

THE GREENING OF AMERICA AND THE GRAYING OF UNITED STATES ENVIRONMENTAL LAW: REFLECTIONS ON ENVIRONMENTAL LAW'S FIRST THREE DECADES IN THE UNITED STATES

*Richard J. Lazarus**

I.	INTRODUCTION.....	76
II.	ORIGINS OF MODERN U.S. ENVIRONMENTAL PROTECTION LAW—THE FIRST DECADE.....	76
	A. <i>The First Generation of U.S. Environmental Protection Law</i>	77
	B. <i>Roots of the First Generation Laws</i>	79
	C. <i>Challenge and Response: The Emergence of a Second Generation of Environmental Laws</i>	82
	D. <i>Concluding Thoughts</i>	84
III.	THE TRANSFORMATION OF AMERICAN LAW IN RESPONSE TO ENVIRONMENTALISM: THE SECOND DECADE	85
	A. <i>Regulatory Reform, Deregulation, and the Legislative Backlash</i>	85
	B. <i>The "Greening" of U.S. Law</i>	87
	C. <i>The Expanding Practice of Environmental Law</i>	88
	D. <i>Concluding Thoughts</i>	89
IV.	A SURPRISE ATTACK, PERSISTENT CONTROVERSIES, AND THE EMERGENCE OF INTERNATIONAL ENVIRONMENTAL LAW IN THE DOMESTIC ARENA: THE THIRD DECADE.....	90
	A. <i>Trading Places in a Third Rebuff of a Frontal Assault on Environmental Law</i>	92
	B. <i>The Changing Nature of the Federal Judiciary</i>	95
	C. <i>Persistent and Emerging Controversies During the "Graying" of Environmental Law</i>	97
	1. <i>Structural Issues</i>	97
	2. <i>Regulatory Means Issues</i>	98
	3. <i>Distributional Fairness Issues</i>	99
	D. <i>The Internationalization of U.S. Domestic Environmental Law and Its Practice</i>	102
V.	CONCLUSION.....	105

* Professor of Law, Georgetown University Law Center, Washington, D.C., 1999-2000 8
2000 Richard J. Lazarus. This article is derived from a talk delivered at the 4th International
Conference on Environmental Law, held in Sao Paulo, Brazil, June 4-7, 2000, which is itself
based on a forthcoming book by the author on "The Making of Environmental Law." Michael
Doherty, Georgetown University Law Center Class of 2001, provided valuable research and
editorial assistance in the preparation of this article.

I. INTRODUCTION

Environmental law in the United States is relatively new, yet it is no longer a newcomer. The modern era of environmental law in the United States commenced over 30 years ago in response to rising public consciousness during the 1950s and 1960s of the perils of pollution and of the waste of natural resources. During the final three decades of the twentieth century, federal and state governments enacted a series of increasingly ambitious, complex, and often dense laws aimed at reducing pollution and promoting resource conservation.

The purpose of this article is to begin to place the developments of the past few decades in historical perspective. To that end, the article is divided into three parts, roughly corresponding to the final three decades of the past century. The first part of the article describes the origins of U.S. environmental law, focusing primarily on its first decade from 1970 through 1980. The second part examines how U.S. environmental laws have since evolved, focusing primarily on their second decade (the 1980s), which was a period of tremendous expansion for environmental law. Finally, the third part considers future trends in environmental law in the United States, i.e., where environmental law is going, focusing on developments during the 1990s while relating them to several controversies that developed in the 1970s, persisted in the 1980s, and have since exploded to the surface in the 1990s.

II. ORIGINS OF MODERN U.S. ENVIRONMENTAL PROTECTION LAW— THE FIRST DECADE

Those of us who have spent our professional lives as practicing lawyers, teachers, and scholars steeped in environmental law often lose sight of the discipline's relative youth. Yet, prior to 1970, environmental protection law in the United States was essentially nonexistent. Of course, there were a few, isolated states pursuing fledgling efforts, and there were common law property and tort doctrines that some of the more activist judges were willing to invoke on behalf of environmental concerns in private and public lawsuits. But there was nothing even remotely resembling a comprehensive legal regime for regulating pollution of the air, water, or land.

There was no national clean air legislation, no federal clean water act program, no hazardous waste or toxic substance laws. There was not even a federal environmental protection agency prior to the 1970s (and virtually no state agency analogues). The federal pollution control authorities that did exist were greatly fragmented amongst several agencies, and they possessed relatively weak statutory powers, much of which consisted of little more than providing financial and technical assistance to state and local governments.

Ten years later, a relative blink of an eye for the lawmaking process in most moments of history, the legal landscape transformed completely. There were hundreds of pages of federal environmental protection statutes, and thousands of pages of federal regulations and less formal agency regulatory guidance documents. There was also a federal environmental agency, the United States Environmental Protection Agency ("EPA"), which was primarily responsible for the implementation of the host of newly enacted environmental protection laws. Although the EPA was shy of the full-fledged cabinet-level status many environmentalists had sought, the agency possessed a powerful array of statutory authorities. These authorities provided for the EPA's promulgation of pollution control standards and, through a variety of financial incentives and sanctions, for its oversight of state governmental efforts to achieve compliance with such standards within their respective jurisdictions.

A. The First Generation of U.S. Environmental Protection Law

What did the first generation of laws look like? There was, at the very outset, the National Environmental Policy Act ("NEPA"), literally signed into law on the first day of the decade, January 1, 1970.¹ NEPA requires federal agency assessment of the environmental impacts of proposed federal agency action and possible alternatives. Although NEPA's essentially procedural requirement had a massive impact on governmental decision-making, the federal legislative enactments during the early 1970s that imposed substantive requirements were even more significant.

Three of these substantive laws were the Clean Air Act of 1970,² the Federal Water Pollution Control Act Amendments of 1972 (now, as further amended, referred to as the Clean Water Act),³ and the

¹ 42 U.S.C. § 4331.

² Pub. L. No. 91-604, 84 Stat. 1676 (1970).

³ Pub. L. No. 92-500, 86 Stat. 816 (1972).

Endangered Species Act Amendments of 1973.⁴ These laws were dramatic, sweeping, and apparently uncompromising. Each of these laws imposed a series of specific statutory commands on polluting activities. They did not rely primarily on voluntary behavioral changes in response to mere exhortation. Nor did they turn, in the first instance, principally to financial incentives or otherwise seek to enlist market incentives to achieve their environmental protection objectives. They instead sought to identify classes and categories of polluting or environmentally destructive activities that threatened human health and the environment, and then to impose stringent standards on their performance.

The restrictions were generally not based on economic feasibility but rather on far more demanding norms. Some were based on technological standards designed not simply to replicate existing pollution control technology but rather, in effect, to force industry to develop new technology capable of substantially more reductions in existing levels of pollution. Other standards directly required that certain environmental or human health risks be eliminated regardless of either economic or technological feasibility, even if (in theory) compliance with such a standard could occur only upon shutdown of the polluting activity.

These first generation laws were also remarkably aspirational in scope and in their mandates. The standards, and corresponding deadlines for their accomplishment, were exceedingly ambitious, if not unrealistic. Indeed, as discussed below, although such ambitious laws necessarily made a strong symbolic societal statement regarding the importance of environmental protection and the need for fundamental change in humankind's relation to the natural environment, they also unwittingly triggered a pathological cycle of crisis, controversy, and public distrust, which has since hampered needed reform.⁵

The Clean Air Act, for instance, required the Administrator of the EPA to promulgate and, in short order (by 1975) achieve nationally uniform ambient air quality standards that would protect public health, with an adequate margin of safety and public welfare. The Clean Water Act, enacted as the Federal Water Pollution Control Act Amendments in 1972, was equally demanding. The 1972 enactment sought fishable and swimmable waters everywhere by 1983 and zero discharge of pollutants by 1985, and it made unlawful any discharge of

⁴ Pub. L. No. 93-205, 87 Stat. 884 (1973).

