

Michigan Journal of Environmental & Administrative Law


Volume 2 | Issue 2

2013

Environmental Law at the Crossroads: Looking Back 25, Looking Forward 25

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Recommended Citation

Richard J. Lazarus, *Environmental Law at the Crossroads: Looking Back 25, Looking Forward 25*, 2 MICH. J. ENVTL. & ADMIN. L. 267 (2013).

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ESSAY

**ENVIRONMENTAL LAW
AT THE CROSSROADS:
LOOKING BACK 25,
LOOKING FORWARD 25**

*Richard J. Lazarus**

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INTRODUCTION

Twenty-five years used to seem like an exceedingly long time. It certainly did when I was graduating from law school and not yet twenty-five. My perspective on time, however, has (naturally) since evolved, much as environmental law itself and the controversies surrounding it have, too, evolved.

The contrast between environmental law twenty-five years ago and environmental law today is remarkable and makes clear that environmental law and lawmaking were changing in fundamental ways a generation ago, but those changes are revealed only now with the aid of hindsight. To be sure, the statutory texts of domestic environmental law are strikingly the same. And yet, it is that static quality that ironically underscores how much has changed.

A generation ago, environmental law scholars would routinely comment on how the only constant in environmental law was change: its dynamic

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nature.¹ Congress was regularly passing significant statutory amendments in what was largely a constructive iterative lawmaking process, involving federal and state legislatures, agencies, and courts. Some might have worried that the change was too great—making it too difficult for the regulated community to adjust and invest.² Whether any such concern then was justified, the concern now is quite different: too little change rather than too much. And the static nature of environmental lawmaking here in the United States stands in sharp contrast to the dynamic nature of environmental lawmaking globally.³ The United States, once a lauded pioneer, now very much risks being left behind.

This essay is written in celebration of the 25th Annual Meeting of the National Association of Environmental Law Societies at the University of Michigan Law School and in recognition of Michigan Law's hosting of the Association's inaugural meeting in 1988. The essay focuses on three topics in reflecting on the changes in environmental law and environmental lawmaking since the Association's first meeting. The first is Congress and the politics of environmental law. The second topic concerns the courts and the changing relationship of constitutional law to environmental law. And, finally, the essay considers the contrasting nature of the challenges that environmental lawyers and environmental law face today as compared to twenty-five years ago.

I. CONGRESS AND ENVIRONMENTAL POLITICS

Twenty-five years ago, the nation could legitimately boast of a Congress fully engaged in environmental lawmaking.⁴ Both Democrats and Republicans worked together to enact sweeping, ambitious federal environmental laws. By the time of the Association's first conference in 1988, prior decades had witnessed an explosion of federal environmental protection laws.

1. See, e.g., Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 791 (1994); see also Daniel P. Selmi, *Experimentation and the "New" Environmental Law*, 27 LOY. L.A. L. REV. 1061, 1062–68 (1994).

2. Or, as I once wrote, environmental law's dynamic quality might create tensions with efforts to criminalize violations of environmental protection standards to the extent that "[c]riminal law emphasizes settled norms, while environmental law constantly changes and aspires for fundamental and dramatic change." Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2445 (1995).

3. Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615, 645–49 (2009).

4. Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 625–29 (2006).

A mere listing of the laws from the 1970s is illustrative.⁵

Statute	Year
NEPA	1970
Clean Air Act	1970
Federal Water Pollution Control Act	1972
Federal Insecticide, Fungicide, and Rodenticide Act	1972
Noise Control Act	1972
Coastal Zone Management Act	1972
Endangered Species Act	1973
Safe Drinking Water Act	1974
Forest Rangeland Renewable Resources Planning Act	1974
Federal Coal Leasing Act Amendments	1976
Toxic Substances Control Act	1976
Resource Conservation and Recovery Act	1976
National Forest Management Act	1976
Federal Land Policy and Management Act	1976
Magnuson Fishery Conservation and Management Act	1976
Clean Air Act Amendments	1977
Clean Water Act Amendments	1977
Surface Mining Control and Reclamation Act	1977
Outer Continental Shelf Lands Act	1978

These were no less than revolutionary laws in their aspiration and potential reach. They promised an upending of the then-prevailing relationship of human activity to the natural environment and included tough new pollution control standards applicable to emissions of pollutants into the ambient air,⁶ discharges of pollutants into navigable waters,⁷ and disposal of hazardous wastes onto land.⁸

And the laws were not just pollution control laws. They extended to sweeping natural resource management, conservation, and preservation laws and were applicable to public lands,⁹ coastal zone,¹⁰ endangered species,¹¹ fisheries,¹² national forests,¹³ and coal lands.¹⁴ Almost all the laws were

5. *Id.* at 625.

6. Clean Air Act, 42 U.S.C. §§ 7401, 7409 (2006).

7. Clean Water Act, 33 U.S.C. §§ 1251, 1311 (2006).

8. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, 6924–6925 (2006).

9. Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1787 (2006 & Supp. II 2008).

10. Coastal Zone Management Act, 16 U.S.C. §§ 1451–1466 (2006).

11. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006).

