

# ENVIRONMENTAL LAW WITHOUT CONGRESS

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The topic for this essay, environmental lawmaking without Congress, is admittedly a bit depressing. Our nation today faces significant and pressing environmental problems, and Congress is, at least in theory, the lawmaking institution most appropriate for designing a legal regime capable of addressing these problems. Indeed, the pre-eminent role of Congress as the nation’s lawmaker is a matter of deliberate design. Of the three branches, only the legislative branch is dominated by democratically-elected leaders directly responsive to the nation’s voters. Congress should therefore be the branch making the fundamental policy decisions underlying federal environmental law: determining acceptable levels of risk to public health and welfare, assessing the relevance of scientific uncertainty, and making the distributional tradeoffs implicit in the setting of environmental protection standards.

Yet for the past two decades, our nation has experienced environmental lawmaking *without* Congress. I first wrote about this development in 2006, then contrasting the “ascent” of Congress during modern environmental law’s first two decades in the United States to its “descent” ever since.<sup>1</sup> Tragically, we seem no closer today than we were in 2006 to breaking that legislative log-jam. With the passage of eight more years, the political intransigence underlying Congress’s abdication of its environmental lawmaking responsibilities appears to have hardened and deepened its roots.

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

This essay, based on a keynote address I delivered at a conference at the Florida State University College of Law, "Environmental Law Without Congress," sets the stage for the remainder of the papers produced from the conference. Rather than purport to offer answers to the fundamental question the proceedings proposed, my aim is to place what we are currently seeing in a broader historical perspective, and to make clear how sharply Congress's current absence over the past two decades contrasts with the role that Congress played in the emergence and evolution of modern environmental law. This historical inquiry reveals that this is not the first time the nation's environmental laws have suffered from a congressional lawmaking vacuum.

This essay is divided into three parts. Part I considers the role of Congress during the nineteenth and the first half of the twentieth century. Part II considers Congress during the second half of the twentieth century. And, finally, Part III focuses on the role of Congress, or the lack thereof, since congressional passage of the Clean Air Act Amendments of 1990.

#### I. CONGRESSIONAL ENVIRONMENTAL LAWMAKING DURING THE NATION'S FORMATIVE YEARS

During the nation's formative years, Congress played a fundamental part in environmental law.<sup>2</sup> Particularly during the nineteenth century, it had a critical foundational role in establishing the borders that define the nation and in managing the natural resource wealth within those borders. Congress also defined the terms for the disposition of those resources into private and public hands.

The Louisiana Purchase, the Treaty of Guadalupe Hidalgo, the purchase of Florida from Spain, and the purchase of Alaska from Russia dramatically expanded the nation's physical borders and defined its resource potential.<sup>3</sup> After acquiring such lands, in a systematic effort to promote expeditious settlement, Congress passed a significant number of laws designed to dispose of the lands.<sup>4</sup> Land grants to states were a major part of that congressional effort.<sup>5</sup> The thirteen original states retained

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2. Today, many routinely equate "environmental law" with pollution control laws; but "environmental law" today, as in the earlier times, can best be understood as embracing both pollution control and the kinds of natural resource management laws that dominated national lawmaking in the 19th century.

3. See GARY ALDEN SMITH, *STATE AND NATIONAL BOUNDARIES OF THE UNITED STATES* (2011).

4. See GEORGE C. COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* §§ 2.2-2.9 (2d ed. 2007).

5. *Id.*

ownership over all unsold lands within their borders, but pursuant to state-enabling legislation, Congress granted to new states title to substantial amounts of lands, including for the support and development of public schools, and millions of acres of swamplands, which, notwithstanding that label, included some extremely valuable properties.<sup>6</sup> Congress also granted 175 million acres, or approximately one-tenth of the landmass of the United States at the time, to the railroads.<sup>7</sup> Finally, Congress granted land directly to settlers, beginning with the Preemption Act of 1841, placing hundreds of millions of acres into private hands.<sup>8</sup> Through these actions, Congress sought to promote the settlement and economic development of the nation.

However, even in the midst of this substantial lawmaking, Congress faced significant impasses. In the years leading up to the Civil War, in particular, Congress was increasingly dysfunctional. The issue of slavery dominated the nation and polarized the political parties to such an extent that little could be accomplished.<sup>9</sup> Indeed, our polarization today, no matter its seeming intensity, pales in comparison to that which afflicted the nation in the mid-nineteenth century. The order of magnitude difference is highlighted by one of the most notorious events ever witnessed in the Senate Chamber: on May 22, 1856, House of Representatives member Preston Brooks caned and severely injured Massachusetts Senator Charles Sumner, with whom he vehemently disagreed about the morality of slavery.<sup>10</sup>

Not coincidentally, the legislative log-jam in Congress broke only after the Civil War began in 1861. President Lincoln issued his order authorizing war against the Confederate States in January 1862, and later that year Congress passed three significant environmental and natural resources laws: the Homestead Act of 1862,<sup>11</sup> the Morrill Act of 1862,<sup>12</sup> and the Pacific Railroad Act of 1862.<sup>13</sup> The Homestead Act was, at that time, the still-young nation's most significant natural resource law,

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6. See *id.* § 2.7; ANN VILEISIS, *DISCOVERING THE UNKNOWN LANDSCAPE: A HISTORY OF AMERICA'S WETLANDS* 76–78 (1997) (describing grants of swamplands to states).

7. DONALD L. FIXICO, *BUREAU OF INDIAN AFFAIRS* 90 (2012).

8. Preemption Act of 1841, ch. 16, 5 Stat. 453.

9. See Keith T. Poole, *The Roots of the Polarization of Modern U.S. Politics* 5 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1276025](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1276025).

10. *The Caning of Senator Charles Sumner*, UNITED STATES SENATE, [http://www.senate.gov/artandhistory/history/minute/The\\_Caning\\_of\\_Senator\\_Charles\\_Sumner.htm](http://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm) (last visited Sept. 19, 2014).

11. Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392 (repealed 1976).

12. Morrill Act of 1862, Pub. L. No. 37-108, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301-305, 307-308 (2012)).

13. Pacific Railroad Act of 1862, 12 Stat. 489 (codified as amended at 43 U.S.C. §§ 942-943 (2012)).

promoting settlement of the west by providing that any adult citizen or intended citizen who had not borne arms against the United States could claim up to 160 acres and, based on activities to improve that land, achieve its ownership.<sup>14</sup> The Morrill Act created the land-grant to colleges by providing each state with 30,000 acres for every member of Congress from that state, with the proceeds from that property used to create colleges and universities.<sup>15</sup> Finally, the Union Pacific Railroad Act was the most significant and most generous of these federal laws, granting land to railroads in exchange for their construction of railways across the western United States. In addition to the land necessary for the railroad itself, the Act granted ten square mile acres of public lands for every mile of track construction.<sup>16</sup>

Congress next faced changing national priorities during the turn of the nineteenth century, when natural resource conservation and preservation grew in importance. Congress responded to these changing priorities by shifting its laws from those that emphasized disposition of natural resources into private hands to laws that fostered natural resource conservation and preservation.<sup>17</sup> These new laws promoted the retention of significant lands as permanent federal "public lands" for economic development, conservation, and preservation. They included the General Revision Act of 1891 (Forests),<sup>18</sup> the Forest Management Act of 1897,<sup>19</sup> the Rivers and Harbors Act of 1899,<sup>20</sup> the Reclamation Act of 1902,<sup>21</sup> the Antiquities Act of 1906,<sup>22</sup> the National Park Service Organic Act of 1916,<sup>23</sup> the Migratory Bird Treaty Act of 1918,<sup>24</sup> the Federal Power Act of 1920,<sup>25</sup> the Mineral Leasing Act of 1920,<sup>26</sup> and the Migratory Bird Conservation Act of 1929.<sup>27</sup>

This policy shift from disposition to retention, conservation, and preservation did not come easily. It disrupted significant

14. Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392; *see also* THE LIBRARY OF CONGRESS CIVIL WAR DESK REFERENCE 677-78 (Margaret E. Wagner et al. eds., 2002).

15. Morrill Act of 1862, Pub. L. No. 37-108, 12 Stat. 503; *see also* THE LIBRARY OF CONGRESS, *supra* note 14, at 149.

16. Pacific Railroad Act of 1862, 12 Stat. 489; *see also* THE LIBRARY OF CONGRESS, *supra* note 14, at 149.

17. *See* COGGINS & GLICKSMAN, *supra* note 4, at §§ 2.10-2.15.

18. 26 Stat. 1095-1103 (1891) (repealed 1976).

19. 30 Stat. 34-36 (1897) (codified as amended at 16 U.S.C. § 473 (2012)).

20. 30 Stat. 1151 (1899).

21. 32 Stat. 388 (1902).

22. 34 Stat. 225 (1906).

23. 39 Stat. 535 (1916).

24. 40 Stat. 755 (1918).

25. 41 Stat. 1063 (1920).

26. 41 Stat. 437 (1920).

27. 45 Stat. 1222 (1929).

settled economic expectations, including those of powerful business interests who were enjoying the benefits of the prior, more generous, federal natural resource laws. The federal government's struggle to develop the right approach to petroleum found on public lands is emblematic of those challenges.

As technological advances rendered petroleum an increasingly important energy resource in the latter half of the nineteenth century, its status under natural resource disposition laws remained at first murky. Eventually, Congress made petroleum available under extremely generous terms, providing that petroleum resources, like other minerals on public lands, were "free and open to occupation, exploration, and purchase by citizens of the United States."<sup>28</sup> The associated costs were relatively minimal compared to the value of the mineral. As a result, a rush of private companies made claims and removed petroleum from federal lands at accelerating and sometimes wasteful amounts.<sup>29</sup>

This came to a head at the beginning of the twentieth century as the federal government began to perceive its own role as more significant, both domestically and on the world stage. In particular, in the early 1900s, the federal government discovered that it had to buy large amounts of costly petroleum for its growing fleet of navy vessels from private companies that had obtained their petroleum from the federal government's own lands at little or effectively no cost. As one government study described, the petroleum had been "practically given away."<sup>30</sup> President William Howard Taft sought to change the law so as to allow the government to retain its ownership in furtherance of national interests, including supporting its navy. To effectuate the change, however, the President needed Congress to act quickly; every day of delay meant the loss of more petroleum lands under the existing disposition laws. Indeed, the government study concluded that at current rates of withdrawals in California, "it would be impossible for the people of the United States to continue ownership of oil lands for more than a few months."<sup>31</sup>

In order to put a halt to the permanent loss of federally owned petroleum resources while waiting for Congress to act, President Taft issued a unilateral executive order "in aid of proposed

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28. An Act to Authorize the Entry and Patenting of Lands Containing Petroleum and Other Mineral Oils under the Placer-Mining Laws of the United States, approved Feb. 11, 1897, 29 Stat. at L. 526, chap. 216, Comp. Stat. 1913, § 4635; *see also* General Mining Law of 1872, 30 U.S.C. §§ 21–54 (1872).

29. *See* COGGINS & GLICKSMAN, *supra* note 4, at § 2.5.

30. *United States v. Midwest Oil Co.*, 236 U.S. 459, 467 (1915); *see also* UNITED STATES CONGRESS, LEASING OF OIL LANDS: HEARING BEFORE THE COMMITTEE ON PUBLIC LANDS (1916).

31. *Midwest Oil Co.*, 236 U.S. at 466 (1915).

legislation.”<sup>32</sup> The President ordered an immediate cessation of the withdrawal of petroleum lands from the public domain.<sup>33</sup> The President’s authority to take this action, however, was unclear. After all, existing federal statutory law permitted the very withdrawal that the President was now purporting, in effect, to enjoin. The President’s action for this reason could be characterized as flouting clear congressional intent, as expressed in a formally enacted and fully applicable federal statute. And the President’s reason—a strongly held, sincere belief that the existing law was having unanticipated, disastrous consequences—was, regardless of its strength on the policy merits, at the very least not an obvious one for circumventing the necessity of persuading Congress to enact a new and different statute.