⁵ See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Fed. Envtl. Law*, 54 LAW & CONTEMP. PROBS. 311, 323 (1991) [hereinafter Lazarus, *The Tragedy of Distrust*].

pollutants into navigable waters absent a permit issued by the EPA. The Endangered Species Act of 1973 was not nearly as sweeping in its scope as the others, but set requirements that unsettled existing standards of conduct. The ESA mandated that federal agencies ensure that their actions were not likely to jeopardize the continued existence of endangered or threatened species, or result in the destruction or adverse modification of their habitat. The mandate was absolute.⁶

B. Roots of the First Generation Laws

The natural question that arises is what prompted this dramatic legal transformation. Part of the explanation finds its roots in the way that a series of news media events captured the attention of the American public in the late 1960s, culminating in the first celebration of "Earth Day" in the spring of 1970. Certainly to be included in those triggering events would be the publication of Rachel Carson's book, *Silent Spring*, in 1962,⁷ which raised public concerns about the adverse health effects of pesticides. Two other important public viewpoint-forming events both occurred in 1969: the Santa Barbara oil spill off the California coast and the "burning" of the Cuyahoga River in Ohio, each of which was the subject of considerable television news coverage.⁸

The time was also ripe in the United States for consensus. The civil rights movement and the antiwar movement had polarized the nation in the 1960s. Many citizens were ready for an issue about which there could be a national consensus rather than further polarization. To a large extent, the environmental movement satisfied that need.

Indeed, for that reason, many elected officials saw the environmental movement as a basis for political self-promotion. Environmental issues were largely ignored during the 1969 Presidential election, but by 1969 and 1970, both Democrats in Congress and Republicans in the White House sought to demonstrate their environmental credentials to enhance their competing aspirations for national office. The lofty goals and stringent requirements of the Clean Air Act, for instance, resulted in part from a competition between President Richard Nixon and Senator Edward Muskie, with each seeking to "out-environmental" the other in their respective willingness to propose ever tougher

⁶ See Pub. L. No. 93-205, 87 Stat. 892-893 (1973); *TVA v. Hill*, 427 U.S. 153 (1978).

⁷ RACHEL CARSON, *SILENT SPRING* (1962).

⁸ RICHARD N. L. ANDREWS, *MANAGING THE ENV'T, MANAGING OURSELVES: A HISTORY OF AM. ENVTL. POLICY* 387 (1999).

restrictions on air pollution.⁹

The emergence of strong national environmental public interest organizations during this period also fueled the explosion in environmental lawmaking activities. New organizations, such as the Environmental Defense Fund and Natural Resources Defense Council, joined longstanding, but recently invigorated entities, such as the Sierra Club, National Audubon Society, and National Wildlife Federation, to push for tougher environmental laws. These organizations prodded through lobbying, lawsuits, legislative, executive, and judicial decision makers to be more responsive to environmental concerns.¹⁰

Legislative action was critical because, after all, only the U.S. Congress is empowered to pass laws such as the Clean Air Act, Clean Water Act, and Endangered Species Act. But the courts likewise served a crucial historical function. They acted both independent of, and in some respects, in collaboration with, Congress.

Many judges viewed environmental lawsuits as akin to the civil rights suits of the prior decade: proper occasions for heightened judicial attention on behalf of societal concerns likely to be given short shrift in the democratic process. Those judges, accordingly, sought to relax standing barriers that might otherwise restrict judicial access for those environmental citizen suits. They sought to apply more exacting standards of judicial review to ensure that environmental concerns were not ignored by executive and legislative branch policymakers. In addition, they frequently read more into the meaning of the statutes than many lawmakers likely had specifically contemplated when voting in favor of their passage.¹¹

The courts thus resurrected the Rivers and Harbors Act of 1899 into a modern tool for pollution control.¹² They created out of a single sentence of NEPA a judicially enforceable strict procedural requirement that has transformed governmental decision making affecting the natural environment.¹³ They seized upon incidental statutory preamble language to justify a comprehensive program for

⁹ See Elliott et al., *Toward A Theory of Statutory Evolution: The Federalization of Envtl. Law*, 1 J. L. ECON. & ORG. 313 (1985).

¹⁰ See generally PHILLIP SHABECOFF, *A FIERCE GREEN FIRE* (1985).

¹¹ See generally Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249 (1991) [hereinafter Glicksman & Schroeder, *EPA and the Courts*].

¹² See *U.S. v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

¹³ See *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

the prevention of significant deterioration of air quality.¹⁴ The courts likewise invoked long overlooked statutory terms in the Forest Service Organic Act of 1897 to conclude that most clearcutting of national forests was unlawful, thereby prompting Congress to enact comprehensive and far more environmentally favorable national forest management legislation.¹⁵

These judicial rulings also had the practical effect of providing the environmental community with enormous political leverage before Congress. Environmentalists, and politicians vying to enhance their environmental credentials, were not the only parties seeking comprehensive federal environmental legislation. Industry, too, sought such legislation; indeed, the regulated community did so quite urgently.

Many judicial rulings and state legislative actions favorable to the environment had left industry unsettled about what was, and what was going to be, required of them. Indeed, in certain areas, industry faced legal prohibitions of conduct in which they had long engaged. The regulated community, accordingly, needed to restore some order through federal legislative action. Environmentalists effectively exploited industry's need by insisting upon exceedingly demanding statutory requirements. The strict requirements of the Clean Air Act, Clean Water Act, and the National Forest Management Act can all be traced to such prior judicial rulings and state legislative initiatives.¹⁶

Finally, the far reaching nature of the laws is also likely a reflection of American culture. The 1960s were divisive times, but they also offered the nation a shared moment of self-congratulation. President John Kennedy had boldly announced at the outset of the decade that the United States would land a man on the moon by the decade's end, and, in 1969, the nation did so. To many, cleaning up the environment presented a similar challenge—a challenge made all the more

¹⁴ See *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd by an equally divided Court*, 412 U.S. 541 (1973).

¹⁵ *W. Va. Div. of the Izaak Walton League v. Butz*, 522 F.2d 945 (4th Cir. 1975).

¹⁶ The automobile industry sought federal air pollution control legislation to fend off the specter of varying state law motor vehicle manufacturing requirements. See ROBERT V. PERCIVAL ET AL., *ENVTL. REGULATION: LAW, SCIENCE, AND POLICY* 772 (2d ed. 1996). Industry similarly required federal water pollution control legislation in the aftermath of the judiciary's expansive readings of both the Rivers and Harbors Act and the National Environmental Policy Act. See ROBERT V. PERCIVAL ET AL., *ENVTL. REGULATION: LAW, SCIENCE, AND POLICY* 634 (3d ed. 2000). The forestry industry had no choice but to seek federal statutory relief following the Fourth Circuit's ruling in *West Virginia Division of the Izaak Walton League v. Butz*, 522 F.2d 945 (4th Cir. 1975), sharply curtailing the practice of clearcutting in national forests.

compelling by those first solitary pictures of Earth taken from outer space. The nation, it seemed, needed only to pursue its environmental protection goals with the same uncompromising determination and technological ingenuity that had characterized the space program. If it did, the United States could also achieve goals—zero discharge into waters of the United States and compliance with ambient air quality standards within five years—that might at the outset seem wholly out of reach.¹⁷

C. Challenge and Response: The Emergence of a Second Generation of Environmental Laws

It is, of course, far easier to set an ambitious goal than it is to meet one, and, almost as soon as these first generation laws were passed, it seemed as if they might well have a short half-life. Industry resisted their implementation, as did many state governments who concluded that the federal legislation improperly usurped state sovereignty.

The greatest challenge the laws faced, however, was the energy crisis of the mid-1970s. Industry promoted the notion, readily embraced by many politicians, that the energy needs of the nation were both more pressing than and inconsistent with environmental protection concerns. The country's need, for instance, to rely on abundant domestic supplies of coal, rather than petroleum imports, might require relaxing air pollution control requirements inconsistent with increased coal combustion. Likewise, the need to explore, extract, and transport domestic energy reserves of coal, petroleum, and natural gas would likely require relaxation of environmental restrictions that impeded or otherwise made such activities more costly.