12. Magnuson Fishery Conservation Act, 16 U.S.C. §§ 1801–1891D (2006).

13. National Forest Management Act, 16 U.S.C. §§ 1600–1614 (2006).

enacted by lopsided bipartisan majority votes in both congressional chambers.¹⁵

Nor did this pattern abate in the 1980s. Just the opposite. Consider 1980, the first year of the second decade of modern environmental law. Congress passed two laws in December 1980: the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA),¹⁶ and the Alaska National Interest Lands Conservation Act (ANILCA).¹⁷ In theory, Congress never should have enacted either of these laws. Why? Because just a few weeks before, the nation had elected a new president, Ronald Reagan, who had campaigned against just those kinds of federal laws.¹⁸ And, no less significant, the Democrats had lost their Senate majority, so the Republicans were going to take control of the Senate in a few weeks for the first time in decades. That is more than a lame duck Congress. That has all the trappings of a dead duck Congress. In this situation, nothing of significance should have passed because the political party ascending to the White House and the Senate leadership had every incentive to block its passage, which is not hard to do under our political system.

CERCLA is one of the toughest pollution control and pollution liability laws Congress has ever enacted, and ANILCA is one of the most sweeping natural resource conservation laws.¹⁹ Yet both laws passed, because leading Republicans ultimately supported their passage.²⁰ These leaders included Senator Howard Baker from Tennessee, who would become the Senate Majority Leader, and Senator Robert Stafford from Vermont, who would become Chair of the Senate Committee on the Environment and Public Works.²¹ Rather than block the laws, they joined with leading Democrats and a lame duck president to make the compromises necessary to

14. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–79 (2006).

15. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (“The average vote in favor of major federal environmental legislation during the 1970s was seventy-six to five in the Senate and 331 to thirty in the House.”).

16. 42 U.S.C. §§ 9601–9675 (2006); Pub. L. No. 96-510, 94 Stat. 2767 (1980).

17. 16 U.S.C. §§ 3101–3233 (2006); Pub. L. No. 96-487, 94 Stat. 2374 (1980).

18. Hedrick Smith, *President Concedes: Republican Gains Victories in All Areas and Vows to Act on Economy*, N.Y. TIMES, Nov. 5, 1980, at A1; Philip Shabecoff, *Major Environment Leaders Back Carter Re-election Bid*, N.Y. TIMES, Sept. 28, 1980, § 1 at 36; Editorial, *The Environment and the Stump*, N.Y. TIMES, Oct. 22, 1980, at A30.

19. Lazarus, *supra* note 4, at 626.

20. Philip Shabecoff, *Compromise on ‘Superfund,’* N.Y. TIMES, Nov. 24, 1980, at D9; Joanne Omang, *Senate Approves Fund to Clean Up Hazardous Wastes*, WASH. POST, Nov. 25, 1980, at A1; Seth S. King, *Compromise Bill to Preserve Alaskan Lands Approved*, N.Y. TIMES, Nov. 13, 1980, at A1.

21. See Shabecoff, *supra* note 20.

secure CERCLA's and ANILCA's passage.²² Senator Stafford, in particular, pushed hard for the hazardous waste law's passage.²³

During the rest of the decade, Congress enacted more laws.²⁴ These new laws were increasingly detailed and more finely tuned.²⁵ Congress, in other words, did what Congress should do: learn from experience, amend laws in light of that experience, and thereby engage in an appropriately thoughtful, reflective, and iterative lawmaking process.

In 1988, then-Vice President George Bush campaigned for president, declaring that he would be the first "Environmental President."²⁶ He famously criticized the Democratic Candidate and Governor of Massachusetts, Michael Dukakis, for failing to ensure adequate cleanup of Boston Harbor from water pollution.²⁷ And immediately after his election, President Bush sought to fulfill his campaign promise, at least for the first two years of his presidency.²⁸ He appointed William Reilly as Environmental Protection Agency (EPA) Administrator, an individual of unquestioned—indeed unparalleled—credentials for that position.²⁹ The White House, along with the EPA, also championed passage of sweeping amendments to the Clean Air Act, breaking a legislative logjam that had precluded the enactment of long-overdue amendments for thirteen years.³⁰ The Administration worked closely with environmental groups such as the Environmental Defense Fund and Democratic congressional leaders such as Senate Majority Leader George Mitchell.³¹ The result of such bipartisan collaboration was a statute that wholly revamped federal air pollution control law and that is widely trumpeted as having achieved significant gains in the nation's air quality.³²

What no one could or did know in 1990 was that the Clean Air Act was essentially Congress's last hurrah. Based on the 1990 success there was reason to assume that the trend would be increasing congressional engage-

22. *Id.*

23. *Id.*

24. Lazarus, *supra* note 4, at 626–28.

25. *Id.*

26. See John Holusha, *Bush Pledges Efforts to Clean Up Air and Water*, N.Y. TIMES, Sept. 1, 1988, at B9; see also Mark Green, *How Dukakis Can Overcome Bush's 'Slur du Jour'*, N.Y. TIMES, Sept. 17, 1988, § 1, at 27.

27. Robin Toner, *Bush, in Enemy Waters, Says Rival Hindered Cleanup of Boston Harbor*, N.Y. TIMES, Sept. 2, 1988, at A16.

28. See Philip Shabecoff, *E.P.A. Nominee Says He Will Urge Law to Cut Acid Rain*, N.Y. TIMES, Feb. 1, 1989, at A1.

29. *Id.*

30. Keith Schneider, *How Clean Air Became Part of the Bottom Line*, N.Y. TIMES, Oct. 28, 1990, § 4, at E4.

31. Keith Schneider, *Ambitious Air Pollution Bill Sent to White House*, N.Y. TIMES, Oct. 28, 1990, § 1, at 38.

32. *E.g.*, U.S. EPA, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, 7-1 to 7-10 (2011).

ment and bipartisanship. After all, the thirteen-year logjam had been successfully broken. We now see, more than two decades later, that the Clean Air Act was the last gasp of congressional bipartisanship. To be sure, there have been a few episodic lawmaking moments since, but nothing of the grand scale of the 1990 law or those that routinely became law in the two prior decades. If the first two decades can be fairly characterized as the “ascent” of Congress in environmental lawmaking, the last two-plus decades can be fairly dubbed congressional “descent.”³³

Capitol Hill may look the same on the outside. But it is completely different on the inside. It is not the Congress of the 1970s, 1980s, or of 1990. It is instead a legislative body that has essentially abdicated its lawmaking responsibilities in environmental law. And it is not as though new laws and amendments are needed less now than before. Today, new information and new challenges warrant statutory attention. The whole world around us is changing along several dimensions: economically, politically, and now with climate change, ecologically.