In a major victory upholding the inherent power of the President, the United States Supreme Court upheld President Taft’s executive order in *United States v. Midwest Oil* in 1915.<sup>34</sup> The case was argued twice before the Court. The majority stressed that the power of Congress over the public domain is more than that of a “legislature”—that Congress also exercises the authority of a “proprietor”—and in that capacity Congress may grant the Executive Branch, as its agent, the authority to address emergencies that may occur in response to changing conditions.<sup>35</sup> The Court also relied on the fact that Congress appeared to have acquiesced in prior Presidential executive orders, removing some parts of the public domain from private withdrawal, although plainly none of those prior actions were of the same breadth and sweeping character as President Taft’s most recent action.<sup>36</sup> This historical precedent was critical to the case’s outcome, with the Court emphasizing that it need not say how it would have ruled on the question before the Court, had it been an “original question.”<sup>37</sup> *Midwest Oil* remains today one of the Supreme Court’s most significant endorsements of the power of the Chief Executive to act in response to national emergencies without clear congressional authority, and even in the presence of congressional intent to the contrary. This ruling is very much rooted in the inherent power of the federal government to address emergencies rooted in the management of the nation’s natural resources.

Modern environmental law today is plainly rooted in these early natural resources laws. It can also be fairly traced to the

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32. *Id.* at 467.

33. *Id.*

34. *Id.* at 459.

35. *Id.* at 474–507.

36. *Id.* at 469–70.

37. *Midwest Oil Co.*, 236 U.S. at 469 (1915).

urban justice and public health movements of the late nineteenth and early twentieth centuries. For example, Upton Sinclair's celebrated book, *The Jungle*, prompted the passage of the Pure Food and Drug Act of 1906,<sup>38</sup> and dust storms that devastated farmlands in the Midwest and brought harmful high concentrations of particulate pollutants to the eastern United States resulted in the passage of the Taylor Grazing Act of 1934.<sup>39</sup> In the 1940s, air pollution in Donora, Pennsylvania—compounded by a thermal inversion that prevented the polluted air from dissipating—killed twenty people and left thousands more seriously ill.<sup>40</sup> New York City had its own widely publicized episodes of smog, most notably in 1953, which resulted in two hundred deaths.<sup>41</sup> In response to these air pollution events, Congress enacted its first air pollution law in 1955.<sup>42</sup> Although the law did not assert a strong federal presence, it created the precedent for a federal role that was later more fully realized. These public health and pollution laws were clear precursors to the more modern pollution control laws enacted in the 1970s.

## II. CONGRESSIONAL ROLE IN ENVIRONMENTAL LAWMAKING DURING THE SECOND HALF OF THE TWENTIETH CENTURY

The 1970s were a remarkable decade for environmental law. The country experienced a statutory and institutional transformation that established the vast majority of the environmental and natural resources laws and environmental administrative agencies that we have today. The social and political activity in the sixties was a direct precursor to this legislative transformation. With the publication of *Silent Spring* in 1962, Rachel Carson spurred fears about environmental contamination due to nuclear fallout and pesticides.<sup>43</sup> Other subsequent publications and events furthered the distrust of technology, industry, and government, fueling fears of no less than the end of life on earth.<sup>44</sup> Satellite television brought striking

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38. ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* 104 (2005).

39. Lee Sharp, *Overview of the Taylor Grazing Act*, in UNITED STATES BUREAU OF LAND MANAGEMENT, *THE TAYLOR GRAZING ACT, 1934–1984: 50 YEARS OF PROGRESS* 9 (1984).

40. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 52 (2004).

41. *Id.*

42. Air Pollution Control Act of 1955, Pub. L. No. 84–159, 69 Stat. 322 (1955).

43. RACHEL CARSON, *THE SILENT SPRING* (1962); *see also* GOTTLIEB, *supra* note 38, at 125–27.

44. LAZARUS, *supra* note 40, at 58.

images, including the images of environmental catastrophes across the country, into people's living rooms. No longer did an event such as the Santa Barbara oil spill only occur in distant places—people could see the environmental disaster unfold in real time, whether wildlife buried in oil or an urban river seemingly on fire.<sup>45</sup> And it was the nation's most celebrated technological achievement of the 1960s that may have done the most to stimulate the emergence of modern environmental law. At the end of the 1960s, the United States put a man on the moon. As the first images of the planet Earth were broadcast, the planet seemed fragile and vulnerable, surrounded only by a thin protective atmosphere.<sup>46</sup>

In addition, environmentalism offered a message of hope and unity at a time when the nation seemed divided on the polarizing issues of war and race, and when the country was still reeling from the wake of repeated assassinations of highly respected and beloved political leaders. Environmentalism, with its positive, hopeful, and aspirational message about the future, offered an opportunity to bridge those divides and to bridge the emerging generation gap.<sup>47</sup>

Thus, by the end of the 1960s, public sentiment and national priorities were well in place for significant governmental action on the environment. The opportunity to tap into rising public sentiment was not overlooked by politicians, and certainly not by Richard Nixon, one of the consummate politicians of his generation. Thus, soon after his 1968 election, Nixon seized onto environmental issues.<sup>48</sup> Nixon perceived the advantages of associating himself with the environmental movement, primarily the advantage of outflanking then Senator Edmund Muskie, who was Chair of the Senate Subcommittee on Air and Water Pollution and the most likely Democratic candidate for President against Nixon's reelection.<sup>49</sup> Nixon sought, in effect, to deprive Muskie of the environmental issue by taking it on as his own.<sup>50</sup>

In 1970, Nixon did just that, and with historic results. President Nixon began the first day of the year by signing into law the National Environmental Policy Act, sometimes dubbed environmental law's *Magna Carta*.<sup>51</sup> In December of that same year, he created the Environmental Protection Agency (EPA).<sup>52</sup> He

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45. See *id.* at 59.