The "energy/environment" confrontation, however, ultimately fell far short of dismantling the first generation laws of the early 1970s. At the instigation of environmental citizen suits, courts insisted on strict implementation of those laws, resulting in a series of negotiated settlements between government and environmental interests, as well as judicial orders outlining schedules for agency compliance with statutory requirements. Although Congress amended the laws in

¹⁷ In a wonderfully creative and thoughtful contribution to this same symposium issue, Don Elliott relates the evolutionary emergence of environmental protection law to the manner in which any "parasite" must in response to changing circumstances modify its relationship to its "host" in order to ensure its survival. Viewed from this perspective, environmental law reflects humankind's realization that it must undertake efforts to protect and preserve its planet's ecosystem rather than maximize the exploitation of its wealth of natural resources. See E. Donald Elliott, *The Tragi-Comedy of the Commons: Evolutionary Biology, Econ. and Env'tl. Law*, 20 VA. ENVTL. L.J. 17 (2001).

certain respects, it did so without abandoning the law's basic structure and rigor. Congress extended some deadlines, fine-tuned some requirements to add incremental flexibility, and mostly relaxed standards only in terms of their application to the daily behavior of individual citizens (e.g., driving) rather than the conduct of industry.¹⁸

Indeed, rather than abandon the first generation of environmental protection laws, Congress expanded upon them in the second half of the first decade. Congress enacted a new series of laws at least as ambitious and sweeping, and in some respects, even more so. These "second generation laws" are distinguishable from the first generation largely because they tend to focus on a particular type of pollutant, rather than the identity of the particular environmental media in which pollutants are released. Hence, while the Clean Air Act, Clean Water Act, and Endangered Species Act focused on air, water, and wildlife (and habitat), the Toxic Substances Control Act ("TSCA")¹⁹ and Resource Conservation and Recovery Act ("RCRA"),²⁰ adopted in 1976, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),²¹ each focused on that subset of more dangerous, i.e., toxic or hazardous, pollutants and substances regardless of the environmental media in which they were found.

RCRA and TSCA were both classic, prospective, and comprehensive regulatory laws. They included both health-based provisions and technology-based provisions, with some consideration of costs versus benefits. The theoretical justification for these laws was the need to supplement the media-based laws, which risked simply chasing toxic pollutants from one media to the next, with some laws that looked at the larger, overall picture. RCRA and TSCA were meant to close the "last remaining loophole" in environmental law.²²

CERCLA likewise focused on "hazardous" substances, but was fundamentally different in its orientation than any other previous legislation. It was a retrospective *liability* law, not a prospective regulatory enactment. CERCLA was designed to provide for cleanup of abandoned and inactive hazardous waste sites, and to assign liability to the responsible parties for those cleanup costs. The other laws, with their prospective focus, generally neglected to deal with the legacies of decades of inadequate controls. Instead, they likely exacerbated the

¹⁸ See generally Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977); Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

¹⁹ Pub. L. No. 94-469, 90 Stat. 2003 (1976).

²⁰ Pub. L. No. 94-580, 90 Stat. 2795 (1976).

²¹ Pub. L. No. 96-510, 94 Stat. 2767 (1980).

²² H.R. REP. NO. 94-1491, at 4 (1976).

problem. By significantly increasing the costs of doing business, the prospective laws inevitably generated more abandoned and inactive sites as business sought to avoid the new, more stringent requirements (and associated liabilities) by simply closing down.

CERCLA's liability scheme was wholly unprecedented when enacted, at least in terms of U.S. law. It assigns liability for cleanup costs not just to current owners and operators of the site, but to all past and previous owners of the site at the time of waste disposal. Also included within the liability net are any persons who generated the hazardous substances that were disposed on the site, as well as parties who transported substances to the site. Moreover, because liability is strict, and almost always joint and several (because the harm is indivisible), any one of these parties may be held liable for the entire cleanup costs.²³

D. Concluding Thoughts

The overall transformation of U.S. law from 1970 through 1980 is astounding. The environmental improvements were minimal and some activities escaped the most demanding environmental protection requirements altogether. Nonetheless, in many respects, there were substantial improvements in the resulting quality of the environment in the United States during this time period. Still, perhaps the fairest characterization of the laws is that they permitted the U.S. economy to continue to grow without the kind of massive environmental degradation that might have otherwise occurred and which certainly has been experienced elsewhere.

There was, however, during that first formative decade, the planting of seeds of unrest that have since persisted and tended to undermine environmental law's ability to reform itself in response to changing information and circumstances. The promises not kept, however unrealistic they may have been, were broken at a cost. They helped to create a pathological cycle of distrust that has since plagued U.S. environmental law. When aspirational promises of clean air, clean water, and species preservation were not met, the debates and discussions regarding environmental law and policy became dominated by accusations of incompetence, exchanges of blame, and worse. Ironically, the general pattern was to respond to those discussions by enacting statutes that made even grander promises which, when not met, triggered a further cycle of blame and distrust.

²³ See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

U.S. governmental institutions have frequently exacerbated rather than redressed this dilemma. These institutions are founded upon deep-seated skepticism of those who wield government authority and they seek, through the checks and balances embraced by the U.S. tripartite system of government, to curb potential governmental overreaching and any single branch's abuse of the public trust. During environmental law's first decade in the United States, repeated failures to meet statutory promises suggested agency abuse of its public trust as public aspirations went unmet. At the same time, various interests exploited to their own advantage the institutional forces of distrust embedded within the American system. The result has been the pattern of agency crisis and controversy and a cycle of regulatory failure, which first began during the 1970s.

III. THE TRANSFORMATION OF AMERICAN LAW IN RESPONSE TO ENVIRONMENTALISM: THE SECOND DECADE

Modern environmental law's second decade in the United States began as tumultuously as the first but with a very different evolutionary spin. Immediately on the heels of congressional passage of CERCLA, the most far-reaching of all the environmental statutes, President Ronald Reagan took office. He favored a substantial cutback of environmental regulation and took concerted action to accomplish that end.

By the end of the decade, however, no such rollback had occurred, notwithstanding a series of Presidential efforts. Instead, Congress passed federal environmental statutes that were even more demanding than they had been at the start of the decade. Even more significantly, the environmental protection laws were themselves only the most formal expression of environmental law in the United States. Environmentalism, and its underlying values, priorities, and information, had triggered a sweeping transformation of legal rules across a broad spectrum of areas of law in the United States.

A. Regulatory Reform, Deregulation, and the Legislative Backlash

When President Ronald Reagan took office in January 1981, significant cutbacks on federal environmental protection law seemed inevitable. Candidate Reagan had campaigned on a platform that seemed to leave little room for comprehensive federal pollution control requirements. He had campaigned on themes antithetical to much

federal environmental law: against "big government;" against the federal government diminishing the power of state governments to decide for themselves how to govern; and against government rules and regulations that restricted industry and substituted governmental determinations of proper industrial conduct for basic economic forces supplied by a free market.

During his campaign, Reagan also specifically singled out federal environmental laws on each of these grounds. He complained that many environmental restrictions were extreme: they improperly usurped state sovereignty, they cost too much, they stifled needed economic growth, and they reflected the views of a radical fringe rather than mainstream America. It is therefore not surprising that President Reagan, immediately upon taking office, reportedly sought to nominate to the position of the EPA Administrator someone willing to "bring EPA to its knees."²⁴

Surprisingly, the popular President's efforts were not only stymied but actually prompted a legislative backlash that ultimately generated even more stringent environmental protection laws. The Reagan Administration's efforts at deregulation unwittingly fueled the public's pre-existing distrust of government—the legacy of the first decade's series of failed promises—especially the public's readiness to believe that the government might be compromising public health concerns in order to bolster the corporate profits of industry. The environmental community in the United States took effective advantage of public concern—vigorously promoting public outrage—and, as a result, substantially increased both their own financial resources and membership as well as their lobbying clout before Congress.²⁵

The Reagan Administration's short-term solution was to replace its initial head of the EPA, who had sought to decrease the agency's budget, with a highly regarded individual with strong environmental credentials. The long-term impact of the Administration's effort to cut back on federal environmental protection laws, however, was precisely the opposite from the Administration's original policy objective. Congress responded to the public's disapproval of deregulatory efforts by amending the federal environmental protection laws in a manner designed both to make them stronger and to reduce executive branch discretion to diminish their effectiveness in the

²⁴ ANNE BURFORD, ARE YOU TOUGH ENOUGH? 84 (1986).