There is, moreover, a major cost to such abdication. In the absence of necessary amendment and addition, agencies are nonetheless compelled to address the problems of the day rather than the problems of yesterday. But when limited to the laws enacted in response to the latter, agencies are invariably forced to act at the border of their lawmaking authorities or beyond those borders, which in turn prompts protracted, unsettling, and often successful litigation. Today, for instance, EPA is struggling to address global climate change within the existing terms of the Clean Air Act. Some issues are easy, such as whether greenhouse gases are an air pollutant within the meaning of that law.³⁴ Others are, according to the agency’s own description, impossibly hard, such as applying the prevention of significant deterioration program and Title VI permitting program to all sources of greenhouse gases that fall within the Act’s literal terms.³⁵

Even worse, the only times that Congress does act these days is through appropriation bills: omnibus budget bills which can number in the thousands of pages. There is, often deliberately, no opportunity to read the bill, which can be riddled with hidden riders, let alone engage in meaningful debate and discussion. It is the worst kind of lawmaking. The riders

33. Lazarus, *supra* note 4, at 629–32.

34. *Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007).

35. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31513, 31516 (June 3, 2010) (to be codified at 40 C.F.R. §§ 51–52, 70–71) (describing EPA’s reliance in greenhouse gas rulemaking on the “administrative necessity” doctrine, which authorizes agencies to apply statutory requirements in a way that avoids impossible administrative results.”). On June 26, 2012, the D.C. Circuit dismissed an industry challenge to this regulation for lack of Article III standing. *See Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012).

themselves invariably represent short-term, impulsive interests rather than the application of long-term perspective and expertise.³⁶

The most notorious example is the Salvage Timber Rider that Congress considered and enacted in 1995.³⁷ The emergency appropriations legislation was meant to provide funds for the victims of the Oklahoma City bombing.³⁸ But after riders were inserted, to vote for appropriations for bombing victims required also voting to allow timber harvesting in old growth forest in the Pacific Northwest.³⁹ The legal effect of the rider, as law, was to override a then-existing court injunction of such forest cutting based on violations of the National Environmental Policy Act and Endangered Species Act.⁴⁰

But this is what tends to be the beginning and end of congressional lawmaking efforts these days. As a result, most efforts on Capitol Hill these days seem directed at trying to prevent Congress from doing something ill-advised, rather than passing new laws that the nation needs. A far cry from the late 1980s, when the first National Association of Environmental Law Societies met at the University of Michigan Law School.

II. THE COURTS AND THE CHANGING RELATIONSHIP OF CONSTITUTIONAL LAW TO ENVIRONMENTAL LAW

Twenty-five years ago, the nation's courts could be widely credited for the enormously positive and constructive role they had played in promoting and developing the nation's environmental laws. Their early rulings helped the nation's lawmaking efforts by embracing new, expansive theories for pollution control law. The courts looked to seemingly ancient laws like the Rivers and Harbors Act of 1899,⁴¹ which led to the enactment of the Clean Water Act,⁴² and the Organic Act of 1897,⁴³ establishing the Forest Service,⁴⁴ which almost eighty years later led to the passage of the National

36. See Lazarus, *supra* note 4, at 638–48.

37. Pub. L. No. 104–19, §§ 2001–2002, 109 Stat. 194, 240–47 (1995).

38. *Id.*

39. *Id.*

40. *Id.* at § 2001(c)(9) (“The Secretary concerned may conduct salvage timber sales under subsection (b) notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this section”); see Lazarus, *supra* note 4, at 643.

41. 33 U.S.C. § 403 (2006); 30 Stat. 1151 (1899).

42. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972); see Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TUL. L. REV. 2279, 2282–91 (1996).

43. 16 U.S.C. §§ 473–482 (2006).

44. 30 Stat. 11, 35 (1897).

Forest Management Act.⁴⁵ Indeed, courts not only prompted and then welcomed these new laws.⁴⁶ Some judges saw it as their judicial function to safeguard them.⁴⁷

No judge better illustrates that judicial perspective than Judge Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit.⁴⁸ Judge Wright came to the D.C. Circuit from the United States District Court sitting in New Orleans.⁴⁹ Ironically, he was not elevated in an effort to promote him because of his good work.⁵⁰ The original impetus would better be described as an effort to get rid of him because of his rulings.⁵¹ Or at least to get him out of New Orleans, Louisiana, and the South.⁵²

Wright's offense? Implementing the Supreme Court's ruling in *Brown v. Board of Education* by ordering the desegregation of public schools in New Orleans.⁵³ The southern Democratic senators reportedly told then-President John F. Kennedy that they wanted Judge Wright gone.⁵⁴ So President Kennedy accommodated by appointing Judge Wright to the D.C. Circuit.⁵⁵

Once on the D.C. Circuit, Judge Wright perceived the connection between civil rights law and environmental law: the need to protect the unrepresented, those with less political and economic power.⁵⁶ In the context of civil rights, this had meant the protection of racial minorities who had suffered decades of discrimination and segregation, much of which had been formally sanctioned by law.⁵⁷ Now, in environmental cases before the federal appellate court in the nation's capital, Judge Wright naturally expanded his concerns to include those people with less political and economic power who environmental protection laws sought to protect, especially future generations.⁵⁸

45. Pub. L. No. 94-588, 90 Stat. 2949 (1976); see Houck, *supra* note 42, at 2291-2301.

46. *E.g.*, Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL L.J. 201, 205-06, 208-11 (2004).