46. *Id.* at 57.

47. *Id.* at 60.

48. J. BROOKS FLIPPEN, *NIXON AND THE ENVIRONMENT* 50–79 (2000).

49. *Id.*

50. *Id.*

51. See *id.*; 42 U.S.C. §§ 4321–4370 (2012).

52. Reorganization Plan No. 3 of 1970, 3 Fed. Reg. § 15623 (1970) (codified as amended at 5 U.S.C. app. 1 (2012)).



closed the year by signing into law the federal Clean Air Act, an enormously ambitious pollution control law.<sup>53</sup>

These actions were the launching pad for a sweeping and ambitious series of laws that Congress enacted during the 1970s. The sheer listing of laws passed during the decade is stunning.<sup>54</sup>

1970	National Environmental Policy Act
1970	Clean Air Act
1972	Federal Water Pollution Control Act
1972	Federal Insecticide, Fungicide, and Rodenticide Act
1972	Noise Control Act
1972	Coastal Zone Management Act
1972	Marine Mammal Protection Act
1973	Endangered Species Act
1974	Safe Drinking Water Act
1974	Forest Rangeland Renewable Resources Planning Act
1975	Federal Coal Leasing Act Amendments
1976	Toxic Substances Control Act
1976	Resources Conservation and Recovery Act
1976	National Forest Management Act
1976	Federal Land Policy and Management Act
1976	Magnuson-Stevenson Fisheries Management Act
1977	Clean Air Act Amendments
1977	Clean Water Act Amendments
1977	Surface Mining Control and Reclamation Act
1978	Outer Continental Shelf Lands Act

These sweeping pollution control and natural resources laws enjoyed significant bipartisan support.<sup>55</sup> Congressional leaders such as Democratic Senator Ed Muskie<sup>56</sup> and Republican Senator Howard Baker<sup>57</sup> played prominent roles in securing their passage, as did leading congressional staffers for both the majority and minority parties (such as Leon Billings and Tom Jorling, respectively).<sup>58</sup>

The historical record, available now decades later in the National Archives, documents House and Senate negotiators ironing out the hard-fought compromises necessary for the passage of these laws.<sup>59</sup> Their negotiations were enormously creative and

53. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

54. Lazarus, *Congressional Descent*, *supra* note 1, at 625.

55. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (noting that the average vote in favor of federal environmental legislation during this decade was "seventy-six to five in the Senate and 331 to thirty in the House.").

56. See LAZARUS, *supra* note 40, at 84.

57. Philip Shabecoff, *Compromise on 'Superfund'*, N.Y. TIMES, Nov. 23, 1980, at D9.

58. See LAZARUS, *supra* note 40, at 84.

59. See, e.g., S. COMM. ON PUBLIC WORKS, 93D CONG., LEGIS. HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, (1973); S. COMM. ON PUBLIC WORKS, 93D CONG., LEGIS. HISTORY OF THE CLEAN AIR ACT AMENDMENT OF 1970, (1974).

constructive. The development of technology-based standards, the creation of citizen suits, and the selective role of cost-benefit analysis all displayed a shared willingness and good faith to ensure that laws addressing the nation's pressing air and water pollution problems could be achieved. Working tirelessly together, the House and Senate forged the compromises necessary to overcome obstacles that threatened legislative stalemate.<sup>60</sup> Indeed, when industry contacted conservative stalwart Arizona Senator Barry Goldwater, he effectively rebuffed their attempts to have him support an industry effort to block or otherwise weaken tough, new federal air pollution legislation. Senator Goldwater had been the champion of the conservative wing of the Republican Party in the mid-1960s, the same wing ultimately inherited more than a decade later by Ronald Reagan.<sup>61</sup> But, while forwarding industry concerns with the pending air pollution bill, Goldwater made his "position absolutely clear" that "I enthusiastically support our strong Senate version and would ask only that any impractical aspects that have come to light be examined closely."<sup>62</sup>

Although the bipartisan sweep promoting Congress's prominence in environmental lawmaking lasted for two decades, the seeds of its unraveling were planted almost as soon as it began. Immediately after the November 1970 mid-term elections, President Nixon began to second-guess the politics of environmentalism. The archival record of the Nixon Presidency, which famously includes recordings and notes of his meetings with his close advisors, reveal his growing doubts in stark, chronological fashion. In February 1971, in a telephone conversation with his chief of staff, Nixon opined that the environment is "not a good political issue" and "we're catering to the left in all of this."<sup>63</sup> By June of that same year, in White House meetings, Nixon told his staff they should be willing to take on environment: "it's not [a] sacred cow."<sup>64</sup> The President also elaborated on why it is not a good political issue: "our whole line is responsibility—hard to sell"; and he added, "ultimately it is freedom (from big government) that has political legs."<sup>65</sup> And by July, Nixon advised staffers to "reexamine all pollution bills in terms of current economic effect" and to "put

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60. See PAUL CHARLES MILAZZO, *UNLIKELY ENVIRONMENTALISTS: CONGRESS AND CLEAN WATER, 1945-1972* (2006).

61. See BRIAN ALLEN DRAKE, *LOVING NATURE, FEARING THE STATE: ENVIRONMENTALISM AND ANTIGOVERNMENT POLITICS BEFORE REAGAN* 5–6 (2013).

62. Letter from Senator Barry Goldwater to Senator Jennings Randolph (Nov. 23, 1970) (on file with author).

63. FLIPPEN, *supra* note 48, at 135.

64. Personal notes of H.R. Haldeman, Chief of Staff to the President, of meeting with President Nixon (June 27, 1971) (copy from National Archives on file with author).

