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Judging Environmental Law

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ESSAY

Judging Environmental Law

Richard J. Lazarus*

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The title of this Essay, "Judging Environmental Law," evokes several different themes. On the one hand, the title presents an occasion to discuss the role of judges in environmental law. On the other hand, it offers an opportunity to judge environmental law itself: whether environmental law is guilty, as charged by some in industry, of overreaching in its regulatory requirements; or, whether environmental law is instead guilty, as charged by some environmentalists, of underreaching, by failing to address pressing pollution control and natural resource management concerns. Finally, the title of the Essay possibly presents an occasion for a more theoretical inquiry: to consider the nature of environmental law itself. What, if anything, makes environmental law unique? Is environmental law just an incidental context for resolving legal disputes in which environmental quality and pollution control are at stake? Or is there something more unique about the nature of laws arising out of such disputes that warrants a distinct label?

My objective is to tie together these three seemingly disparate themes. My thesis is that environmental law is one of the law's great success stories of the twentieth century. A major reason for its success,

* Professor of Law, Georgetown University Law Center. This Essay is based on the Ninth Annual Dermot S. McGlinchey Lecture on Federal Litigation that I presented at Tulane University Law School on March 8, 2004. Thanks are owed to Tulane Law School for inviting me to deliver the lecture and to the law firm of McGlinchey Stafford PLLC for its support of the lecture series. I also benefited from outstanding research assistance from Ramya Sivasubramanian, Georgetown University Law Center Class of 2005, and from J.R. Drabick, Georgetown University Law Center Class of 2006.

moreover, has been the role of the judiciary. Yet, critical to the role of the judiciary has been judicial apprehension of the particular demands of environmental law: how and why it is unique and important. For that same reason, however, I am concerned about the future of environmental law. I am not as persuaded that judges today possess the necessary appreciation of the nature of environmental law. Indeed, judges today are more likely to harbor heightened skepticism toward, rather than solicitude for, environmental law.

I. LOUIS FENNER CLAIBORNE AND THE ART OF MENTORING

With regard to the first topic, the role of judges in environmental law, I would like to begin with what might seem like an aside, but which is most certainly not: the importance of mentoring. I have enjoyed a remarkably interesting career so far. Much of it has resulted, as is often the case, from the happenstance that I began my undergraduate studies and my professional career simultaneous with the emergence of modern environmental law in the United States. I was, accordingly, able to study modern environmental law in its earliest moments both in college and in law school during the 1970s. Upon graduation from law school in 1979, I had the opportunity to participate in environmental law's formative years, whether working on a Supreme Court case or teaching what I hope will be the next generation's leaders in environmental law.

But I am also well aware that my own career has benefited from my early work with an extraordinary mentor: Louis Fenner Claiborne. Louis Claiborne was a 1953 graduate of Tulane University Law School.¹ Because Louis Claiborne graduated from Tulane more than fifty years ago, I do not expect that anyone on the current faculty recalls Claiborne as a student. But, I would be surprised if the name "Claiborne" did not ring more than a few bells here in New Orleans.

Louis Claiborne came from a remarkable Louisiana family. His ancestor, William C.C. Claiborne, served as the first American governor of Louisiana.² Claiborne Parish is named after William C.C. Claiborne.³ Louis Claiborne's cousin, Craig Claiborne, was the famed chef.⁴ Another cousin, Lindy Claiborne Boggs, served as the American Ambassador to the Vatican and is the mother of celebrated news reporter, Cokie

1. Richard Pearson, *Louis Claiborne Dies: Was Scholarly Deputy Solicitor General*, WASH. POST, Oct. 13, 1999, at B6.

2. LINCOLN CAPLAN, *THE TENTH JUSTICE—THE SOLICITOR GENERAL AND THE RULE OF LAW* 160 (1987).

3. *Id.*

4. E-mail from John Briscoe to Richard J. Lazarus (June 23, 2004) (on file with author).

Roberts.⁵ Louis Claiborne's sister, however, is no doubt the most famous of the modern Claiborne clan: Liz Claiborne, one of the most well-known names worldwide in fashion design.⁶

But for those of us who practice environmental law before the United States Supreme Court, there is only one famous Claiborne, and that is Louis. Louis Claiborne was one of the single most important lawyers in environmental law's formative years in the Court. He was without peer in his eloquence. He was widely celebrated for his use of language, both written and spoken. He was famous for his turns of phrases and for his truly extraordinary literary allusions.⁷ He served for many years as Deputy Solicitor General, and his jurisdiction extended to the environmental law cases before the Court. Between 1962 and 1985, he handled hundreds of cases and presented oral argument in seventy cases.⁸