47. *E.g.*, *id.*

48. *See id.*

49. Peter Braestrup, *Wright is Named to Appeals Court*, N.Y. TIMES, Dec. 16, 1961, at 18.

50. *Id.*; see *Jurist in Racial Dispute: James Skelly Wright*, N.Y. TIMES, Nov. 16, 1960, at 23; see also Lazarus, *supra* note 46, at 204.

51. Braestrup, *supra* note 49; *Jurist in Racial Dispute*, *supra* note 50.

52. Braestrup, *supra* note 49; *Jurist in Racial Dispute*, *supra* note 50.

53. Braestrup, *supra* note 49; *Jurist in Racial Dispute*, *supra* note 50; see Bill Monroe, *In Memoriam: J Skelly Wright*, 102 HARV. L. REV. 361, 363-64, 371-72 (1988).

54. See David Halberstam, *Judge Is Opposed by Senator Long*, N.Y. TIMES, June 1, 1961, at 22.

55. See Lazarus, *supra* note 46, at 204; Monroe, *supra* note 53, at 371-72.

56. Lazarus, *supra* note 46, at 204-05.

57. Monroe, *supra* note 53, at 371-72.

58. Lazarus, *supra* note 46, at 204-05.

Judge Wright's most famous expression of the role of the courts in federal environmental law occurred in his opinion for the court in *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*⁵⁹ in 1971. In applying the newly enacted National Environmental Policy Act to the licensing proceedings of the Atomic Energy Commission, Judge Wright's opinion literally transformed the law in a manner likely far beyond what the senator who drafted it (Scoop Jackson from the State of Washington) and the president who signed it (Richard Nixon) had personally anticipated.⁶⁰ The very first paragraph of *Calvert Cliffs* made clear Judge Wright's intent:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material “progress.” But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.⁶¹

Consider no more than the very first sentence of the very first paragraph of that opinion. In describing laws like NEPA, Judge Wright refers to the “promise” of a “flood of litigation.”⁶² A flood of litigation is not, however, supposed to be “promised”; it is supposed to be “threatened.” But not for Judge Wright. As the opinion continues to make plain, Judge Wright envisioned the “judicial role” as making sure that the “important policies” expressed in these new environmental laws were realized.⁶³ He expressly understood how powerful economic and political forces would soon seek to “los[e]” or otherwise “misdirect” these policies in the “vast hallways of the federal bureaucracy,” as he had witnessed occur with civil rights laws in the South, in state governmental institutions rather than in federal agencies.⁶⁴ And, according to Judge Wright, “therein lies the judicial role”: to ensure that that would not happen.⁶⁵

59. 449 F.2d 1109 (D.C. Cir. 1971).

60. A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, in ENVIRONMENTAL LAW STORIES 77, 82–83 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

61. *Calvert Cliffs*, 449 F.2d at 1111.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

Judicial activism? Absolutely. An unapologetic and emphatic call to judicial arms might be a fairer characterization. For Judge Wright, and some others, there was almost a quasi-constitutional dimension to environmental law. While courts never endorsed the notion of a federal constitutional right to environmental protection, they clearly treated environmental protection concerns as entitled to special judicial protection, a heightened value in the judicial balance.

That judicial attitude spawned other rulings. There were decisions that expanded judicial access for environmental plaintiff citizen suits.⁶⁶ There were expansive rulings favoring stronger environmental protections, for instance, establishing, in the absence of clear statutory support, the Prevention of Significant Deterioration Program under the Clean Air Act.⁶⁷ Similarly courts upheld the remarkable harshness of the routine application of joint and several liability under the federal Superfund law.⁶⁸ Emblematic of the times, the Supreme Court in 1986 ruled 9–0 in *United States v. Riverside Bayview* in favor of the United States Army Corps of Engineers' and EPA's expansive view of the meaning of navigable waters and therefore the geographic scope of the federal Clean Water Act.⁶⁹ The Court endorsed the agencies' efforts to apply a functional approach to the meaning of the statute's language, as needed to address the problems of water pollution that Congress had identified, even though such an approach paid little more than lip service to the literal meaning of the terms "navigable waters" that Congress had chosen.⁷⁰

But after forty years on the federal bench and just a few months after the first meeting of the National Association of Environmental Law Societies, Judge Wright died.⁷¹ And, in certain respects, the notion that environmental protection rights were entitled to special judicial safeguarding passed with him. Twenty-five years ago, a new and very different judicial attitude was spawning and reaching the nation's highest court. The Supreme Court building looked the same on the outside. But it was different on the inside. And the difference was reflected in the judicial philosophy of a brand new Supreme Court Justice—Justice Antonin Scalia—who ascended to the bench just a few months after *Riverside*

66. See, e.g., *United States v. Students Challenging Agency Regulatory Administrative Procedures*, 412 U.S. 669 (1973) (upholding environmental plaintiff Article III standing notwithstanding attenuated allegations of causation).

67. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd*, No. 72-1528 (D.C. Cir. 1983), *aff'd by an equally divided Court*, *Fri v. Sierra Club*, 412 U.S. 541 (1973).

68. *U.S. v. Chem-Dyne*, 572 F.Supp. 802, 809–11 (1983).

69. 474 U.S. 121, 122 (1985).

70. *Id.* at 132–35.

71. Marjorie Hunter, *Judge J. Skelly Wright, Segregation Foe, Dies at 77*, N.Y. TIMES, Aug. 8, 1988, at D10.

Bayview was decided and just eighteen months before the first meeting of the National Association of Environmental Law Societies.⁷²

During Justice Scalia's confirmation hearings, there was no attention paid to his views on environmental law. But that was not because of the absence of a record. Justice Scalia was in many respects the anti-Skelly Wright and proud of it. In no manner was he a stealth nominee. In 1983, three years before being sworn in as a Supreme Court Justice in September 1986, then-D.C. Circuit Judge Scalia published a law review article that made clear his rejection of Judge Wright's philosophy.⁷³ In arguing for heightened jurisdictional barriers to environmental plaintiffs' lawsuits, Justice Scalia did not just criticize Wright's declaration of a new judicial role for safeguarding the natural environment. He mocked Judge Wright. Expressly citing to *Calvert Cliffs*, Justice Scalia decried "the judiciary's long love affair with environmental litigation."⁷⁴ He further acknowledged the question whether his views would mean, quoting Judge Wright, that "important legislative purposes, heralded in the halls of Congress [can be] lost or misdirected in the vast hallways of the federal bureaucracy?"⁷⁵ And he did not beat around the bush, emphatically and unapologetically responding: "Of course it does—and a good thing too."⁷⁶ The Senate confirmed Justice Scalia by a vote of 98–0.⁷⁷ And there was not a single mention of environmental law in the entire proceedings.⁷⁸ The Committee report on the Scalia nomination was only seventy-six words long.⁷⁹

Once on the Court, Justice Scalia reversed the relationship between constitutional law and the environment. In environmental law's early years, the question for many had been whether there already was or should be a constitutional right to environmental protection. Justice Scalia more broadly brought to the Supreme Court a new skepticism of the wisdom of the tough environmental laws of the 1970s and 1980s, and he channeled that skepticism by advancing a variety of legal arguments that cast doubt on the constitutionality of environmental protection laws and their enforcement by private citizens. In *Nollan v. California Coastal Commission*⁸⁰ and *Lucas v.*

72. Stuart Taylor, Jr., *Rehnquist and Scalia Take Their Places on Court*, N.Y. TIMES, Sept. 27, 1986, § 1, at 8.

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

74. *Id.* at 884–85.

75. *Id.* at 897.

76. *Id.*

77. 132 CONG. REC. 23,813 (1986).

78. *See id.* at 23,803–13; *see also* *Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States*, S. Comm. on the Judiciary, 99th Cong. (1986).

79. Linda Greenhouse, *Reporter's Notebook: Senators vs. Rehnquist*, N.Y. TIMES, Sept. 18, 1986, at A24.

80. 483 U.S. 825 (1987).

South Carolina Coastal Council,⁸¹ the issue was whether environmental protection laws amounted to unconstitutional takings of private property in the absence of just compensation. In *Lujan v. National Wildlife Federation*⁸² and *Lujan v. Defenders of Wildlife*,⁸³ the claim was that environmental plaintiff citizen suits lacked Article III jurisdiction. And in *Rapanos v. United States*, Justice Scalia championed a narrow view of Clean Water Act jurisdiction, partly in response to his narrow view of Congress's Commerce Clause authority.⁸⁴ The latter ruling, in particular, was a far cry from the Court's unanimous ruling in the *Riverside Bayview* case, which embraced a potentially sweeping view of that Act's geographic scope and which was decided just a few months before Justice Scalia joined the Court.⁸⁵

III. ENVIRONMENTAL LAW'S CHALLENGES: TODAY'S CONTRASTED WITH TWENTY-FIVE YEARS AGO

This is a tough time for environmental law and environmental protection. We recently witnessed the nation's worst oil spill with the BP Deepwater Horizon Gulf oil spill in the spring and summer of 2010.⁸⁶ And we are facing a potential environmental catastrophe: global climate change. Yet, as of the writing of this essay, more than two years after the Gulf oil spill and five years after the Intergovernmental Panel on Climate Change announced that the evidence was "unequivocal" that global warming was happening and that it was "very likely" that most of the warming was caused by increases in anthropogenic greenhouse gas concentrations in the atmosphere,⁸⁷ Congress has not enacted any significant legislation aimed at preventing future oil spills or addressing the causes or consequences of global climate change.

To be sure, during the 1980s, environmental lawmaking was getting harder, but one axiom still could not be denied: there is nothing like an environmental catastrophe to break a lawmaking logjam. The history of modern environmental law is replete with examples. The dire warnings of Rachel Carson's *Silent Spring* in the 1960s helped prompt the regulation of pesticides and emergence of the first wave of federal environmental statutes

81. 505 U.S. 1003 (1992).

82. 497 U.S. 871 (1990).

83. 504 U.S. 555 (1992).

84. 547 U.S. 715 (2006).

85. 474 U.S. 121, 132–35 (1985).

86. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 173–78 (2011).

87. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30, 37 (2007).

in the early 1970s.⁸⁸ The Cuyahoga River seemingly on fire and the Santa Barbara oil spill, both in 1969, became rallying cries for the passage of the Federal Water Pollution Control Act in 1972.⁸⁹ The threatened catastrophe of a nuclear power plant meltdown in 1978 helped trigger reform of the federal scheme for the regulation of nuclear power.⁹⁰ In the late 1970s and 1980, widely publicized hazardous waste sites, such as Love Canal and Valley of the Drums, helped move Congress to enact CERCLA in 1980.⁹¹ And in 1989, *Exxon Valdez* gave us the Oil Spill Pollution Act of 1990.⁹² This was legislation that, after being proposed, debated, and considered during the late 1970s and 1980, laid dormant in Congress for ten years, without the political momentum and sponsorship required for passage.⁹³ Within months of the Alaska oil spill, however, Congress was able to pass long overdue legislation.⁹⁴

But by 2010, not even a catastrophe could prompt needed lawmaking. There was nothing subtle about that Gulf oil spill: the blowout of the Macondo well in the deep waters of the Gulf of Mexico, the sinking of the *Deepwater Horizon* oil rig, the tragic loss of eleven workers on the rig, the spilling of hundreds of millions of gallons of oil into one of the nation's, indeed, the world's, most vibrant ecosystems—the Gulf of Mexico—where the Gulf coastlines were poised like a sponge to soak up oil to the potential long term destruction of vital environmental and economic resources.⁹⁵

What legislation has Congress enacted in two-plus years since the Gulf oil spill? In 1989, it took a year for Congress to pass comprehensive oil spill legislation.⁹⁶ More than two years later, the nation is still waiting. Congress

88. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 58–60 (2004).

89. *Id.* at 59; see *Water Pollution Control Legislation: Part 1; Hearings on S. 75, S. 192, S. 280, S. 281, S. 523, S. 573, S. 601, S. 679, S. 927, S. 1011, S. 1012, S. 1013, S. 1014, S. 1015 and S. 1017 Before the Subcomm. on Air and Water Pollution of the S. Comm. on Pub. Works*, 92nd Cong. 374 (1971) (statement of Rep. Charles A. Vanik); see also 118 CONG. REC. 10,218 (1972).

90. See, e.g., *Nuclear Regulatory Comm.—The Rogovin Rep.: Hearing Before Subcomm. on Env't, Energy, and Natural Res. of the H. Comm. on Gov't Operations*, 96th Cong. (1980).

91. Lazarus, *supra* note 88, at 108; see Pub. L. No. 96-510, 94 Stat. 2767 (1980); see also 126 CONG. REC. 26337, 26340, 26347 (1980); see also *Hazardous and Toxic Waste Disposal: Administration Testimony on S. 1480 to the Subcomm. on Env't. Pollution and Resource Prot. of the S. Comm. on Env't and Pub. Works*, 96th Cong. (1979).

92. See S. REP. NO. 101-99 (1989).

93. See *Tanker Safety in Alaska: Part 3; Hearings on S. 182, S. 568, S. 682, S. 715, and S. 898 Before the S. Comm. On Commerce, Sci., and Transp.*, 95th Cong. (1977); see also *Comprehensive Oil Pollution Liab. and Comp. Act: Hearing on H.R. 85 Before the Subcomm. on Water Res. of the H. Comm. on Pub. Works and Transp.*, 96th Cong. (1979); see also Leo H. Carney, *For Environmentalists, The Battle Goes On*, N.Y. TIMES, Jan. 4, 1981, § 11, at NJ22.

94. 136 CONG. REC. 21, 726, 22,299 (1990); Philip Shabecoff, *Largest U.S. Tanker Spill Spews 270,000 Barrels of Oil Off Alaska*, N.Y. TIMES, Mar. 25, 1989, § 1, at 1.

95. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *supra* note 86, at 173–78.

96. Schneider, *supra* note 30, § 4, at 4.

has done nothing to provide government with the resources needed for more careful planning of deepwater drilling to provide for more effective government oversight and risk management of these important drilling operations, or to provide the Department of the Interior, Coast Guard, EPA, or the National Oceanic and Atmospheric Administration with the resources they need to respond to such spills when they occur.

This is all low-hanging fruit, in everyone's interest—the oil companies, the Gulf States, business interests in those states, and individual citizens. Winners without losers. But instead of needed legislation, we see continued legislative stalemate.⁹⁷ And included in the laws proposed for enactment are, ironically, laws that would eliminate existing safeguards and increase rather than reduce risks of major spills by expediting the drilling process in the absence of needed oversight.⁹⁸ The only legislation that Congress has enacted is designed largely to spread the spoils of the spill—in the form of the billions of dollars in potential civil penalties BP might have to pay for causing the spill—between the States and federal agencies clamoring for their respective fare shares.⁹⁹ No doubt some good can come from such monies, but none is likely to address the fundamental causes of the spill, which is why, on the second anniversary of the oil spill, the President's Oil Spill Commission (reconstituted as "Oil Spill Commission Act"), assigned Congress the grade of "D" based on its total abdication of legislative responsibility to respond with effective legislation to prevent future oil spills.¹⁰⁰

And if Congress cannot address something as relatively simple as deepwater drilling in the immediate aftermath of the clear lessons taught by the 2010 Gulf oil spill, how much hope can one garner that Congress will be capable of addressing what is likely the most important environmental issue of the 21st century: global climate change. As I (and others) have previously described, global climate change is a lawmaking nightmare—a "super wicked" problem.¹⁰¹ The root of the problem is how cause and effect in climate

97. Editorial, *The Big Spill, Two Years Later*, N.Y. TIMES, Apr. 18, 2012, at A26.

98. See JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41684, Summary of OIL SPILL LEGISLATION IN THE 112TH CONGRESS (2011).