65. *Id.*

brakes on when we can – w/o getting caught.”<sup>66</sup> Such “economics,” according to the President, were “more important than cutting Muskie.”<sup>67</sup>

Although Nixon clearly had his failings—he was, after all, our only President to have resigned—he knew his politics. Environmental protection is hard to sell, politically; freedom from government is far more palatable. Perhaps somewhat tragically, but no less accurately, President Nixon summarized this fundamental challenge facing environmental lawmaking and prophesized the political dynamic that would ultimately create the legislative stalemate we are facing today. Electoral politics is dominated by the short-term; environmental protection and natural resource conservation is ultimately about the longer term. Electoral politics and environmental protection exist on overlapping but nonetheless very different spatial and temporal dimensions.<sup>68</sup> Nixon understood this early on, decided that the positive political returns for embracing environmentalism were accordingly too elusive, and, within a year or so of aligning himself with the movement’s aspirations, retreated. This divide was further expressed during the Presidential campaign of 1980. Jimmy Carter ran on responsibility; Ronald Reagan ran on freedom from big government and targeted environmental protection law as exhibit A.<sup>69</sup> And, of course, Reagan won handedly. Reagan made freedom from government the dominant theme of his first Inaugural Address in 1981,<sup>70</sup> and cutting back on federal environmental laws became a signature effort of his first term.<sup>71</sup>

Congress, however, did not immediately follow suit. In fact, Congress’s environmental lawmaking continued unabated for still another decade, defying political odds. In December 1980, only a few weeks after Reagan had defeated Carter for the Presidency, Congress was not only a lame duck; it was arguably a dead duck.<sup>72</sup> Not only was the White House shifting to a Republican standard bearer in January, but the Senate had also switched parties too, with the Republicans taking over its leadership.<sup>73</sup> The December

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66. Personal notes of H.R. Haldeman, Chief of Staff to the President, of meeting with President Nixon (July 23, 1971) (copy from National Archives on file with author).

67. *Id.*

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

69. Douglas E. Kneeland, *A Summary of Reagan’s Positions on the Major Issues of this Year’s Campaign*, N.Y. TIMES, July 16, 1980, at A14.

70. President Ronald Reagan, Inaugural Address (Jan. 20, 1981).

71. LAZARUS, *supra* note 40, at 100.

72. *Id.* at 106–07.

73. *Id.*

Congress, therefore, should accordingly have been incapable of passing any significant new law because the Republican Party should have had every incentive, and ability, to defeat its passage.

Yet, against all odds, in December 1980 Congress passed one of the nation's toughest environmental protection laws and one of its most important natural resources laws: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>74</sup> and the Alaska National Interest Lands Conservation Act (ANILCA),<sup>75</sup> respectively. CERCLA imposed expansive, harsh retroactive liability on industry for releases of hazardous substances, which has played a significant role in changing industry behavior.<sup>76</sup> ANILCA added millions of acres to the most protective of federal regulatory regimes for resource conservation and preservation.<sup>77</sup> These stringent environmental protection laws were passed as a result of strong bipartisan support.<sup>78</sup> Republicans, including the rising Republican leadership in the Senate, joined Democrats to secure the votes necessary for passage.<sup>79</sup>

CERCLA and ANILCA were just the beginning of a decade of impressive environmental lawmaking by Congress. Throughout the 1980s, Congress enacted ever more ambitious laws, which were both more prescriptive and more detailed than their predecessors.<sup>80</sup> These laws, including the Hazardous and Solid Waste Act Amendments of 1984,<sup>81</sup> Safe Drinking Water Act Amendments of 1986,<sup>82</sup> Superfund Amendments and Reauthorization Act of 1986,<sup>83</sup> Water Quality Act of 1987,<sup>84</sup> and Medical Waste Tracking Act of 1988,<sup>85</sup> addressed issues such as water pollution, hazardous waste contamination, and drinking water. In the passage of these laws, Democrats and Republicans worked together, and there were no Presidential vetoes.

The environmental lawmaking juggernaut was so irresistible that, in 1988, George H.W. Bush ran for the Presidency claiming

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

75. Pub. L. No. 96-487, 94 Stat. 2374 (1980); *see also* Alaska National Interest Lands Conservation Act Remarks on Signing H.R. 39 into Law, 16 WEEKLY COMP. PRES. DOC., 2756-59 (Dec. 2, 1980).

76. Pub. L. No. 96-510, 94 Stat. 2767 (1980); *see also* Lazarus, *Congressional Descent*, *supra* note 1, at 626-28.

77. *See* Lazarus, *Congressional Descent*, *supra* note 1, at 626-27.

78. *Id.* at 626.

79. *Id.*

80. *See id.*

81. Pub. L. No. 98-616, 98 Stat. 3221 (1984).

82. Pub. L. No. 99-339, 100 Stat. 643 (1986).

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

84. Pub. L. No. 100-4, 101 Stat. 7-90 (1987).

85. Pub. L. No. 100-582, 102 Stat. 2951 (1988).

that he would be the first “Environmental President.”<sup>86</sup> During his campaign, he criticized his Democratic challenger, Massachusetts Governor Michael Dukakis, for the polluted state of Boston Harbor.<sup>87</sup> When Bush won the election, he initially followed through on his campaign promise.<sup>88</sup> He named William Reilly, an individual of enormously distinguished environmental credentials, as EPA Administrator.<sup>89</sup> The White House and Reilly worked hard to secure passage of the Clean Air Act Amendments of 1990, a far-reaching and demanding law.<sup>90</sup> Finally, in 1990, Congress also responded quickly to an environmental catastrophe, the 1989 *Exxon Valdez* oil spill. It quickly passed the Oil Pollution Act of 1990, legislation designed to minimize the risks of future accidents.<sup>91</sup> What was not and no doubt could not have been fairly anticipated at the time, was that 1990 marked Congress’s last hurrah for environmental lawmaking for at least another generation.