Reinforcing the Louisiana theme, Louis Claiborne's own mentor was Judge Skelly Wright. Claiborne served as Judge Wright's senior law clerk from 1960 to 1962.⁹ Claiborne's path to Judge Wright's chambers is itself vintage Claiborne. Not long after graduating from Tulane, Claiborne worked in a small law firm and had the opportunity to argue at a very young age a case before the United States Supreme Court. It was a federal court abstention case, *Louisiana Power & Light Co. v. City of Thibodaux*.¹⁰ Although his position did not prevail before the Court on the merits, Claiborne so impressed Justice Frankfurter that Frankfurter soon afterwards encountered his good friend United States District Judge Skelly Wright of New Orleans and asked Wright about Claiborne. When Judge Wright responded that he was not familiar with a Louis Claiborne, Justice Frankfurter reportedly responded that Wright should know of any lawyer in New Orleans as talented as Claiborne.¹¹ Wright ultimately responded by hiring Claiborne as his law clerk. Upon completion of his clerkship, Judge Wright and Justice Frankfurter in turn contacted then Solicitor General Archibald Cox to press him to hire Claiborne as an attorney in the Solicitor General's Office.¹² Despite apparent concerns

5. Dayna Harpster, *Claiborne Rendezvous; Governor's Relatives Gather to Discuss History and a Mystery*, TIMES-PICAYUNE (New Orleans), Oct. 3, 1999, at E1.

6. CAPLAN, *supra* note 2, at 161.

7. See John Briscoe, *A Life of Law and Letters: Louis F. Claiborne, 1927-1999*, 23 SUP. CT. HIST. Q. (Supreme Court Historical Soc'y, Washington, D.C.) 3, at 8-14 (2002).

8. *Id.* at 9.

9. Pearson, *supra* note 1, at B6.

10. 360 U.S. 25 (1959).

11. See CAPLAN, *supra* note 2, at 157.

12. *Id.* at 158.

about hiring a graduate of a law school other than Harvard, where Cox had taught, Cox acquiesced.¹³ Claiborne started in the office as an assistant to the Solicitor General, was promoted to the Deputy Solicitor General position, and represented the United States in the Supreme Court in many of the most famous environmental and Indian law cases of the 1970s and early 1980s.¹⁴

II. JUDGE SKELLY WRIGHT AND THE NATURE OF ENVIRONMENTAL LAW

Even more than his law clerk, Louis Claiborne, Judge Skelly Wright is a historic figure because of the role he played in the development of federal environmental law. To be sure, Judge Wright was most famous early on for his civil rights rulings as a federal district court judge in New Orleans.¹⁵ Actually, “infamous” might be a more fitting label. Judge Wright issued demanding desegregation orders in 1960. His law clerk? Louis Claiborne.¹⁶ Judge Wright’s orders made Wright a hero to some, but not to all. At least one cross was burned on his lawn and he received multiple death threats. President John F. Kennedy appointed Judge Wright to the United States Court of Appeals for the District of Columbia Circuit in 1962.¹⁷ An appointment to the United States Court of Appeals for the Fifth Circuit, much closer to home, was not feasible. There was too much political opposition, meaning that Wright would have to leave the South in order to be elevated to a federal court of appeals.¹⁸

Louisiana’s loss, however, was the nation’s gain. Judge Wright continued to issue important civil rights rulings from the D.C. Circuit. His dissent from the *Pentagon Papers* case became the majority in the Supreme Court.¹⁹ But one of his greatest contributions proved to be his promotion of environmental law.

13. *Id.* at 158-59.

14. *See id.* at 155, 160, 162-69; *see also* *Summa Corp. v. Cal. ex rel. State Lands Comm’n*, 466 U.S. 198 (1984) (arguing for the United States as amicus curiae where the Supreme Court held that California could not assert public trust easement over property where the easement was not referenced in federal patent proceedings that confirmed the owner’s interest).

15. CAPLAN, *supra* note 2, at 157.

16. Letter from Joseph B. Stahl, Attorney-at-Law, to Richard J. Lazarus, In re: Remembrance of Louis Fenner Claiborne (Apr. 24, 2000) (on file with author) (“[I]t was common knowledge that Louis was the ghostwriter of several of [Judge Wright’s] most controversial opinions that had Ku Klux Klansmen leaving burning crosses on the Judge’s lawn. . .”).

