937).

³⁴ 422 U.S. 490 (1975).

³⁵ *Id.* at 493.

peals affirmed, holding that none of the plaintiffs had standing.³⁶ The Supreme Court also affirmed the dismissal.³⁷ Justice Powell, writing for the Court, recognized that the standing inquiry “involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.”³⁸ He then assigned the prohibition on citizen standing to the prudential category:

Apart from [Constitutional prohibitions], this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. [T]he Court has held that when the asserted harm is a “generalized grievance” shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.³⁹

Classification of this bar as prudential suggested, of course, that the limitation could be changed by statute.

This prudential bar collided with citizen suit provisions in *Lujan v. Defenders of Wildlife*.⁴⁰ The plaintiffs, organizations dedicated to conservation of wildlife, challenged a regulation promulgated by the Secretary of the Interior, which limited certain protections of the Endangered Species Act to the United States or the high seas.⁴¹ The organizations filed suit, asking for a declaratory judgment that the Endangered Species Act did apply in additional geographic areas and for an injunction requiring the Secretary to promulgate a new regulation.⁴² The Endangered Species Act included a citizen suit provision which provided in part, “any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.”⁴³ Justice Scalia, for the Court, first discussed the direct interests of two Defenders of Wildlife members and found their interest in the disputed regulation insufficient.⁴⁴ Justice Scalia then turned to the citizen suit provision. He

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 498.

³⁹ *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

⁴⁰ 504 U.S. 555 (1992).

⁴¹ *Id.* at 557-58.

⁴² *Id.* at 559.

⁴³ Endangered Species Act of 1973 § 11, 16 U.S.C. § 1540(g) (1973) (amended 1988).

⁴⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564-71 (1992).

wrote:

We have consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy.⁴⁵

This result necessarily transformed the prudential bar to citizen standing, described by Justice Powell in *Warth v. Seldin*,⁴⁶ into an Article III prohibition, giving the Supreme Court an independent role in responding to the citizen suit initiative. Against this background, the importance of *Laidlaw* clearly emerges.

II. STANDING

Current general doctrine about standing requires that plaintiffs plead and prove three elements: injury, causation and redressability.⁴⁷ The plaintiff must have suffered some harm or be in imminent danger of harm; that harm must have been caused by the action of the defendant; and the court must be able to redress plaintiff's harm or prevent the imminent harm. These elements are also among those that the plaintiff must show to establish justiciability in order to gain access to federal court. In *Laidlaw*, the Fourth Circuit simply assumed that the existence of initial standing had become moot.⁴⁸ In contrast, Justice Ginsburg immediately turned to the question of whether FOE and CLEAN had standing when the enforcement action was commenced.⁴⁹ She began by plainly indicating that “we have an obligation to assure ourselves that [plaintiffs] had Article III standing at the outset of the litigation.”⁵⁰ Justice Ginsburg then referred to *Defenders of Wildlife* and recognized the Article III basis of that decision.⁵¹ Next, she explained that an association has standing when its members would have standing in their

⁴⁵ *Id.* at 573-74.

⁴⁶ 422 U.S. 490 (1975).

⁴⁷ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 120 S. Ct. 693, 704 (2000) (citing *Defenders of Wildlife*, 504 U.S. at 560-61).

⁴⁸ *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 149 F.3d 303, 306-07 (4th Cir. 1998).

⁴⁹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 120 S. Ct. at 704.

⁵⁰ *Id.*

⁵¹ *Id.*

own right, and recounted the affidavits and deposition testimony of several FOE and CLEAN members.⁵²

One FOE member averred that he drove over the North Tyger River and that while he would like to fish or swim in the river, he would not “because he was concerned that the water was polluted by Laidlaw’s discharges.”⁵³ Another FOE member attested that she would like to use the river for recreational purposes, “were she not concerned that the water contained harmful pollutants.”⁵⁴ A CLEAN member attested that her home near the Laidlaw facility had a lower property value than similar homes further away from the facility “and that she believed the pollutant discharges accounted for some of the discrepancy.”⁵⁵

The interesting point about these and similar statements offered by FOE and CLEAN is that they are quite similar to statements that were found insufficient for standing purposes in *Defenders of Wildlife*. In that case, one Defenders of Wildlife member stated that she had traveled to Egypt and observed the habitat of the crocodile there and “intend[ed] to do so again and hope[d] to observe the crocodile directly.”⁵⁶ Another member stated that she had traveled to Sri Lanka and observed the habitat of the Asian elephant and leopard and “intend[ed] to return to Sri Lanka in the future and hope[d] to be more fortunate in spotting at least the endangered elephant and leopard.”⁵⁷ According to Justice Scalia in *Defenders of Wildlife*, “Such ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”⁵⁸ Although some might suggest that a majority of the Court finds a significant distinction between “intentions” which may lead to harm and “concerns” that harm exists – a far more plausible explanation for such divergent findings is that a majority of the Court now holds a more favorable view of private enforcement.