²⁵ See Lazarus, *The Tragedy of Distrust*, *supra* note 5, at 344-47.

future.²⁶

Hence, environmental laws that in the 1970s had conferred considerable discretion on the EPA regarding how best to meet strict environmental goals now commenced to dictate to the agency not only the statutory *ends*, but the precise *means* as well. Even those statutory amendments that retained some discretion in the EPA to develop environmental protection requirements in the first instance imposed strict deadlines on their promulgation. Furthermore, in the event those deadlines were not met, the amendments mandated the automatic triggering of stringent requirements, including absolute prohibitions on specified waste disposal activities.

From 1981 through 1990, Congress substantially amended virtually all of the major environmental protection laws. Congress amended the Endangered Species Act in 1982,²⁷ the Resource Conservation and Recovery Act in 1984,²⁸ CERCLA in 1986,²⁹ the Clean Water Act in 1987,³⁰ and the Clean Air Act in 1990.³¹ These detailed, prescriptive amendments converted what had been open-ended statutes, tens of pages in length, into statutes of several hundred pages in length. Congress had, in effect, deprived the executive branch of much of the environmental policymaking authority that the latter had historically enjoyed. Although the Clean Air Act included, for the first time, a major program dependent on market incentives (tradeable emission rights to control acid deposition),³² the statutes generally adhered to a "command and control" regime of strict technology and health-based standards.

B. The "Greening" of U.S. Law

The significance for environmental law of the 1980s, however, was not confined either to the nation's rebuff of the Reagan Administration's deregulatory efforts or Congress' detailed amendments of both first and second generation environmental statutes. Virtually all of U.S. law was "greened" during the 1980s. The environmental protection laws were simply the most obvious, surface expression of the legal transformation.

²⁶ See *id.* at 340-42.

²⁷ Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (1982).

²⁸ Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984).

²⁹ Pub. L. No. 99-499, 100 Stat. 1613 (1986).

³⁰ Pub. L. No. 100-4, 101 Stat. 7 (1987).

³¹ Pub. L. No. 101-549, 104 Stat. 2399 (1990).

³² See Clean Air Act, 42 U.S.C. §§ 7651-7651o.

The emergence of environmental law in the United States underwent, especially in the second decade, a general process of assimilation as the teachings and values of environmentalism infused one category of legal rules after another, transforming our nation's laws in response to the public's demand for environmental protection. Areas of the law as diverse as administrative, bankruptcy, civil rights, corporate, free speech, insurance, international, remedies, securities, and tax law each underwent (and are still undergoing) a significant process of transformation in response to the public's desire to have a legal system that better reflects the public's environmental protection goals. Legal rules invariably express a balance struck—an equilibrium—between competing values. Modern environmentalism challenged many of those settled equilibria.

It challenged: (1) administrative law principles that limited judicial review of environmental lawsuits; (2) limitations on tort liability that made recovery of environmental harm more difficult; (3) property law rules that promoted environmentally destructive activities; (4) limitations on corporate liability that made it difficult to hold corporations responsible for environmental harm they caused; (5) bankruptcy rules that frequently kept economic actors from paying the full cost of environmental harm they had created; and (6) civil rights laws that considered housing, employment, and education needs, but gave too little attention to the civil rights dimension of clean air and clean water. In response, legal doctrine in each of these areas evolved during the 1980s.³³

C. *The Expanding Practice of Environmental Law*

Another important feature of U.S. environmental law in the 1980s was the way in which the practice of environmental law grew exponentially. At the beginning of the decade, environmental law was a fairly narrow specialty. Many firms had no lawyers that specialized in the area, and those that did generally included environmental law as a subpart of their litigation sections. Few corporations possessed in-house environmental law expertise.

By the end of the 1980s, the number of practitioners of environmental law had dramatically increased. Environmental law became one of the "hot" specialties. Law firms were eager to find lawyers with expertise in the area, and law students enrolled in record

³³ This discussion of the broader evolutionary impact of environmental law during the 1980s is more fully set forth in Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Envtl. Law: Reforming Envtl. Criminal Law*, 83 GEO. L.J. 2407, 2415-20 (1995).

numbers of environmental law courses. Every major law firm boasted of its own environmental law practice; some large firms employed as many as 100 lawyers practicing primarily environmental law. Sizeable law firms specializing almost exclusively in environmental law also developed. Virtually every major corporation hired in-house counsel knowledgeable about environmental law.³⁴

A similar explosion in environmental counsel occurred in the public sector. The U.S. Department of Justice had approximately 15 lawyers working full time on environmental enforcement matters at the outset of the 1980s. By the end of the 1980s, there were more than 150 enforcement lawyers.³⁵ The U.S. Environmental Protection Agency employed approximately fifty-two lawyers when it commenced operations in the early 1970s, but employed more than 800 by the early 1990s.³⁶ Similar patterns were likely mimicked throughout state and local governments, where the vast majority of environmental enforcement actually occurs.

No doubt the primary reason for this dramatic expansion in environmental law expertise was CERCLA's unprecedented and sweeping liability regime and the threat of possible criminal prosecution for felony violations of environmental statutes, both of which dominated the decade of the 1980s. Expanded civil and criminal liability provided the private sector (and many public sector entities as well) with a huge incentive to hire lawyers to represent them in pending CERCLA actions and, even more importantly, to advise them regarding future compliance to minimize their possible future liability and exposure to felony prosecution. Moreover, because CERCLA liability, in particular, swept so broadly—bringing within its liability net every major Fortune 500 company as well as many small companies, nonprofit medical and educational institutions, and even the government itself—the combined need for environmental counsel was massive in the mid- to late-1980s.

D. Concluding Thoughts

With everyone claiming to be an environmentalist, U.S.

³⁴ See generally Michael B. Gerrard, *Trends in the Supply and Demand for Env'tl. Lawyers*, 25 COLUM. J. ENVTL. L. 1 (2000).

³⁵ See Richard J. Lazarus, *Fairness in Env'tl. Law*, 27 ENVTL. L. 705, 708 & n.28 (1997) [hereinafter Lazarus, *Fairness in Env'tl. Law*].

³⁶ See *id.* at 11. The attorney employment numbers related to the Environmental Enforcement Section of the U.S. Department of Justice are estimates based on the author's familiarity with the operations of the Environment and Natural Resources Division, within which the Enforcement Section is located.

environmental law's second decade ended in many significant respects the way the first decade began. The politically disastrous rejection of President Reagan's effort at the beginning of the decade to dismantle much of the federal environmental protection arsenal prompted most policymakers to shy away from any pretense of an effort to challenge the propriety of increasingly stringent federal environmental protection requirements.

During the 1988 Presidential elections, both major party candidates (George Bush and Michael Dukakis) claimed environmental credentials. Each promised significant new initiatives to protect the natural environment. Upon his subsequent election, President George Bush delivered on his promise by providing crucial support to amendments to the Clean Air Act, which had been stalemated in Congress for more than a decade. The resulting Clean Air Act Amendments of 1990 imposed sweeping, comprehensive, and demanding requirements that largely perpetuated, through detailed elaboration and supplementation, the Act's initial 1970 regulatory regime.³⁷

Environmental law no longer seemed to be at risk of wholesale abandonment, but to have come of age. After two decades, it was increasingly seen as part of the settled legal landscape, as reflected both in the environmental protection laws themselves and in the host of legal rules that had been effectively "greened" in other intersecting, yet nonetheless diverse, areas of law. The major perceived challenges concerned how best to achieve the next stages of pollution control and, in particular, how best to channel limited resources to those environmental protection problems that presented the most serious risks. Although the precise terms of the laws seemed constantly in flux, however, no wholesale abandonment of the law's basic goals and regulatory frameworks seemed in the offing.