17. Bill Monroe, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 361, 372 (1988).

18. *See id.*

19. *See* *United States v. Wash. Post Co.*, 446 F.2d 1322, 1325 (D.C. Cir.) (per curiam) (Wright, C.J., dissenting), *amended by* 446 F.2d 1327 (D.C. Cir.), *aff’d*, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

Indeed, if one were to write a *Who's Who* of environmental law judges of the twentieth century, one would undoubtedly see Judge Wright's name as one of the top judges on everyone's list.²⁰ Although modern environmental law is now more than thirty years old, there have likely been no more famous words written by a judge about environmental law than those penned by Judge Wright at the very beginning. It is fair to equate Judge Wright's early writing as one of the transformative moments in the legal revolution expressed by this nation's environmental law. As described by one law professor, Judge Wright's "phrasing launched more ships than Helen of Troy."²¹

Here is what Judge Wright wrote in *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission* in 1971,²² involving a challenge based on the then-recently enacted National Environmental Policy Act of 1969²³ (NEPA) to the Atomic Energy Commission's regulations for the consideration of environmental factors. These are words etched deeply in the mind of every law professor who has taught environmental law for three decades and words that have been read by the literally thousands of law students who have studied environmental law:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress." But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.²⁴

This is an extraordinary statement by a judge. One would likely never see a judge use this kind of language in a court opinion today.

For those who know Judge Wright's judicial opinions, moreover, this is a particularly striking declaration. Judge Wright was not at all famous for promoting heightened judicial scrutiny of agency action.

20. See William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: "The Whats,"* 2000 U. ILL. L. REV. 1, 14.

21. *Id.* (quoting e-mail from Zygmunt Plater, Professor, Boston College Law School, to William H. Rodgers, Jr., Professor, University of Washington School of Law (Feb. 2, 1998) (on file with the *University of Illinois Law Review*)).

22. 449 F.2d 1109 (D.C. Cir. 1971).

23. 42 U.S.C. §§ 4321-4370(f) (2000).

24. 449 F.2d at 1111.

Quite the opposite. He was well known for advocating judicial deference to agency decisionmaking.²⁵

There are only two areas of law in which Wright departed from his general policy of judicial deference: civil rights law and environmental law. The answer to the riddle presented by his departure from practice in these two areas is that Wright understood the nature of environmental law. He appreciated what makes environmental law, like civil rights law, particularly in need of heightened judicial scrutiny to safeguard the interests of those less politically powerful (whether racial minorities or unborn future generations).

What was Judge Wright's central insight about the nature of environmental lawmaking? Wright intuitively understood the inherent, structural reasons why environmental law is hard to make, maintain, and enforce over time. That basic intuition is what prompted him to insist on such a substantial, engaged, and active judicial role.

The primary source of these difficulties is an inherent mismatch between two things: (1) features of the natural environment that are the subject of environmental law and (2) competing features of the U.S. law-making institutions. Even more specifically, there are dominant characteristics of the problems presented by ecological cause and effect in the natural environment that generate the need for laws with features that are systematically difficult for the nation's law-making institutions to make and implement and that generate sustained legal and political opposition. It is because of this mismatch that environmental law can be exceedingly hard to make in the first instance, to maintain, and to enforce over time.²⁶

For example, the nature of ecological cause and effect is such that it spreads cause and effect out over large spatial dimensions. Activities in one part of the country can affect environmental quality in locations tens, if not hundreds or thousands, of miles away. In the natural environment, cause and effect are also spread out over long periods of time. Actions taken today can have environmental impacts that last for centuries and, in some instances, do not even have any perceptible impact for decades. The upshot is both tremendous scientific uncertainty in cause and effect and an inherent lack of equivalency between who pays the costs of

25. ARTHUR SELWYN MILLER, A "CAPACITY FOR OUTRAGE" 89-90 (1984).

26. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 5-42 (2004), for a lengthier, more complete discussion of the challenges of environmental lawmaking as they relate to the physical characteristics of ecological cause and effect and the structure and deliberate biases of U.S. law-making institutions.

environmental protection and who enjoys the benefits of that protection.²⁷ Environmental legal rules invariably regulate activities at one location and/or at one time in order to avoid harms or confer benefits on persons or environmental amenities at another place or time.

It is a challenge for any legal regime to impose significant costs on the here and now for the benefit of the there and then. But there are particular features of this nation's law-making system that make meeting that challenge especially difficult. These features include the way in which we deliberately, by constitutional design, fragment law-making authority both horizontally and vertically. Horizontal fragmentation occurs both between and within branches of government. Within Congress, authority over environmental law issues is split among hundreds of committees and subcommittees. There are also the authorization and appropriations sides of congressional lawmaking, with very different perspectives and some different procedures. Vertical fragmentation of law-making authority is reflective of the Constitution's commitment to principles of federalism, emphasizing the limited powers of the federal government and the general authority of the states. The federal government lacks general police power, with the Constitution instead limiting its authority to discrete areas such as interstate and foreign commerce, spending, and property. But the Constitution's emphasis on federalism and decentralized authority, while reflective of important principles upon which the nation was founded, does present problems for environmental lawmaking. It lies in tension with the physical nature of the problem, which does not so neatly follow state borders and which naturally pits downstream and downwind states and localities against upstream and upwind states and localities.²⁸