⁵² *Id.* at 704-05.

⁵³ *Id.* at 704.

⁵⁴ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 120 S. Ct. at 705.

⁵⁵ *Id.*

⁵⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (quoting the affidavit in question).

⁵⁷ *Id.* (quoting the affidavit in question).

⁵⁸ *Id.* at 564.

My suggestion that the difference in outcomes between *Defenders of Wildlife* and *Laidlaw* reflects a more favorable view of private enforcement receives further support from the district court's determination that there had been "no demonstrated proof of harm to the environment"⁵⁹ – apparently referring to the North Tyger River. Thus, it appears that the "concerns" of the FOE and CLEAN members sufficient to satisfy the injury element were not in fact well founded. These circumstances prompted Justice Ginsburg to hold that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."⁶⁰ She continued by holding that knowledge of the discharges gave rise to a reasonable perception of harm and was thus sufficient.⁶¹ Because Justice Ginsburg wrote nothing about the causation elements, we must presume that a plaintiff's perception that a harm follows from a defendant's conduct is sufficient. Thus, a reasonable though mistaken perception about harm in *Laidlaw* satisfied both the first and second elements of the standing test.

With respect to the third element of standing – redress – *Laidlaw* argued that plaintiffs lacked standing to seek civil penalties because any penalty imposed on *Laidlaw* was payable in full to the United States and hence no redress was available to the plaintiffs from the court.⁶² Justice Ginsburg rejected this argument and explained that the deterrent effect of any penalty was sufficient to satisfy the redress requirement.⁶³ She wrote, "[I]t is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties."⁶⁴ Justice Ginsburg continued, "To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct."⁶⁵ Obviously, this determination is significant support for private enforcement because it seemingly makes unnecessary the provision of a

⁵⁹ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 956 F. Supp. 588, 602 (D.S.C. 1997).

⁶⁰ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 120 S. Ct. 693, 704 (2000).

⁶¹ *Id.* at 705.

⁶² *Id.* at 706.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 120 S. Ct. 693, 706-07 (2000).

“bounty” payable to the plaintiff.⁶⁶

III. MOOTNESS

Prior to *Laidlaw*, the most common definition of the mootness requirement was a statement by Professor Henry Monaghan which described mootness as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”⁶⁷ This description was quite convenient because after a survey of standing doctrine, mootness doctrine appeared as only a logical extension, requiring little independent analysis. One component of mootness doctrine which does not follow simply from the standing concept is the exception for “voluntary cessation.” The leading case is *United States v. W.T. Grant Co.*,⁶⁸ an antitrust suit in which the United States sought to enjoin the practice of competing corporations having many common directors. When the action was commenced the common directors resigned and the defendant claimed the action was moot.⁶⁹ The Supreme Court disagreed, pointing out that “[t]he defendant is free to return to his old ways.”⁷⁰

In *Laidlaw*, Justice Ginsburg began her discussion of the mootness issue by observing that “[t]he only conceivable basis for a finding of mootness in this case is Laidlaw’s voluntary conduct — either its achievement by August 1992 of substantial compliance . . . or its more recent shutdown of the Roebuck facility.”⁷¹ She then explained that voluntary cessation would not moot a case unless the defendant can persuade the court “that the challenged conduct cannot reasonably be expected to start up again.”⁷² Justice Ginsburg then recounted the Fourth Cir-

⁶⁶ Justice Kennedy indicated serious concern about this holding, writing, “Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants . . . are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.” *Id.* at 713 (Kennedy, J., concurring).

⁶⁷ Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973) (citing *Roe v. Wade*, 93 S. Ct. 705, 713 (1973)), (referenced in *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 120 S.Ct. at 708, citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997)).

⁶⁸ 345 U.S. 629 (1953).

⁶⁹ *Id.* at 630.

⁷⁰ *Id.* at 632.

⁷¹ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 120 S.Ct. 693, 708 (2000).