### III. CONGRESS’S ROLE – OR LACK THEREOF – SINCE 1990

The series of events leading up to 1990 demonstrated Congress doing what it should be doing—learning from experience, taking charge, and answering the tough policy questions underlying the establishment of environmental protection laws. Up until the 1990s, Congress had remained actively engaged with implementing environmental protection laws. However, the Clean Air Act Amendments of 1990 were Congress’s last significant successful environmental effort. Since 1990, Congress has not passed any meaningful new environmental statutes, nor has it amended any important legislation.

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86. See Richard J. Lazarus, *Environmental Law at the Crossroads: Looking Back 25, Looking Forward 25*, 2 MICH. J. ENVTL. & ADMIN. L. 267, 271 (2013); John Holusha, *Bush Pledges Efforts to Clean Up Air and Water*, N.Y. TIMES, Sept. 1, 1988, at B9; Mark Green, *How Dukakis Can Overcome Bush’s ‘Slur du Jour,’* N.Y. TIMES, Sept. 17, 1988, § 1, at 27.

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

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

89. *Id.*

90. See EPA, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, (2011). The number of pages in the *Statutes at Large*, by itself, tells the story: the original Clean Air Act of 1963 was 10 pages long, Pub. L. No. 88-206, 77 Stat. 392–401 (1963); the 1970 and 1977 amendments added 38 and 112 pages, respectively, Pub. L. No. 91-604, 84 Stat. 1676–1713 (1970); Pub. L. No. 95-95, 91 Stat. 685–796 (1977); and the 1990 amendments added 314 more, Pub. L. No. 101-549, 104 Stat. 2399–2712 (1990).

91. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

The executive branch has played a role in this logjam. By 1990, George Bush had learned the same lesson Nixon learned in 1970: there is no, or at least there is too little, political payoff for supporting environmental causes. For Nixon, the 1970 mid-term elections made that clear; for Bush, it was the 1990 mid-term elections.<sup>92</sup> Environmentalists did not support him, and the business base was highly critical of his environmental protection efforts, which were not sufficiently aligned with its short-term economic interests.<sup>93</sup> As a result, Bush changed course mid-Presidency. He asked his Vice President, Dan Quayle, to chair the Competitiveness Council, which he charged with reducing the economic impact of federal regulations, including environmental regulations, on business.<sup>94</sup>

The election of Bill Clinton as President in 1992 resulted in a role reversal of sorts. The executive branch became more environmentally friendly, especially with its environmentally-focused Vice President Al Gore and EPA Administrator Carol Browner, who had previously served as a Gore staffer on the Hill.<sup>95</sup> But, soon thereafter, Congress became more hostile to environmental protection laws. The Contract with America targeted environmental statutes and regulations, and in particular, EPA's operating budget, for regulatory reform and reduction.<sup>96</sup> The Republican legislative agenda sought to enhance protection of private property rights, promote cost-benefit analysis limitations on the setting of environmental protection standards, and cut EPA's budget drastically.<sup>97</sup> The legislative effort was similar to what the executive branch sought to do in the early 1980s during President Reagan's first term, but in the early 1990s, it was Congress leading the regulatory reform charge, and the executive branch resisting.

The confrontations of the mid-1990s confirmed and deepened the partisan divide that remains more than twenty years later. The seeds of that divide had been there since the early 1970s, but in the 1990s, they settled in, took deep root, and have barred any significant legislation ever since. Since the 1990s, Congress has not displayed meaningful lawmaking ability. It has not shaped

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92. LAZARUS, *supra* note 40, at 126-27.

93. *Id.*

94. *Id.* at 127.

95. See Editorial, *Bill Clinton's Pragmatists*, N.Y. TIMES, Dec. 12, 1992.

96. John H. Cushman Jr., *Congressional Republicans Take Aim at an Extensive List of Environmental Statutes*, N.Y. TIMES, Feb. 21, 1995, at A14.

97. *Id.*; see also John H. Cushman Jr., *House Approves a New Standard for Regulations*, N.Y. TIMES, Mar. 1, 1995, at A1; John H. Cushman Jr., *House Clears More Limits on Environmental Rules*, N.Y. TIMES, Mar. 3, 1995, at A19; Editorial, *The GOP's War on Nature*, N.Y. TIMES, May 31, 1995, at A20.

new statutes to address problems, responded to new priorities, or accounted for new understandings; nor has it amended existing statutory provisions in light of new information, intervening judicial rulings, or the experiences of state governments.<sup>98</sup>

For example, since the Endangered Species Act (ESA) was enacted in 1973, the relevant science has dramatically changed. We are far more aware now of the pitfalls of having the ESA's statutory requirements triggered only once a species becomes endangered and threatened, long after the most effective options for species restoration may be available. Although a statutory update is greatly needed, the ESA has gone largely unchanged for more than forty years.<sup>99</sup> The basic structure of the Clean Water Act, established in 1972, is older still. Its last significant amendment was in 1987, twenty-seven years ago. The Water Act's structure reflects a constitutional architecture regarding Congress's Commerce Clause authority long ago jettisoned. It uses statutory terms invented in 1899, invoking notions of navigability that weigh down the effectiveness of a modern water pollution control law.<sup>100</sup>

In the absence of new environmental legislation that encompasses the latest understandings about the environment, federal agencies are forced to work within the confines of old statutes to address pressing environmental problems. Unsurprisingly, the statutory language, drafted years ago, often does not fit with these new problems. Therefore, agencies must flirt with the border of law to do the best they can.<sup>101</sup>

The EPA's use of the Clean Air Act, the basic architecture of which was established in 1970, and which was last amended in 1990—to address cross-state air pollution and climate change, is a prominent example of these efforts. In the recent case *EPA v. EME Homer LLP*,<sup>102</sup> the Supreme Court examined EPA's efforts to implement the Clean Air Act's Good Neighbor provision, which

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98. See, e.g., Sanne H. Knudsen, *Remedying the Misuse of Nature*, 2012 UTAH L. REV. 141, 174-178 (describing how environmental laws have failed to adapt to evolving information concerning ecosystems and the need in particular "to manage ecosystems on a more holistic basis" (*id.* at 178)); Annecos Wiersema, *A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 ENVTL. L. 1239 (2008) ("traditional approaches to environmental law appear insufficiently responsive to science and further, insufficiently flexible even to develop responsiveness to science.").