Our nation also, importantly, includes constitutional provisions, such as Article III, which limit the jurisdiction of federal courts, and the Bill of Rights, which is designed to limit governmental intrusions on the individual.²⁹ The Constitution reflects a natural and often healthy skepticism of government and the potential for governmental overreaching, especially as it might adversely affect private property rights. Environmental laws, however, naturally challenge these limitations. Environmental protection requirements inherently limit the exercise of absolutist notions of private property rights in natural resources, as necessary to respond to enhanced perceptions of the spatial and temporal spillover effects caused by natural resource development

27. *See id.* at 16-28.

28. *See id.* at 29-42.

29. U.S. CONST. art. III; *id.* amends. I-X.

and physical exploitation. Environmental values similarly invite judicial intervention on behalf of plaintiffs who, because of the sometimes distant spatial and temporal nature of ecological effect, cannot allege the kind of “imminent” and “concrete” injury normally necessary to establish Article III standing to sue in federal court.³⁰

Judge Wright’s insight in *Calvert Cliffs* is that he understood both these kinds of challenges and the corresponding responsibilities that arose for the federal judiciary. He intuitively appreciated the necessity for a “flood” of litigation.³¹ He understood why such a flood in this context was not a negative occurrence, as typically presumed in legal rhetoric seeking to avoid the “floodgates of litigation.”³² The flood about which Wright wrote was a necessary part of a positive legal transformation of the nation’s laws. Hence, a “flood” became for Wright a “promise” and not a threat.³³

Judge Wright’s *Calvert Cliffs* quotation also reflects the fundamental reasons why citizen suits and an active, vigilant judiciary are necessary for environmental law.³⁴ He recognized that it is hard for Congress to enact environmental laws, which is why it occurred only at “long last.”³⁵ He further understood that the difficulties associated with the creation of environmental law in the first instance do not disappear simply upon their statutory enactment. Environmental laws are radical and unsettling in their import. They question traditional notions of “material” progress.³⁶ They disrupt settled economic expectations and are riddled with political controversy. Further vigilance, including by the judiciary, is therefore necessary, as Judge Wright stresses in *Calvert Cliffs*, for the “promise” of the statutes to “become[] reality.”³⁷ Wright understood the political and economic pressures that would naturally be brought to bear on laws that sought to impose high costs on some for the benefit of others and how easy it is for such laws and policies to be “lost or misdirected in the vast hallways of the federal bureaucracy.”³⁸ It was to guard against just that possibility of bureaucratic diversion that Judge

30. See Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703, 749-52 (2000).

31. See *Calvert Cliffs’ Coordinating Comm. v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

32. See *id.*

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

38. See *id.*

Wright defined the “judicial role.”³⁹ “Therein lies the judicial role,” he proclaimed.⁴⁰ “Our duty,” he declared.⁴¹

Judge Wright, moreover, practiced what he preached. *Calvert Cliffs* transformed NEPA into the Magna Carta of modern environmental law. His jurisprudence helped spur the creation of a then-unprecedented citizen suit program enforcing NEPA. Judge Wright’s decisions also prompted a major transformation within the vast hallways of the federal government. NEPA changed the nature of those who worked for the federal government. As environmental factors became relevant to federal agency decisionmaking, those same agencies frequently needed to hire in-house experts. NEPA empowered environmental-mission-oriented offices within the federal government such as the Fish and Wildlife Service, the Environmental Protection Agency (EPA), and the Council on Environmental Quality, among others, all of which are regularly consulted as part of the NEPA planning process.⁴²

Judge Wright’s significant environmental opinions extend far beyond *Calvert Cliffs*. He authored the court’s opinion in *Students Challenging Regulatory Agency Procedures v. United States* in 1972.⁴³ In that case, the federal court (a three-judge panel) upheld citizen standing for environmentalists to challenge Interstate Commerce Commission (ICC) rates based upon their possible impact on recycling.⁴⁴ The court rejected a motion to dismiss the complaint based on the government’s contention that the chain of causation between the ICC rates and the amount of recycling was too attenuated and the plaintiffs therefore could demonstrate only a generalized interest.⁴⁵ The court no doubt recognized that such attenuated chains of causation are often the grist of the environmental mill because of the nature of ecological cause and effect, particularly its spreading out of cause and effect over great spatial and temporal dimensions. The court thereby both recognized the importance of citizen suit oversight in environmental law and substantially facilitated it. The Supreme Court subsequently upheld Judge Wright’s standing ruling in a decision widely considered the high

39. *See id.*

40. *Id.*

41. *Id.*

42. *See* NEPA § 102, 42 U.S.C. § 4332 (2000) (“Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”); NEPA § 204, 42 U.S.C. § 4344 (describing duties and functions of the Council on Environmental Quality).