IV. A SURPRISE ATTACK, PERSISTENT CONTROVERSIES, AND THE EMERGENCE OF INTERNATIONAL ENVIRONMENTAL LAW IN THE DOMESTIC ARENA: THE THIRD DECADE

Appearances are often as deceiving in law as they are in life; the close of environmental law's second decade was no exception. The early 1990s revealed once again how abruptly the political winds

³⁷ See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

surrounding environmental law can dramatically shift. Environmental programs that seemed a matter of shared consensus became, virtually without warning, the subject of radical, yet broad-based efforts at their legislative unraveling. Unlike in the 1980s, however, Congress now supported reform, and the executive branch was in opposition. Nevertheless, somewhat astonishingly, the legislative reform effort dissipated almost as dramatically as it arose, leaving the entire federal program largely intact. Indeed, it is the phenomenon of relatively little legislative action that may prove to be one of the significant legacies of the 1990s.

A less obvious but still significant catalyst for reform can be found in the changing nature of the federal judiciary in the United States. More than a decade of conservative judicial appointments from 1981 through 1992 created a federal judiciary in the 1990s wholly unlike one that welcomed, indeed affirmatively instigated, the development of tough environmental protection requirements in the 1970s. The full implications of that shift are still not clear, but there has been an increasing number of judicial rulings in environmental law's third decade that are openly skeptical of the expansive application of strict environmental requirements.

Although congressional reform efforts have since diminished, the controversies that precipitated those efforts have not disappeared. Prominently left in the legislative wake are several persistent, growing controversies related to U.S. environmental law that require resolution if yet another massive, unpredictable reform effort is to be avoided. Some of these controversies relate to longstanding disputes pertaining to the structure of governmental decision making in the United States. Federal and state governments have long debated, and frequently differed, on how best to allocate environmental law and policymaking authority between their respective sovereign authorities and, within each sovereign, between their various branches of government.³⁸

Another continuing source of controversy as we enter the twenty-first century arises from those voices within academia and the private and public sectors who contend that a third "generation" of environmental laws is now necessary for environmental protection in the next millennium. A variety of rubrics are used, such as "next generation," "reflexive," and "complex, adaptive systems," to describe the reforms needed. A shared feature of each is that they purport to

³⁸ See generally Daniel C. Esty, *Revitalizing Envtl. Federalism*, 95 MICH. L. REV. 570 (1996); Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Envtl. Policy*, 86 YALE L.J. 1196 (1977).

embrace the ambitious goals of the laws of the first three decades but seek to develop a more flexible, efficient, and effective legal regime for their accomplishment.³⁹

A distinct set of persistent controversies relate to long simmering, but often less visible, concerns about the fairness of environmental law's distributional dimension. While legal scholars have remained largely focused on questions of lawmaking structure and of how best to determine and achieve the correct levels of pollution, questions regarding distributional fairness have persisted and been a major, yet less explicit, force in environmental law's evolution. But new voices and new concerns are now being expressly and loudly raised, especially within low income communities and communities of color, that environmentalists find most unsettling and can no longer be ignored.⁴⁰

A third noteworthy feature of the past third decade and the new millennium concerns the increasing influence of international law on domestic environmental law. The United States tends, by its nature, to be a self-referential society that views, in a Copernican manner, other nations as dependent upon it, rather than the converse. However, as the United States has become increasingly (and necessarily) engaged in the development of international environmental law norms, principles, and more formally binding treaty obligations, U.S. domestic environmental law finds itself beginning to be molded by these broader international forces. The transformation of U.S. domestic environmental law from an independent leader to a more dependent follower has proven, and is likely to continue to prove difficult.

A. Trading Places in a Third Rebuff of a Frontal Assault on Environmental Law

Environmental law's third decade momentarily began with George Bush, the self-declared "environmental President," but quickly shifted in the early 1990s to an emphasis on regulatory retrenchment. His Vice-President made environmental deregulation a major executive branch initiative, culminating in a formal moratorium on regulations, including several significant environmental protection programs.

The most remarkable challenge to federal environmental protection

³⁹ See Rena I. Steinzor, *Reinventing Env'tl. Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103 (1998).

⁴⁰ See generally Richard J. Lazarus, *Pursuing "Env'tl. Justice": The Distributional Effects of Env'tl. Protection*, 87 NW. U. L. REV. 787 (1993); Richard J. Lazarus, *Env'tl. Racism! That's What It Is*, 2000 U. ILL. L. REV. 255 (2000) [hereinafter Lazarus, *Env'tl. Racism!*].

laws, however, came several years later in 1994, with the election of Republican majorities to both the House and Senate of Congress. The Republicans campaigned on the basis of a program they dubbed as the "Contract With America," the full implications of which for environmental law became apparent only in the immediate aftermath of their election. The Contract targeted federal environmental protection programs more than any other area of the law for significant curtailment.¹¹

Republican majorities in both chambers moved swiftly on several legislative fronts to convert their agenda into positive law. They proposed legislation that would have replaced environmental standards based on minimum standards of human health and technology-forcing requirements. In their place would be environmental standards based on cost/benefit analyses, comparative risk assessment, and other economic efficiency criteria. Environmentalists have long complained that such standards inevitably decrease environmental protection by discounting environmental values not susceptible to monetary valuation and environmental risks not certain to occur.¹²

Other aspects of the new Republican majority agenda similarly promised a radical overhaul of the existing federal environmental law programs. They included legislation that would limit Congress' ability to enact so-called "unfunded mandates," which require action by state governments without providing the states with the funding necessary to do so. Proponents of this legislation repeatedly cited federal environmental laws as examples of laws that, because they necessarily rely on state and local implementation, included such improper mandates.

Other bills promised "regulatory relief" designed to make it harder for government to promulgate regulations that impose economic costs on industry. Here too, proponents singled out costly environmental requirements as justifying these reforms. The bills proposed, *inter alia*, imposing on federal agencies multiple layers of procedural requirements and heightened standards of judicial review, each of which would be likely to chill agency implementation of environmental protection rules.

Finally, the Republican "Contract" sought to cut back on environmental law through budgetary reductions and disincentives.

¹¹ See Victor Flatt, *Envtl. "Contraction" for Am.? (Or How I Stopped Worrying and Learned to Love the EPA)*, 29 LOY. L.A. L. REV. 583 (1996); Robert Glicksman & Stephen B. Chapman, *Regulatory Reform & (Breach of) the Contract with Am.*, 5 KAN. J.L. & PUB. POL'Y 1 (Winter 1996).

¹² See, e.g., MARK SAGOFF, *ECON. OF THE EARTH: PHILOSOPHY, LAW, & THE ENV'T* (1988).

For instance, within the broader context of reducing the national debt, the new Republican legislative majorities proposed budgets that singled out environmental protection for some of the most severe reductions. Their budgets reportedly would have reduced the EPA's enforcement dollars by up to forty percent.⁴³

The even more sweeping proposals, however, related to proposed budgetary disincentives. The "Contract" included bills that called for compensating private property owners for any economic loss they might suffer because of federal restrictions on the use of their property. The legislative proposal singled out for such treatment environmental restrictions, especially those related to water quality control and endangered species protection. The legislative hearings in support of such a compensation requirement, accordingly, sought to highlight the (greatly exaggerated) plights of small land owners that retained no economic use of their land because of environmental restrictions.⁴⁴

The practical effect of the proposed laws would be to confer on those who owned private property rights in natural resources an economic right—compensable if diminished—to engage in the very kind of environmentally destructive conduct that the environmental laws had deemed unlawful. The most likely programmatic effect of such a damage remedy, which was estimated to cost the federal government billions of dollars if enacted and the environmental laws fully implemented, would be for those federal agencies responsible for implementing federal environmental laws to minimize their liability by curbing their implementation and enforcement efforts. No doubt to ensure just that result, the proposed legislation called for the damage remedies to be paid out of the agency's own operating budget, rather than out of general U.S. Treasury funds.

Any one of these legislative proposals, if enacted, could have fundamentally changed the structure of federal environmental law. Their cumulative impact would have been as revolutionary as the lawmaking effort that created modern environmental protection law in the early 1970s. For much of 1994, moreover, congressional passage of at least several of these initiatives seemed a virtual certainty.

Remarkably, however, practically none of these varied proposals became law (although some proposals are still pending).⁴⁵ The reform

⁴³ See Adam Clymer, *After a Bad Week, G.O.P. Looks to Budget for Help*, N.Y. TIMES, July 23, 1995, at A18.