99. See, e.g., Nancy Kubasek et al., *The Endangered Species Act: Time for a New Approach?*, 24 ENVTL. L. 329 (1994); J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367 (1998).

100. See, e.g., *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

101. For further discussion on this issue, see Jody Freeman & David B. Spence, *Old Statutes, New Problems*, PENN. L. REV. (forthcoming 2014), available at [http://www.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/file/RPP\\_2014\\_02\\_Freeman\\_Spence.pdf](http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/RPP_2014_02_Freeman_Spence.pdf).

102. *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

was designed to prevent sources of emissions in upwind states from preventing attainment or maintenance of national ambient air quality standards in downwind states.<sup>103</sup> EPA sought to take into account the cost effectiveness of emission reductions in determining the extent to which different sources in different states should have to reduce emissions.<sup>104</sup> The issue was whether the statutory language was sufficiently ambiguous to permit the agency to do so, or whether instead, as industry contended, EPA was required to allocate reductions based on a strictly proportional numerical approach.<sup>105</sup> Ultimately, the Court upheld EPA's rule in a hugely significant Supreme Court ruling. But the victory was far from easy or pre-ordained. *EME Homer* divided the Justices and required several rulemakings, appellate court losses, and years of litigation.

Climate change is perhaps the quintessential example of a new environmental problem that the Clean Air Act did not contemplate. In *Utility Air Regulatory Group v. EPA*,<sup>106</sup> the Supreme Court examined the validity of EPA's first significant rulemaking to address greenhouse gas emissions from major stationary sources.<sup>107</sup> The Court held that the Act does not permit EPA to require a source to obtain a Clean Air Act Prevention of Significant Deterioration or Title V permit based solely on greenhouse gas emissions.<sup>108</sup> However, the Court found that EPA could regulate greenhouse gases from major stationary sources that were already regulated under other provisions of the Act.<sup>109</sup> Although not a total win for the EPA, this holding grants the agency the power to regulate greenhouse gases from many major greenhouse gas emitters. However, as in *EME Homer*, this outcome was far from clear. The litigation surrounding this case illuminates how difficult it is—and will continue to be—for EPA to effectively address climate change using the existing language of the Clean Air Act. A new law is desperately needed in order to address today's most pressing environmental problem.

In 2009, it looked like Congress would pass just such a law.<sup>110</sup> For the first time since the science had become sufficiently settled

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103. *Id.*

104. *Id.* at 1596–97.

105. *Id.* at 1598.

106. *Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014).

107. *Id.*

108. *Id.* at 2454.

109. *Id.* at 2449.

110. See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1189–93 (2009) (explaining why the prospects of climate legislation in 2009 were good); Ryan Lizza, *As the World Burns: How the Senate and the White House Missed Their Best Chance to Deal with Climate*



to support the necessary legislative enactments, all of the lawmaking pieces seemed firmly in place. The President, the Secretary of Energy, and the EPA Administrator were all committed to the passage of climate legislation as a top Administration priority.<sup>111</sup> To achieve this priority, the President named former EPA Administrator Carol Browner to serve as the Administration's "quarterback," spearheading the effort to work with Congress on getting climate legislation passed.<sup>112</sup>

The table was no less well-set in Congress. Leaders of both chambers—Nancy Pelosi in the House and Harry Reid in the Senate—favored the passage of a climate bill.<sup>113</sup> The leaders of the relevant committees—Barbara Boxer at the Senate Committee on the Environment and Public Works and Henry Waxman at the House Commerce Committee—made the climate bill a, if not *the*, top priority.<sup>114</sup> Highlighting the importance of the effort, placing Waxman as head of the House Commerce Committee had required the removal of John Dingell of Michigan from that position—no small feat given Dingell's stature and formidable character—but important to climate legislation supporters because of concerns about Dingell's longtime allegiance to the auto industry.<sup>115</sup>

Despite this environment, nothing happened. A bill passed the House of Representatives in 2010<sup>116</sup> only as a result of late night machinations and strong-arming hardly suggestive of truly deliberative debate and discussion. But the Senate never voted on the bill at all.<sup>117</sup> And after climate legislation died, both congressional and executive branch leaders left little doubt that they viewed attempts to revive that legislative effort as futile, notwithstanding the increasingly alarming nature of the evidence

*Change*, THE NEW YORKER (Oct. 11, 2010), [http://www.newyorker.com/reporting/2010/10/11/101011fa\\_fact\\_lizza?currentPage=all](http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza?currentPage=all).

111. See Lazarus, *Super Wicked Problems*, *supra* note 110.

112. John M. Broder, *Title, but Unclear Power, for a New Climate Czar*, N.Y. TIMES, Dec. 12, 2008, at A28.

113. Darren Samuelsohn, *Top Democrats Plan Action on Climate Change Bill by End of Summer*, SCIENTIFIC AMERICAN, Feb. 20, 2009, <http://www.scientificamerican.com/article/democrats-plan-climate-bill/>.

114. *Id.*

115. John M. Broder, *Democrats Oust Longtime Leader of House Panel*, N.Y. TIMES, Nov. 20, 2008, at A1.

116. The American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

117. See Darren Samuelsohn, *Democrats Pull Plug on Climate Bill*, POLITICO, July 22, 2010, <http://www.politico.com/news/stories/0710/40109.html>. The political dynamic at the time is well depicted by a political campaign ad by Joe Manchin, a successful Democratic candidate for the U.S. Senate from West Virginia. In the ad, Manchin pulls out a rifle, shoots, and hits a bulls-eye at a target with a copy of the climate bill – not a subtle message, and from a Democratic candidate to boot. John Collins Rudolf, *Taking Aim, Literally, at a Dead Climate Bill*, N.Y. TIMES, Oct. 11, 2010, <http://green.blogs.nytimes.co/2010/10/11/taking-aim-literally-at-a-dead-climate-bill>.

of the harm to public health and welfare already being caused by climate change.