43. 346 F. Supp. 189 (D.D.C. 1972), *rev’d on other grounds*, 412 U.S. 669 (1973).

44. *Id.* at 195-96.

45. *Id.*

water mark of environmental citizen suit standing.⁴⁶ And, as revealed by the papers recently released by Justice Blackmun, including his conference notes in the case, the Justices expressly acknowledged Judge Wright's role. Blackmun's notes indicate that the Chief Justice, Warren Burger, who apparently was no fan of Judge Wright, blamed the lower court outcome on Wright's having done a "snow job" on United States District Judge Thomas A. Flannery, who was then a new judge sitting on the panel in what Burger described as Flannery's "1st case."⁴⁷

In *Wilderness Society v. Morton*, Judge Wright in 1973 authored a D.C. Circuit opinion that imposed obstacles that temporarily impeded the construction of the Alaska Pipeline.⁴⁸ The court strictly applied congressionally determined limited rights of ways.⁴⁹ Although the pipeline was ultimately built, following congressional passage of further legislation, the early litigation transformed pipeline planning. Planning, as delayed, became far more deliberate and careful. As industry representatives later acknowledged, if the early plans had been followed, it might well have been an economic and environmental disaster.⁵⁰

Finally, Judge Wright also wrote the D.C. Circuit's 1976 opinion in *Ethyl Corp. v. EPA*,⁵¹ which, thirty years later, is still widely read and discussed.⁵² In that case, the court upheld the EPA's decision under the Clean Air Act (CAA) to regulate lead as an additive to gasoline.⁵³ Here, again, the court's opinion reflects a fundamental awareness of the nature of environmental law. The opinion describes the enormous scientific uncertainty surrounding cause and effect and explains that "[q]uestions involving the environment are particularly prone to uncertainty."⁵⁴ And, rather than perceive such uncertainty as a bar to regulatory lawmaking,

46. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 683-90 (1973).

47. The Honorable Harry Blackmun, Official Papers, U.S. Library of Conferences, Box # 168, Case No. 72-553, Conference Notes' (1973). Blackmun's handwritten notes of the comments made by each justice provide under Chief Justice Burger: "S Wright did a sno job—Flannery's 1st case." *Id.*

48. 479 F.2d 842 (D.C. Cir. 1973).

49. *See id.* at 875-84.

50. RUSSELL E. TRAIN, *POLITICS, POLLUTION, AND PANDAS—AN ENVIRONMENTAL MEMOIR* 63 (2003) ("And Thornton Bradshaw, president and chief operating officer of ARCO at the time, told me privately after the pipeline was in operation that, had it been built according to the original specifications, the result would have been a disaster environmentally and economically.").

51. 541 F.2d 1 (D.C. Cir. 1976).

52. *See, e.g.*, ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 340, 346, 353-61, 363-64, 558 (4th ed. 2003); ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 268-69, 744, 825 (3d ed. 2004).

53. *Ethyl Corp.*, 541 F.2d at 55.

54. *Id.*

the court concludes that Congress endorsed EPA's effective invocation of a precautionary principle in its rulemaking.⁵⁵

In short, Congress placed the ambitious environmental statutes on the books in the 1970s, but it was the judiciary, led by judges like Judge Skelly Wright, who made it actually happen. They invited and spurred the filing of environmental citizen suits. They compelled those agencies to adhere to the strict terms of the statutes, overcoming bureaucratic friction or, alternatively, allowing the career employees to overcome the resistance of political employees.

The upshot? Any fair judgment of environmental law's record during the past several decades would have to rate it as one of the nation's great success stories of the second half of the twentieth century. The judiciary accomplished a revolutionary change in the nation's laws. In pollution control, we witnessed passage of comprehensive laws such as the CAA,⁵⁶ the Clean Water Act (CWA),⁵⁷ the Resource Conservation and Recovery Act (RCRA),⁵⁸ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁵⁹ In the area of natural resources law, Congress enacted ambitious laws such as the Surface Mining Control and Reclamation Act,⁶⁰ the Alaska National Interest Lands & Conservation Act,⁶¹ the Federal Land Policy & Management Act,⁶² the Endangered Species Act (ESA),⁶³ the Outer Continental Shelf Lands Act,⁶⁴ and, of course, NEPA.⁶⁵

The doomsayers at the time predicted that the nation's economy would grind to a halt under the weight of these new, demanding pollution control and natural resource management laws. Commentators repeatedly predicted that the nation would soon abandon its environmental aspirations once their actual costs became apparent.⁶⁶

What happened? The nation's economy grew between 1970 and 2000 faster than ever. There were tremendous increases in economic growth. But, so, too, were there significant advances achieved in environmental protection. There were dramatic decreases in many

55. *See id.* at 13, 24-28.