⁴⁴ See John Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351, 359-60 (1997).

⁴⁵ The two exceptions were the Unfunded Mandate Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995), which imposes procedural obstacles on the enactment of regulatory requirements on state and local governments absent federal funding to assist in their compliance, and the Small

efforts dissipated almost as quickly they formed. In a reversal of roles, while the legislative branch in 1994 sought to reform environmental law, the executive branch sought to preserve it. In the 1980s, the executive branch had sought to obtain many similar changes, only to be rebuffed by Congress, but when Congress was instigating the reforms in 1994, the executive branch maintained the opposition.

The executive branch also used the same tactics against Congress that Congress had used against it a decade beforehand. Just as Congress had effectively exploited the public's distrust of government efforts to protect the environment in the 1980s to defeat that earlier reform effort, so too the executive branch now pursued an identical strategy to block Congress. The President, Vice President, and the EPA Administrator repeatedly characterized Congress as seeking to undermine public health and environmental quality at the behest of industry profits.⁴⁶ The American public, always ready to perceive environmental protection in such stark terms, and prone to expect such a political sell-out, responded in a manner that ultimately deprived the legislative reform effort of its political strength. Hence, the third major effort in as many decades to dismantle the demanding framework of U.S. environmental law, like the two before it, fell flat.

B. The Changing Nature of the Federal Judiciary

As previously described, during the 1970s the federal judiciary served as a significant catalyst in support of sweeping, far-reaching, and stringent environmental protection law. Many judicial rulings made it easier for environmental plaintiffs to bring suits against polluters. And, through a series of expansive (and sometimes thinly based) interpretations of existing law, courts effectively provided environmentalists with the political leverage necessary to obtain strong environmental protection laws from both the executive and legislative branches.

During the 1980s, however, the seeds of a transformation in judicial attitudes were planted, which finally prominently expressed themselves during the 1990s. More than a decade of conservative judicial appointments to the federal judiciary, commencing in 1981 and not ending until the close of 1992, systematically replaced environmentally sympathetic federal judges with those who were

Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 847, 857 (1996), which similarly imposes procedural hurdles on the EPA's issuance of regulations affecting "small" businesses.

⁴⁶ See Lazarus, *Fairness in Env'tl. Law*, *supra* note 35, at 709 & n.33.

apathetic to, skeptical of, or even seemingly hostile towards environmental concerns. Increasingly lost was any judicial notion that environmental concerns were somehow "special," akin to civil rights, and thus deserving of heightened judicial safeguarding.⁴⁷

The results have been palpable. Prompted by several U.S. Supreme Court rulings, the federal courts are now substantially raising the very same barriers to citizen environmental enforcement lawsuits that the courts lowered during the 1970s. Many citizen challenges can no longer be brought at all either against suspected violators of environmental standards or against government officials for failing to implement strict standards in the first instance.⁴⁸ Moreover, because the Supreme Court has based some of its rulings on its view of constitutional limitations on the power of the federal judiciary, neither of the other two branches of government possesses the power to restore judicial access to those environmental plaintiffs.⁴⁹ That trend has only recently been reversed by a Supreme Court ruling far more favorable to environmental citizen plaintiffs.⁵⁰

Environmental citizen plaintiffs are not the only parties to experience the shift in judicial attitudes. Increased judicial skepticism has resulted in more significant governmental losses in cases in which the government is defending its authority to promulgate and enforce strict environmental protection requirements. Courts that routinely deferred to the government in the past are now far more ready to question the government's legal interpretation and corresponding authority. The result is narrower rulings on industry liability and invalidation of some agency programs altogether.⁵¹

Some of these rulings are rooted in the courts' differing views of the meaning of federal statutes, which Congress is, of course, empowered to change. But here, as in the citizen suit context, the courts are increasingly basing their restrictive views of federal authority on their interpretation of the Constitution. These include limitations on congressional power to regulate activities lacking a substantial relationship to interstate commerce, to command state sovereign authorities, to restrict private property rights, and to subject

⁴⁷ See Glicksman & Schroeder, *EPA & the Courts*, *supra* note 11.

⁴⁸ See John D. Echeverria & Jon T. Zeidler, *Barely Standing: The Erosion of Citizen "Standing" to Sue to Enforce Fed. Env'tl. Law* (Georgetown University Law Center Environmental Policy Project 1999).

⁴⁹ See Glicksman & Schroeder, *EPA & the Courts*, *supra* note 11.

⁵⁰ See *Friends of the Earth v. Laidlaw Env'tl. Services*, 120 S. Ct. 693 (2000).

⁵¹ See generally Richard L. Revesz, *Env'tl. Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); The Honorable Patricia M. Wald, *Env'tl. Postcards From the Edge: The Year That Was & the Year That Might Be*, 26 ENVTL. L. REP. (ENVTL. L. INST.) 10182 (April 1996).

state governments to suit in federal court. These rulings directly implicate the power of the federal government to restrict environmental pollution, at least in the manner currently contemplated in several of the existing statutory regimes.

The broader implications of the shift in the makeup of the federal judiciary, however, have not yet been realized. Perhaps the judicial half-life of the shift will not be long enough, particularly with two terms of contrasting appointments during the decade by a Democratic President with differing proclivities in judicial nominations, to have the more potentially dramatic implications fully realized. The hints of significant change are nonetheless currently present.

C. Persistent and Emerging Controversies During the "Graying" of Environmental Law

1. Structural Issues

Many of the controversies that were reflected in the various "Contract with America" proposals have long been a focus of debates concerning environmental protection law. There are federalism issues relating to the proper division of responsibility between federal and state sovereigns (including local governments). There are also separation of powers issues arising out of disputes between the various branches of government regarding their relative competency and legitimacy in addressing environmental protection issues.

These basic structural issues pertaining to governance will no doubt persist and continue to dominate much discussion and legal scholarship, as they present core issues of governing in the United States. These issues tend, however, to be largely secondary to broader issues relating to environmental protection law. Thus, sometimes it is environmentalists who are the champions of "states' rights," "federal supremacy," "judicial activism," or "judicial restraint," while sometimes it is the regulated community.

After a while, it is hard to believe that either side of the environmental debate retains any core concerns on any of these broader structural issues. They instead possess only a short term concern stemming from how the resolution of any one of these issues may affect their interests in an isolated setting. In the environmental law context, therefore, debates regarding these structural issues tend mostly to mask rather than reveal the parties' true policymaking concerns.

2. Regulatory Means Issues

Another category of persistent controversies concerns how to determine the proper level of environmental protection, and once determined, how to achieve that level in the most efficient and effective manner. To date, federal environmental protection law has determined the former based on a fairly risk-averse set of assumptions, thus not allowing scientific uncertainty to become a barrier to regulation. The bottom line objective of the standards has been quite ambitious: not economic feasibility but rather the more stringent objective of either protecting human health or reducing pollution as much as is technologically possible.

The dominant means for achieving these ends has been a highly centralized program of what is referred to as "command and control" permitting. Major sources of pollution require a formal permit for pollution. Without that permit, their pollution, whatever its amount, is unlawful in the first instance. The permits themselves impose a series of specific limitations on the amount and timing of discharges into the natural environment.

Ever since the enactment of the various federal environmental laws, there has been an ongoing criticism that the current laws are too stringent in their ends, too rigid in their means, and generally fail to account for differences in environmental impacts in different locations and in relative pollution control costs for different sources. There have, accordingly, been recurring efforts to reform federal environmental law to make it less centralized, more flexible and adaptive, and more open to use of market incentives, so as to allow for reductions in pollution that are less costly and more meaningful.⁵²

The 1990s were no different. There were a series of parallel recommendations from a variety of "think-tanks" and individual commentators suggesting that a "next generation" of environmental laws was now in order. These proposals had a variety of labels, but they all tended to share some common themes, including more flexible, localized, fine tuning of applicable controls, greater use of market incentives, and more attention paid to comparative risks so as to ensure the maximum risk reduction at the minimum cost.⁵³

⁵² See, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Env'tl. Law*, 37 STAN. L. REV. 1333 (1985). See generally Richard A. Liroff & Robert Hahn, *Regulatory Reform at EPA: Separating Fact from Illusion* 4 YALE J. ON REG. 175 (1986) (reviewing RICHARD A. LIROFF, *REFORMING AIR POLLUTION REGULATION: THE TOIL & TROUBLE OF EPA'S BUBBLE* (1986)).