Why was there no action on climate change? As I have written elsewhere (albeit at a more optimistic time about the prospects of legislation), the temporal and spatial dimensions of the climate change defy politics.<sup>118</sup> Climate change issues spread cause and effect over time and space; this is inconsistent with the incentives of lawmakers in general and politicians in particular. To address the risks of climate change requires regulation of people and activities in the immediate term for the benefit of people and activities that are far removed. This is a common challenge facing environmental law, but it is particularly true of climate change. Climate change distributes the costs and benefits of mitigation across centuries and around the globe. No lawmaking institution has such a temporal or spatial reach.

While the absence of new legislation to address climate change is undoubtedly the most troubling and serious consequence of the current Congressional logjam, Congress's inaction is not limited to climate issues; it extends to other environmental issues as well. It used to be a central tenet of environmental law that it took a catastrophe to get Congress to pass a law. In the late 1960s, the Santa Barbara oil spill led to congressional action.<sup>119</sup> In the 1970s, Three Mile Island inspired the passage of statutes reorganizing federal oversight of the nuclear power industry;<sup>120</sup> and in the 1980s, the *Exxon Valdez* spill led to laws that regulated activities that risked the spillage of massive amounts of petroleum.<sup>121</sup> But after the 1990s, not even an environmental catastrophe could overcome congressional stalemate.

The best example of this occurred after the 2010 *Deepwater Horizon* oil spill. In the 1990s, deep-water drilling had increased substantially, and the nation was enjoying billions of dollars of increased revenue from the exploration, development, and production in increasingly deeper waters in the Gulf of Mexico.<sup>122</sup> The economic advantages were enormous, but so too were the associated risks.<sup>123</sup> Congress, however, made no meaningful effort to address those increasing risks.<sup>124</sup> It did not update legislation;

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118. Lazarus, *Super Wicked Problems*, *supra* note 110.

119. LAZARUS, *supra* note 40, at 59.

120. J. SAMUEL WALKER, *THREE MILE ISLAND: A NUCLEAR CRISIS IN HISTORICAL PERSPECTIVE* 209 (2004).

121. *See supra* note 91 and accompanying text.

122. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* 72 (2011).

123. *Id.* at 68–72.

124. *Id.* at 72–85.

nor did it increase agency budgets to allow the agencies to do more in response to the increased industry activity.<sup>125</sup> The dereliction of responsibility was bipartisan in nature. And, as the risks increased absent effective governmental oversight, the question was not so much whether an accident would occur, but when. The answer to the question was April 20, 2010, with the blowout of the Macondo Well, hundreds of miles off the U.S. coast in the Gulf of Mexico.<sup>126</sup> The blowout led to the ensuing explosion and destruction of the *Deepwater Horizon* oil rig, the immediate loss of eleven lives on the rig, and the release of millions of gallons of oil over eighty-seven days in the Gulf.<sup>127</sup>

However, the *Deepwater Horizon* explosion and subsequent oil spill generated no new legislation designed to overhaul regulatory oversight to minimize the risks of deep-water drilling in the future.<sup>128</sup> Such oversight, moreover, is low-hanging fruit. Unlike climate change, there is no foreboding temporal or spatial divide between the costs and benefits of the activity to be regulated and the risks to be realized. They are largely commensurate. Effective regulation can make virtually everyone a winner. Yet, again, Congress did nothing.

#### IV. CONCLUSION

That is why we find ourselves where we are today: environmental law *without* Congress. It is not tenable; it is not sustainable; and it is unsettlingly reminiscent of what William Ophuls wrote in his 1977 book *Ecology and the Politics of Scarcity*, when he questioned whether democracy could effectively address complex environmental problems.<sup>129</sup> Ophuls noted that environmental problems contain a potentially tragic combination of scientific uncertainty and distributional implications;<sup>130</sup> we face the same problems today, perhaps even more so, with the advent of climate change as a major environmental problem.

This is why the conference at Florida State and the papers it produced are so timely. The executive branch and individual states, although they have operated creatively to address climate change, can only do so much unilaterally. Without Congress, the President is limited to existing statutory authorities and the

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125. *Id.*

126. *Id.* at 1–19.

127. *Id.* at 1–19, 165.

128. Thomas O. McGarity & Rena I. Steinzor, *The End Game of Deregulation: Myopic Risk Management and the Next Catastrophe*, 23 DUKE ENVTL. L. & POL'Y F. 93, 97 (2012).

129. WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY* (1977).

130. *Id.*

bounds of his constitutional authority. States have their own limits, including those presented by the Dormant Commerce Clause, which limits the ability of states to address issues for which the root causes lie outside states' borders.<sup>131</sup>

The pathway to restoring the proper role of Congress is unsettlingly elusive. In order to effectively and comprehensively address climate change, we need to find ways to realign lawmaking incentives to break through the current impasse. Nature spreads incentives over time and space to an extent far outside the reach of the short-term myopia of politicians and lawmakers. Because we cannot change nature, our only available recourse is to redesign our lawmaking processes and institutions to change political and economic incentives as necessary to promote environmental and climate change lawmaking. The nation must restore Congress to its proper role as the first branch for environmental lawmaking.

Such institutional redesign will not be easy, both from a theoretical and practical standpoint. Those challenges, however, only make more, not less, important and timely the topic of this conference and its series of papers. It is hard to imagine a more pressing assignment for those of us who teach, practice, and study environmental law, and care deeply about the environment and human welfare, than to restore Congress's place in addressing one of the most demanding issues of our time.

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131. See, e.g., Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 18 URB. LAW. 567 (1986).