56. 42 U.S.C. §§ 7401-7671q (2000).

57. 33 U.S.C. §§ 1251-1387 (2000).

58. 42 U.S.C. §§ 6901-6992k.

59. *Id.* §§ 9601-9675.

60. 30 U.S.C. §§ 1201-1328 (2000).

61. 16 U.S.C. §§ 3101-3233 (2000).

62. 43 U.S.C. §§ 1701-1785 (2000).

63. 16 U.S.C. §§ 1531-1544.

64. 43 U.S.C. §§ 1801-1866.

65. 42 U.S.C. §§ 4321-4307f (2000).

66. LAZARUS, *supra* note 26, at 251-52.

pollutants. There was cleaner air in many places. Emissions of the six principal pollutants regulated by the CAA went down by forty-eight percent.⁶⁷ In 1970, only one-third of the nation's waters were safe for fishing and swimming. Now, over two-thirds of the waters are reportedly safe.⁶⁸ The country has enjoyed some reversals of environmentally destructive trends in some areas while, in other areas of environmental quality, we have at least held even notwithstanding huge increases in economic growth and resource exploitation. The costs of such environmental controls, moreover, have almost always been substantially lower than predicted by industry in opposing adoption of the laws in the first instance. The true proponents of exaggerated rhetoric have seemingly far more often been those in industry rather than environmentalists.⁶⁹

Are there significant gaps and looming problems? Absolutely. Approximately one hundred forty-six million Americans live in places where national ambient air quality standards are exceeded.⁷⁰ We have largely failed to impose effective controls on nonpoint sources of pollution, especially of water pollution, which threaten to overwhelm the environmental progress achieved by controls imposed on point source industrial dischargers of pollution into the nation's waters.⁷¹

There is also increasing reason to believe that there have been environmental injustices in the resulting distribution of the costs and benefits of environmental protection, including in the reduction of risks achieved by those laws and the redistribution of residual risks they create. Not all communities nationwide are necessarily better off because of environmental laws. Poor communities and communities of color can receive the economic brunt of environmental protection laws without any corresponding enjoyment of the benefits. Indeed, some communities may in fact be worse off because of increased environmental risks

67. See William F. Pedersen, *Using Federal Environmental Regulations to Bargain for Private Land Use Control*, 21 YALE J. ON REG. 1, 24 n.81 (2004) (citing EPA, 454/K-03-001, LATEST FINDINGS ON NATIONAL AIR QUALITY: 2002 STATUS AND TRENDS 1-2 (Aug. 2003), available at <http://www.epa.gov/airtrends/reports.html> [hereinafter LATEST FINDINGS]).

68. See Jonathan Rauch, *America Celebrates Earth Day 1970—For the 31st Time*, 32 NAT'L J. 1333 (2000).

69. LAZARUS, *supra* note 26, at 251-52.

70. LATEST FINDINGS, *supra* note 67.

71. See Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 ENVTL. L. REP. 10,329 (1997); Oliver A. Houck, *The Clean Water Act TMDL Program V: Aftershock and Prelude*, 32 ENVTL. L. REP. 10,385 (2002).

transferred from other communities to their own with the placement of a hazardous waste treatment, storage, or disposal facility.⁷²

These remaining problems are serious and significant, but they are consistent with the bottom line positive assessment of environmental law's extraordinary accomplishments during the past several decades. Ours is a nation that has not witnessed the kind of wholesale ecological destruction suffered elsewhere, such as in Eastern Europe. Notwithstanding the considerable challenges presented by the enactment and implementation of environmental law in our deliberately fragmented system of lawmaking, the United States' experience has demonstrated the potential compatibility between environmental protection law and democratic, open government. Nor is environmental law today the disruptive agent that it once seemed more than thirty years ago. Pollution control and natural resource management laws have by now settled into the legal landscape. They have become part of the legal fabric that generates many of the nation's economic expectations. Rather than frustrate economic expectations, they are just as likely now to create them. For instance, important industries such as real estate, tourism, and fishing all frequently depend upon maintaining and enhancing the quality of the natural environment. Real estate and tourism find much of their value in a water vista, clean air, and quiet solitude. The fishing industry depends on water quality capable of maintaining fish stocks. There is a distinct billion dollar pollution-control industry in the United States, directly derived from pollution control laws, that employs more than one million people.⁷³

III. ENVIRONMENTAL LAW'S LATEST CHALLENGE: THE FEDERAL JUDICIARY

For this reason, one of the great contemporary ironies is that one of the most significant challenges to environmental law's ability to maintain the course comes from the federal judiciary. Today, the federal judiciary frequently appears skeptical of environmental protection law. Federal judges see the same tensions between the challenges of environmental lawmaking and our constitutional system of lawmaking that Judge Wright perceived. But because many of today's judges are not nearly as persuaded of the necessity and wisdom of existing environmental laws,

72. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993). See generally LUKE COLE & SHEILA FOSTER, *FROM THE GROUND UP—ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 167-83 (2001) (presenting an annotated bibliography of studies).