99. Congress passed the Conference Report on H.R. 4348, June 29, 2012, and President Obama signed the bill into law on July 6, 2012. See Pub. L. No. 112-141, §§ 1601–1608. The new law creates a Gulf Coast Restoration Fund, financed by eighty percent of the civil penalties, fines and other settlements from the 2010 Gulf oil spill. *Id.*

100. OIL SPILL COMMISSION ACTION, ASSESSING PROGRESS: IMPLEMENTING THE RECOMMENDATIONS OF THE NATIONAL OIL SPILL COMMISSION 2 (2012) (assigning Congress a grade of "D" in efforts "to make offshore drilling safer and to improve the nation's ability to respond to oil spills that may occur. Unfortunately, so far, Congress has provided neither leadership nor support for these efforts.").

101. Richard J. Lazarus, *Super Wicked Problems and Climate Change—Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1160 (2009).

change are spread over time and space and the absence of any corresponding, dependable lawmaking authorities over either dimension.¹⁰² Global climate change eludes the short-term time horizons of elected officials. It eludes the short spatial horizons of governments. And it feeds into the short-term thinking of many Americans.¹⁰³

Nonetheless, as recently as 2009, national, comprehensive global climate change legislation seemed a virtual political certainty.¹⁰⁴ The nation seemed poised for a truly historic lawmaking moment.¹⁰⁵ All the necessary pieces seemed to be simultaneously in place. A newly-elected president who had campaigned on the issue and, within a week of his inauguration, spoke about the compelling need for such legislation.¹⁰⁶ The President had accordingly placed in key leadership positions throughout the executive branch a series of appointees uniformly dedicated to the legislation's passage as an administration top priority: EPA Administrator Lisa Jackson,¹⁰⁷ Secretary of Energy Steven Chu,¹⁰⁸ NOAA Administrator Jane Lubchenco,¹⁰⁹ White House Science Advisor John Holdren,¹¹⁰ Council on Environmental Quality Chair Nancy Sutley,¹¹¹ and, of course, White House Director of the Office of Energy and Climate Change Carol Browner.¹¹² No less important, Capitol Hill was also ready. The leadership in all the critical spots was on board. In the Senate, that included the Senate Majority leader, Harry Reid,¹¹³ Chair of the Senate Committee on Environment and Public Works Barbara Boxer,¹¹⁴ and Chair of the Senate Committee on Energy and Natural Resources Jeff Bingaman.¹¹⁵ In the House, it included Speaker Nancy Pelosi¹¹⁶ and House Committee on Energy and Commerce Committee Chair Henry

102. *Id.* at 1166–87.

103. *Id.*

104. *Id.* at 1155–56.

105. *Id.*

106. Barack Hussein Obama, Inaugural Address (Jan. 20, 2009), available at <http://www.whitehouse.gov/the-press-office/president-barack-obamas-inaugural-address>.

107. John M. Broder, *Cabinet Choices Answer Questions from Senators*, N.Y. TIMES, Jan. 15, 2009, at A22.

108. David M. Herszenhorn and Helene Cooper, *2 Confirmed for Economy and for National Security*, N.Y. TIMES, Jan. 21, 2009, at P14.

109. Cornelia Dean, *NOAA Chief Believes in Science as Social Contract*, N.Y. TIMES, Mar. 24, 2009, at D2.

110. Edward Wong & Andrew C. Revkin, *Experts in U.S. and China See a Chance for Cooperation Against Climate Change*, N.Y. TIMES, Feb. 5, 2009, at A14.

111. Broder, *supra* note 107, at A22.

112. John M. Broder, *E.P.A. Pick Vows to Put Science First*, NYTIMES.COM (Jan. 14, 2009), http://www.nytimes.com/2009/01/15/us/politics/15webjackson.html?_r=1.

113. 'Obama's People': *A Who's Who*, N.Y. TIMES, Jan. 18, 2009, at MM53.

114. S. 18, 111th Cong. (2009).

115. *Id.*

116. H.R. 2, 111th Cong. (2009).

Waxman.¹¹⁷ Congressman Waxman's position, in particular, underscored the seriousness of the momentum pushing for climate legislation.¹¹⁸ Based on a strict seniority basis, John Dingell from Michigan should have served as Chair, and Dingell has long been one of the House's most powerful members and certainly not a person to challenge lightly.¹¹⁹ Waxman nevertheless challenged Dingell for the Chair position and won precisely because of the concern of many Democrats that Dingell, because of his longstanding ties to the auto industry, would not be sufficiently supportive of climate change legislation.¹²⁰

Nor was support for climate change legislation limited to Democrats in the White House or in Congress, or environmentalists.¹²¹ There was bipartisan support.¹²² Leaders of the Republican Party had endorsed the need for national legislation, including the party's nominee for president in the 2008 election¹²³ and two who became prominent candidates for their party's nomination for 2012: Mitt Romney and Newt Gingrich.¹²⁴ Industry leaders had likewise come out in favor of comprehensive climate change legislation.¹²⁵

But what can either the White House or Congress show in terms of legislative accomplishments? Nothing. Or worse than nothing. National climate change legislation has become politically toxic. No one will touch global climate change. Industry leaders have walked away from their earlier endorsement. Republican leaders who once touted their support now repudiate their prior positions.¹²⁶

Even President Obama, who campaigned on the issue in 2008, and made clear the issue's compelling urgency in 2009 and 2010, shied away from the issue during the next two years of his presidency. Contrast presidential rhetoric at the outset of his presidency to 2011. Here is what the President said one week after taking office in 2009: "These urgent dangers to our national and economic security are compounded by the long-term threat of climate change, which if left unchecked could result in violent

117. H.R. 8, 111th Cong. (2009).

118. Lyndsey Layton, *Californians Shape Up as Force on Environmental Policy*, WASH. POST, Dec. 29, 2008, at A3.

119. *Id.*

120. *Id.*

121. Andrew Revkin, *Climate*, N.Y. TIMES, Oct. 26, 2008, § Week in Review, at 6 (describing Senator McCain's sponsorship of climate change legislation in 2003).