⁵³ See Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Env'tl. Policy*, 22 HARV. ENVTL. L. REV. 313 (1998).

The lessons of the past three decades strongly suggest that none of these various proposals is likely to be adopted, at least in any form, amounting to a fundamental transformation of the basic structure of U.S. environmental law. That is partly because U.S. environmental law has never, in fact, been the command and control monolith its detractors describe. There has always been far more flexibility at the margin than commentators acknowledge, and those responsible for implementing the law have quietly transformed the programs, both with and without express congressional authorization, into a hybrid scheme that includes a variety of regulatory means, many of which rely on market incentives and other flexible bases for modifying behavior.

Indeed, that is why many of the major reform efforts fail. The basic statutory structures have worked surprisingly well, as has their incremental, rather than wholesale, overhaul. Nor, at this time in environmental law's existence, do those in industry generally, or in the regulated community in particular, automatically support radical change.

The environmental requirements have existed in the United States now for more than a generation and have, accordingly, settled into the legal landscape—they have been the basis of investment decisions and economic forecasting. Their dramatic change would unsettle many investment backed expectations, including both the expectations from those who prefer stability and from those who do not relish the notion of new market entrants facing lower costs than existing business. There is also, of course, in the United States a billion-dollar pollution control industry naturally supportive of the existing legal regime.⁵⁴

3. *Distributional Fairness Issues*

There are nonetheless other simmering sources of controversy that, left unheeded, could eventually provide the political force for more dramatic reform. They relate, however, to a distinct dimension of environmental law, rather than to those issues related to the structure of environmental lawmaking or those disputes relating either to the "correct" level of pollution or the most effective means of its achievement. They instead focus on environmental law's *distributional* dimension, in particular how the benefits and costs of environmental pollution control are distributed.⁵⁵

The two distributional issues that moved to the front lines of environmental law during the 1990s were the property rights

⁵⁴ See Office of Econ. Dev., *The Env't Indus.—The Washington Meeting* (OECD 1996).

⁵⁵ See Lazarus, *Fairness in Envtl. Law*, *supra* note 35.

movement and the environmental justice movement. Advocates of private property rights contend that property owners are singled out for a disproportionately high share of the costs of environmental protection by environmental laws that bar many otherwise economically profitable uses of their property. Environmental justice advocates assert that low income communities and communities of color are disproportionately exposed to pollution in the first instance and that the environmental laws frequently exacerbate, rather than address, those inequities.

Each of these distributional concerns had a significant effect of environmental law during the 1990s. The 1990s witnessed a proliferation of regulatory takings suits brought against federal, state, and local environmental regulators by landowners claiming that environmental restrictions had amounted to unconstitutional takings of private property without the required payment of just compensation. The Supreme Court appeared generally receptive to the equities of many of these landowner claims in a series of Court decisions handed down in the 1990s.⁵⁶

The vast majority of the cases before the lower courts did not, however, result in formal judgments favorable to property owners. The more significant result may well have been that litigation successfully sent a message to policymakers and governmental regulators about the need for greater sensitivity to the economic impact of regulations on individual landowners. The message was that there is a real risk that some property owners may be unfairly treated when environmental regulations that they could not have anticipated frustrate their investment backed expectations to use the property in a particular manner and, for that reason, there is certainly sound basis for the government to take steps to address such legitimate concerns, not because they are constitutionally required to do so, but simply as a matter of just and fair social policy. The object of such governmental efforts is to ease the distributional hardships that may occur during a transitional period when government regulations change as they have in the environmental arena. During the 1990s, the Department of the Interior, in particular, experimented with administrative schemes designed to address some of the distributional hardships seeming to arise from the increasingly widespread implementation of the

⁵⁶ See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

Endangered Species Act.⁵⁷

The transformative effect on environmental law of the environmental justice movement has been even greater. Although the origins of the movement extend far earlier than the 1990s, it was within that decade that environmental justice gained national prominence for environmental policymakers nationwide. The early part of the decade witnessed a proliferation of significant events following on the heels of the United Church of Christ's publication in 1987 of its influential study, *Toxic Wastes and Race in the United States*.⁵⁸ In 1990, Dr. Robert Bullard published his provocative and widely celebrated study, *Dumping in Dixie*.⁵⁹ In 1991, the "First National People of Color Environmental Leadership Summit" was held in Washington, D.C., and attended by several hundred delegates from community organizations from all over the country.⁶⁰ Lastly, in 1994, the President issued a formal executive order mandating federal agency consideration of environmental justice concerns in the administration of federal programs.⁶¹

The impact on environmental law has been widespread and substantial. To be sure, neither Congress nor any of the states have enacted any new generic environmental justice laws. Likewise, no major amendments have occurred to any of the major federal environmental laws that address environmental justice concerns *per se*. Where there has nonetheless been significant impact has been in agency enforcement policy, standard setting, and facility permitting and siting.

Indeed, environmental justice has proven to be one of those rare instances where far more, rather than far less, has been happening than would be suggested by the absence of changes in formal law. The EPA's enforcement policy, in the setting of priorities for where enforcement actions are brought and in how they are settled, expressly addresses environmental justice concerns. Federal environmental protection standards similarly reflect such concerns in areas ranging from the identification of sensitive subpopulations, avoidance of toxic "hotspots" in urban areas, and the encouragement of pollution

⁵⁷ See Albert C. Lin, *Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 ECOL. L. Q. 369, 385-87 (1996).

⁵⁸ United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race in the U.S.* (1987).

⁵⁹ ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVTL. QUALITY* (1990).

⁶⁰ See Keith Schneider, *Minorities Join to Fight Polluting Neighborhoods*, N.Y. TIMES, October 25, 1991, at A20.

⁶¹ Exec. Order 12898, 3 C.F.R. 859 (1995).

prevention programs that target pollution sources within environmental justice communities.⁶²

Perhaps the environmental justice movement's most significant, though also most overlooked, impact was on the process of the siting and permitting of facilities subject to environmental regulatory requirements. In some instances, outright permit denials resulted because of community opposition or cases where an applicant, in the face of community outrage, simply abandoned its plans. Far more often, however, the result of the environmental justice movement has been negotiated settlements with permit terms far more favorable to members of the affected community. The agreements are varied in their terms: they may require reduced pollution, payments for health studies, additional compliance oversight, or even community jobs. Whatever the precise terms, the upshot is a facility that strikes a better bargain for the community in terms of environmental risks and associated economic benefits than those enjoyed by the community in the absence of the environmental justice movement.⁶³

D. The Internationalization of U.S. Domestic Environmental Law and Its Practice

A prominent justification in the United States during the 1970s in favor of national environmental legislation was that pollution does not stop at state borders. If states were allowed to decide their own environmental requirements, absent any national oversight, each state would likely enact laws that encouraged interstate pollution that adversely affected other bordering states. In addition, to the extent that many states shared common resources, including both major bodies of water and, of course, air itself, coordination of their respective environmental requirements was necessary.⁶⁴

The same justification is now promoting international cooperative efforts, ranging from declarations of principles to binding treaty obligations. With increasing technologies and population demands, the number of common resources requiring such international coordination is growing exponentially. Endangered species, depleting fisheries, ozone layer destruction, and global warming are just some of

⁶² Lazarus, *Envtl. Racism*, *supra* note 40.

⁶³ See *id.* at 270-73.

⁶⁴ See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Fed. Env'tl. Regulation*, 67 N.Y.U. L. REV. 1210, 1221-24 (1992). See generally Kirsten H. Engel, *State Env'tl. Standard-Setting: Is There a "Race" and Is It "To the bottom?"*, 48 HASTINGS L. J. 271 (1997).

the more prominent subjects of current international negotiation.⁶⁵

Just as individual states within the United States, both historically and today, resisted the loss of sovereignty implicit in national environmental legislation, many individual nations find it difficult (if not wholly unacceptable) to agree to surrender any of their sovereignty to international authorities. Indeed, the sovereignty obstacle is undoubtedly far greater in the international context – many small and large nations alike resist any such acquiescence.