73. LAZARUS, *supra* note 26, at 162.

they see those same tensions as causes for concern rather than reasons for accommodation.

Compare, for example, Judge Wright's *Calvert Cliffs* opinion to the views of another prominent jurist today. Here is what the latter wrote in an indirect, yet still obvious, reference to *Calvert Cliffs*. He decried what he described as the "judiciary's long love affair with environmental litigation."⁷⁴ He argued that it was a mistake to provide broad citizen suit access to trigger judicial oversight of environmental regulatory action. Even more boldly, the jurist candidly acknowledged the policy implications of his legal position:

Does what I have said mean that . . . "important legislative purposes, heralded in the halls of Congress [can be] lost or misdirected in the vast hallways of the federal bureaucracy?" Of course it does—and a good thing, too. . . . [L]ots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday's herald is today's bore⁷⁵

What radical penned these words? What judge was willing to suggest that environmental law, once a "herald," is now a "bore?" The answer: Justice Antonin Scalia of the United States Supreme Court.⁷⁶

Like Judge Wright in an earlier era, Justice Scalia practices what he preaches. Since Justice Scalia joined the Court in 1986, he has successfully instigated the Court's heightened questioning of citizen suit standing and he has promoted the erection of higher jurisdictional hurdles for citizen suits in environmental cases.⁷⁷ The Court has resurrected once-seemingly antiquated limits on Congress's Commerce Clause authority,⁷⁸ casting doubt on a broad reading of the jurisdictional reach of federal environmental statutes such as the CWA⁷⁹ and, for some lower court judges, on the ESA as well.⁸⁰ The Court has reinvigorated the

74. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983).

75. *Id.* at 897.

76. *Id.* at 881.

77. See *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

78. *United States v. Lopez*, 514 U.S. 549, 558-60 (1995).

79. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).

80. See *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir.), *reh'g en banc denied*, 362 F.3d 286, 287 (5th Cir. 2003) (Jones, J., joined by Jolly, Smith, Demoss, Clement, & Pickering, JJ., dissenting); *Gibbs v. Babbitt*, 214 F.3d 48, 506 (4th Cir. 2000) (Luttig, J., dissenting); *Rancho Viego, L.L.C. v. Norton*, 323 F.3d 1062, *reh'g en banc denied*, 334 F.3d 1158 (D.C. Cir. 2003) (Sentelle & Roberts, JJ., dissenting).

Fifth Amendment Takings Clause and, consequently, prompted increased regulatory takings challenges by property owners aggrieved by the extent to which environmental laws may restrict their exercise of private rights in natural resources.⁸¹ And, based on the Eleventh Amendment, the Court has overruled its own precedent that allowed citizens to sue states for monetary recovery under CERCLA.⁸²

Like Judge Wright, Justice Scalia understands the implications of the nation's environmental laws. But, while Judge Wright saw a need for legal evolution and accommodation, Justice Scalia perceives environmental law as a threat to be cabined. Not because he, or anyone else on the Court, is against environmentalism or environmental protection per se. But, instead because they harbor concerns about the kinds of laws and law-making institutions that environmentalism inevitably promotes in lawmaking: the tendencies to redistribute economic value, limit private property rights, promote citizen suit access to judicial review of agency action, promote centralized authority in federal administrative agencies, and intrude upon the unimpeded operation of free market forces.⁸³

Justice Scalia is also not a lone voice on the current Court in his apparent harboring of these kinds of concerns. In the recent October 2003 Term there were seven environmental cases before the United States Supreme Court.⁸⁴ That is a remarkable number. It represents almost ten percent of the Court's entire docket of cases to be heard on the merits, which numbered fewer than seventy-five. But what is even more remarkable than just the sheer number of cases is their procedural posture. In all seven of those cases, the Court granted review in cases in which the lower courts had ruled in a manner that environmentalists favored. The impression created is that the Court is concerned when environmentalists win, but not when they lose. In other areas of law, the Court's docket does not seem similarly skewed. For instance, although the Court's reputation is one that is predisposed towards the prosecution in criminal cases, a review of death penalty and criminal procedure cases before the Supreme Court during the 2000 Term through the 2002 Term

81. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

82. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-72 (1996).