122. *Id.*

123. *Id.*

124. Ezra Klein, *Obama, Romney and Gingrich Share A Lot—Except in Courage*, WASH. POST, Nov. 29, 2011, at A8; Dan Eggen, *'08 Shift on Energy Was Boon to Gingrich Group*, WASH. POST, Dec. 29 2011, at A4.

125. Steve Mufson, *Push to Reduce Greenhouse Gases Would Put a Price on Emitting Pollution*, WASH. POST, Mar. 13, 2009, at D1 (describing support of industry leaders in U.S. Climate Action Partnership for significant national climate change legislation).

126. *E.g.*, Klein, *supra* note 124, at A8; Eggen, *supra* note 124, at A4.

conflict, terrible storms, shrinking coastlines, and irreversible catastrophe. These are the facts, and they are well known to the American people.”¹²⁷

But later, even a president who sincerely believes in the urgency of the danger and the irreversibility of the threatened catastrophe, literally stopped even saying the words climate change or global warming. President Obama said the words “global climate change” or “global warming” in sixty-three speeches and remarks in 2009. He said those words seventy-three times in 2010. How many times did he dare to utter those words in 2011? Once.¹²⁸ The President’s sole reference to climate change came on January 19, 2011, in a joint news conference with the President of China.¹²⁹ And, that was in response to the President of China’s reference to climate change as a possible area for U.S.-China cooperation.¹³⁰ After January 19th, President Obama did not mention climate change once more in all of 2011. Global climate change as Lord Voldemort: a threat that even the President dared not name, at least until after re-election.

There is, however, even broader significance to the fact that it was a comment of China’s President that prompted the President of the United States to utter the words that otherwise were remarkably soon to be struck from his public vocabulary: the emergence of international and global environmental law during the past twenty-five years. The developments abroad during that time period may in broad strokes be fairly analogized to domestic legal developments here within our own borders during the 1970s and 1980s.¹³¹ There has been an explosion of environmental laws worldwide. And just as the United States seems to be retreating from a leadership role in addressing climate change, either with new laws or new technology, China may well be on the cusp of promoting significant new technology and new laws addressing global climate change, including cap and trade.¹³²

To be an environmental lawyer today, one must look far beyond just our own borders. One is not going to solve global climate change with an exclusive focus on U.S. law, especially with the existing lawmaking logjam here. And one is not going to protect the Gulf of Mexico from the risks of deep-

127. Remarks of the President of the United States on Energy, Public Papers of the President (Jan. 26, 2009).

128. These statistics for 2009, 2010, and 2011 are based on a WESTLAW Search of the “Presidential Documents” file during those three years, searching for the words “global warming” or “climate change.” This file includes all the remarks and speeches delivered by the President.

129. Press Conference with President Obama and President Hu of the People’s Republic of China, Public Papers of the President (Jan. 19, 2011).

130. *Id.*

131. See, e.g., Yang & Percival, *supra* note 3, at 617–19, 628–30, 637.

132. See Information Office of the State Council, *China’s Policies and Actions for Addressing Climate Change*, PEOPLE’S REPUBLIC OF CHINA, Nov. 2011, http://www.gov.cn/english/official/2011-11/22/content_2000272.htm (last visited June 26, 2012).

water drilling or the Arctic from the risks of expanded drilling in that harsh, inaccessible environment, by just focusing on the risks generated by activities within our territorial jurisdiction. Climate change, by its nature, clearly can be effectively addressed only with an unprecedented degree of international coordination and cooperation. And effective oversight of offshore oil drilling activities by Cuba and Mexico in the Gulf and Russia in the Arctic are no less needed than such oversight by U.S. governmental authorities.

CONCLUSION

Twenty-five years ago, each of the speakers who joined me on the panel at the University of Michigan Law School's National Association of Environmental Law Societies Conference in March 2012 was quite differently situated. I was an Assistant to the U.S. Solicitor General, working on environmental cases before the Supreme Court that Justice Scalia had just joined. Lois Schiffer, now General Counsel of the National Oceanic and Atmospheric Administration, was back then General Counsel of National Public Radio, and about to become, only a few years later, the longest serving Assistant Attorney General in the history of the U.S. Department of Justice's Environment and Natural Resources Division. Professor Bob Percival, after clerking for Justice Byron White and then working for six years for the Environmental Defense Fund, had recently begun his academic career at the University of Maryland, where he has since built one of the nation's premier programs in environmental law. And Professor Holly Doremus, after obtaining a Ph.D. in Botany from Cornell University, was a first-year law student on her way to becoming one of the nation's leading environmental law scholars.

For each of us, our immersion in environmental law during the past twenty-five years has been enormously rewarding, exciting, and challenging. What an extraordinary privilege to practice, engage, and teach about one of this nation's truly great and constructive legal revolutions. The challenges that the next generation of environmental lawyers will face are no less significant or potentially rewarding. Much has been accomplished. But there is far more yet to be done. The stakes are unsettlingly high. Not just in the United States, but in the world.