The United States is no exception in this respect, as evidenced by its reluctance to sign on to such agreements as the Law of the Sea Treaty⁶⁶ and the recent Biodiversity Convention in Rio.⁶⁷ To similar effect is the failure of Congress, notwithstanding U.S. formal ratification, to enact any legislation implementing the Basel Convention on the Control of Transboundary Movement of Hazardous Waste.⁶⁸

But as the number of international environmental agreements inevitably increases, U.S. domestic environmental law will eventually have to evolve in response. The number of treaties related to environmental law treaties increased from 52 to 173 between 1970 and 1994. Many of these agreements, such as the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,⁶⁹ implicate changes in domestic law.⁷⁰

In addition, the growth of international trade places pressure on nations to begin to embrace common environmental protection standards, or at least to decrease the existing gaps. Voluntary international environmental standards, such as ISO 14000, which provides for the certification of products as consistent with specified uniform environmental management standards, could be enormously influential on industry practices around the world, including within the

⁶⁵ See Edith Brown Weiss, *Int'l Envtl. Law: Contemporary Issues & the Emergence of a New World Order*, 81 GEO. L.J. 675 (1993).

⁶⁶ U.N. Convention on the Law of the Sea, Oct. 7, 1982, 21 I.L.M. 1261.

⁶⁷ U.N. Conference on Env't and Dev.: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

⁶⁸ U.N. Env't Programme Conference on Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Text of Basel Convention, March 22, 1989, 28 I.L.M. 649.

⁶⁹ U.N.: Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.

⁷⁰ (The Endangered Species Act of 1973 was itself domestic legislation largely implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora. 16 U.S.C. §§ 1531-44 (1994); Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085.

United States.⁷¹ At least in theory, it may well be that much of domestic environmental law and industry practices will reflect international law agreement and standards in the first instance.

The practice of environmental law in the United States is already beginning, once again, to be transformed in response to the developments in the international arena. In the early 1970s, the practice of environmental law was focused primarily on litigation. During the 1980s, litigation remained significant (because of CERCLA), but with the "greening" of American law, the practice extended in multiple directions, becoming especially embedded in general corporate law.

There has been a marked slowing in the growth of the practice of environmental law during the 1990s.⁷² As environmental law has become more of a settled, mature part of U.S. domestic law, the regulated community has discovered the declining need for environmental law experts in law firms. They can now more safely rely on their own in-house experts or those in specialty consulting firms that can instruct them on compliance with the technical intricacies of specific regulatory programs.

The exception to this shift in the nature of the practice is in the international law area. The law there remains quite unsettled and its potential reach sufficiently unsettling for some (and exciting for others) that many U.S. practitioners of domestic environmental law are turning their attention to developments abroad. This includes lawyers representing all the competing parties of interest: those whose clients are within the regulated community, governmental bodies, and public interest organizations. International environmental law classes in American law schools are certainly experiencing curricular expansion and substantial increases in student enrollment.

This emerging area of practice also tends to be dominated by a new generation of environmental lawyers in the United States. As the third decade of environmental law comes to a close in the U.S., a shift in the leadership of the environmental bar is also occurring. The leaders have been a remarkably constant group during the past thirty years of turmoil and controversy, after all, many of them were the pioneers who developed the law itself. But time marches on, and those who were in their 30's in the 1970s are now in their 50's by the close of the 1990s.

⁷¹ See Amy Pesapane Lally, *ISO 14000 and Envtl. Cost Accounting: The Gateway to the Global Mkt.*, 29 LAW & POLY INT'L BUS. 501 (1998).

⁷² See Michael B. Gerrard, *Trends in the Supply & Demand for Envtl. Lawyers*, 25 COLUM. J. ENVT'L L. 1 (2000).

and the beginning of the 21st century. As they begin to retire, a natural shift in leadership is occurring and those assuming leadership positions increasingly have an international bent.

V. CONCLUSION

Although environmental law in the United States remains youthful, after three decades, it is clearly also aging. Many of the signs of aging are positive. For example, environmental law has become a settled part of the law in the United States and has resulted in a sea-change of legal rules throughout American law. This settling has essentially erected a natural barrier to efforts to cut back dramatically on environmental restrictions. Many in the regulated community have already made substantial investment decisions based on those restrictions, and much of the business community is directly dependent on the laws for their own economic viability. Moreover, those who made investment decisions, including purchases of property in fragile natural resources without fair notice of applicable use restrictions, are naturally decreasing in numbers over time. Largely due to these positive outcomes of the settled system, each of the several efforts over the past thirty years to dismantle U.S. environmental law has failed.

With age, however, environmental law in the United States is also beginning to lose some of its color and its passion. Judges no longer routinely view environmental concerns as special, warranting enhanced judicial protection, but instead view them merely as another special interest in the lawmaking process. Environmental policymakers increasingly emphasize that environmental issues do not present clear black-and-white options or stark choices between good and evil. Instead, they present difficult, grayer choices of social policy in the face of tremendous scientific uncertainty regarding environmental risk and the economic costs of pollution reduction. Incremental reform is occurring based on the need for less absolutism, greater compromise, and increased accommodation of competing concerns. Finally, those who practice environmental law are more and more those who view it as a mere menu of terms of legal compliance rather than the result of a legal revolution.

Perhaps these are signs of maturity. Yet environmental law's greatest challenge as it moves into its fourth decade in the U.S. is to retain its original passion and purpose notwithstanding that maturity. I expect that we will find the purpose necessary for that passion both

by looking more closely within our own borders and more broadly outside those same borders. The former will require, finally, paying greater attention to the legitimate needs and concerns of low income communities and communities of color in the United States whose environmental concerns have long received too little attention. The latter will require the U.S. to recognize its role as a partner in a broader world community responsible for maintaining our broader, global common ecosystem. There is much inspiration waiting to be found in both these undertakings.⁷³

⁷³ Just as this article was going to press, President George W. Bush is proposing a series of reforms strikingly reminiscent of the sweeping challenges to modern environmental law launched in each of the past three decades by Presidents Nixon and Reagan and the 104th Congress. President Bush has proposed abandoning a recently promulgated stringent limitation on arsenic in drinking water, retracting the United States agreement to the 1997 international climate change treaty negotiated in Kyoto in 1997, expanding petroleum exploration and production into the Alaska National Wildlife Refuge, relaxing environmental restrictions to accelerate domestic energy production and the construction of new power plants, delaying environmental restrictions on the commercial exploitation of national forests, and appointing a regulatory czar at the Office of Management and Budget well known for his sympathy with the regulated community's complaints about the allegedly excessive high costs and inefficacy of federal environmental protection requirements. See Eric Pianin, *U.S. Aims to Pull Out of Warming Treaty: 'No Interest' in Implementing Kyoto Pact*, *Whitman Says*, *Wash Post* A1 (March 28, 2001); Joseph Kahn, *A New Role for Greens: Public Enemy*, *Section 4*, 3:1 (March 25, 2001); Douglas Jehl, *Regulation Czar Prefers New Path*, *Section 1* 1:1 (March 25, 2001); Douglas Jehl, *E.P.A. to Abandon New Arsenic Limits for Water Supply*, A1:4 (March 21, 2001); Joseph Kahn, *Energy Chief Sketches Plans to Curb Rules Limiting Supply*, A16:1 (March 20, 2001); Douglas Jehl, *U.S. Offers Further Delay to Federal Rules*, A7:1 (March 17, 2001); Douglas Jehl & Andrew C. Revkin, *Bush, in Reversal, Won't Seek Cut in Emissions of Carbon Dioxide*, A1:4 (March 14, 2001). These reform efforts could prove especially difficult to defeat because, unlike in the past, the same political party that appears to favor them controls both the legislative and executive branches. Modern environmental law's first three decades nonetheless strongly suggest that the depth of the public's commitment to environmental protection, expressed both in the ideological commitment of activist organizations and the economic commitment of the nation's billion-dollar pollution control industry, will create formidable obstacles to any sweeping cutbacks.