⁷² *Id.*

cuit's determination that the case was moot and explained that the court of appeals had "confused mootness with standing."⁷³ Justice Ginsburg explained that the lower court had relied on the description of mootness as standing set in a time frame, yet, she added, "[c]areful reflection . . . reveals that the description . . . is not comprehensive."⁷⁴ According to Justice Ginsburg, "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."⁷⁵ Justice Ginsburg concluded that either Laidlaw's compliance or the shut down of the Roebuck facility might meet the test, but both possibilities involved undetermined factual issues which should be considered on remand.⁷⁶

The Court's separation of mootness from standing is a significant result. For academics, the accepted definition of mootness must be qualified in future editions of casebooks and in lectures.⁷⁷ More importantly, a majority of the court signaled strong support for long-term enforcement. Plainly enforcement may continue, despite claims of mootness, in situations where enforcement might not begin because there is not standing. Also, the proliferation of doctrine adds again to the importance of the Court's view of private enforcement. Ultimately, the Supreme Court will determine when "challenged conduct cannot reasonably be expected to start up again."⁷⁸

⁷³ *Id.*

⁷⁴ *Id.* at 709.

⁷⁵ *Id.*

⁷⁶ *See id.* at 711.

⁷⁷ Indeed, Justice Scalia called this discussion an "academic excursion," but he then defended the traditional definition over several pages. He began, "We have repeatedly recognized that what is required for litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 120 S.Ct. 693, 721 (2000) (Scalia, J., dissenting).

⁷⁸ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 120 S. Ct. at 708. Although this essay is focused on standing and mootness, I note that the issue of an award of attorney fees was opened by the Supreme Court after being closed by a footnote in the Fourth Circuit opinion. *See id.* at 711; *Friends of the Earth v. Laidlaw Env'tl. Services*, 149 F.3d 303, 307 (4th Cir. 1998). Justice Ginsburg pointed out that the district court had not made a determination about fees, and "[t]hus, when the Court of Appeals addressed the availability of counsel fees . . . no order was before it either denying or awarding fees." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 120 S.Ct. at 712. Accordingly, the district court will address the fee question on remand.

CONCLUSION

The most important conclusion about environmental citizen suits is that standing and mootness after *Laidlaw* will continue to be independently determined by the Supreme Court. The transformation in *Defenders of Wildlife* of the prudential bar to general citizen standing into an Article III prohibition remains unchanged. Justice Ginsburg in *Laidlaw* referred to the standing question as involving Article III and described *Defenders of Wildlife* as decided under Article III. Thus, the congressional initiative embodied in the citizen suit provisions has, after *Defenders of Wildlife* and *Laidlaw*, little significance. The difference in outcome between the two cases does not reflect a change in treatment of citizen suit provisions but, apparently, a change in views by Supreme Court justices toward private enforcement. Obviously, a majority of the Court now wishes to encourage private law enforcement, at least with respect to the environment. This encouragement comes at the beginning of the process in the form of a perception-based test for the standing elements of harm and causation, with an accommodating view of the deterrent effect of fines paid to the government for the element redress. Also, the encouragement extends over time with a view of mootness that permits cases to continue under circumstances which would not permit the same case to begin anew.⁷⁹

The problem with this conclusion is that none of the opinions in *Laidlaw* reveal why the Justices' views about private enforcement changed (or did not change). The chief cause of this uncertainty is the dominance in *Laidlaw* of the justiciability case which led to the painstaking focus on the relation of FOE and CLEAN members to the alleged permit violations. The analysis of this very particularized material provides no insight about the Justices' general views of private enforcement — a topic surely subject to useful policy analysis. In the closely related

⁷⁹ The Court furnished additional evidence of a favorable view toward private enforcement in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S.Ct. 1858 (2000), decided a few months after *Laidlaw*. In that case a private citizen brought suit in federal court on behalf of the United States against a state agency under the False Claims Act. Although the Court ultimately determined that the statute did not permit action against state agencies, the Court, in an opinion by Justice Scalia, held that the plaintiff did have standing under Article III. *Id.* at 1865. In a noteworthy formulation, Justice Scalia wrote that "the United States' injury in fact suffices to confer standing on respondent Stevens." *Id.* at 1863. The Court was unanimous with respect to this holding, although Justices Stevens and Souter dissented on the statutory issue.

area of class actions, also a vehicle for private law enforcement, analysis of the adequacy of proposed class representatives was once litigated chiefly with respect to the relation of the proposed representatives to the alleged violations. Just as in *Laidlaw*, the Court focused on the relation of FOE and CLEAN members to the alleged permit violations. Now in class actions, adequacy is primarily contested by estimation of the likelihood of effective enforcement. This development in the class action field might well serve as a practical example for judicial consideration of future proposals for private enforcement of environmental policy.