83. LAZARUS, *supra* note 26, at 132-37.

84. *See* *Cheney v. United States Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576 (2004); *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004); *Dep't of Transp. v. Pub. Citizen*, 124 S. Ct. 2204 (2004); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756 (2004); *BedRoc Ltd. v. United States*, 124 S. Ct. 1537 (2004); *Alaska Dep't of Envtl. Conservation v. EPA*, 124 S. Ct. 983 (2004).

shows that the criminal defendants were the petitioners in thirteen out of twenty-two cases.⁸⁵

What is even more remarkable about the number of environmental cases recently before the Court and their procedural posture is that many did not seem like likely Supreme Court cases. The traditional criteria for Supreme Court review were lacking. In some, the Court granted certiorari in the absence of circuit conflicts and where there was no obvious legal issue of transcendent national importance.⁸⁶ There was even one case where the statute being construed applied in only one state out of fifty.⁸⁷

It is certainly true that once the Court grants review and decides cases on the merits, its actual rulings are not nearly so skewed. There are major Supreme Court rulings favorable and unfavorable to environmentalists. In 2001, the Court unanimously upheld the CAA against a constitutional challenge based on the nondelegation doctrine.⁸⁸ The majority has repudiated much of Justice Scalia's narrow views of citizen suit standing⁸⁹ as well as some of his efforts to reinvigorate even more fully regulatory takings challenges.⁹⁰ Also in the 2003 Term, the Court rejected by a vote of five to four a narrow reading of the CAA, which would have circumscribed the EPA's authority to oversee state implementation of the CAA.⁹¹ The Court likewise rejected a narrow reading of the CWA.⁹²

Since those earlier rulings in the October 2003 Term, however, the Court has handed business interests a series of sweeping wins. The Court vacated a court of appeals decision that upheld the right of a regional air pollution control authority to require owners and operators of

85. *Atwater v. Lago Vista*, 532 U.S. 318 (2001); *Kyllo v. United States*, 533 U.S. 27 (2001); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Ohio v. Reiner*, 532 U.S. 17 (2001); *United States v. Knights*, 534 U.S. 112 (2001); *United States v. Arvizu*, 534 U.S. 266 (2002); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Kelly v. South Carolina*, 534 U.S. 246 (2002); *Mickens v. Taylor*, 535 U.S. 162 (2002); *Ring v. Arizona*, 536 U.S. 584 (2002); *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Kaupp v. Texas*, 538 U.S. 626 (2003).

86. *See, e.g., Alaska Dep't of Env'tl. Conservation*, 124 S. Ct. at 983.

87. *See BedRoc Ltd.*, 124 S. Ct. at 1587 (interpreting rights to minerals stemming from the Pittman Underground Water Act of 1919, 43 U.S.C. §§ 351-355 (repealed 1964), applicable only in Nevada).

88. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001).

89. *See Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 180-89 (2000).

90. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320-22 (2002).

91. *Alaska Dep't of Env'tl. Conservation v. United States Env'tl. Prot. Agency*, 124 S. Ct. 983, 1002-06 (2004).

92. *S. Fla. Mgmt. Agency v. Miccosukee Tribe of Indians*, 1254 S. Ct. 1537, 1542-45 (2004).

fleets of vehicles to purchase more low-emission vehicles.⁹³ The Court held that the CAA preempted state and local authorities from unilaterally imposing such requirements.⁹⁴ The Court also unanimously overturned a court of appeals judgment that held that a federal transportation agency violated both the CAA and NEPA by failing to account adequately for the adverse environmental consequences of the agency's promulgation of regulations that allow increased commercial traffic from Mexico (upon the lifting of a Presidential moratorium).⁹⁵ One week later, in yet another unanimous decision, the Court ruled against a grassroots environmental organization that had won in the lower courts in its effort to obtain judicial oversight of a federal agency's failure to take adequate measure to guard against degradation of a potential wilderness area caused by significantly increased off-road vehicle use.⁹⁶ In ruling that the federal courts lacked jurisdiction to entertain such lawsuits, the Court created a potentially insurmountable hurdle to environmental citizen efforts to bring lawsuits designed to make sure that statutory and regulatory environmental protections are not, recalling Judge Skelly Wright's words in *Calvert Cliffs*, "lost" or "misdirected" in the "vast hallways of the federal bureaucracy."⁹⁷ Finally, the Court stalled environmentalist efforts, similarly successful in the lower courts, to obtain through pretrial discovery from the Office of the Vice President copies of documents that citizen plaintiffs claimed would demonstrate the extent to which private industry determined the substantive content of the Vice President's National Energy Plan.⁹⁸

IV. CONCLUSION

In conclusion, the stakes for environmental law's future right now in the courts are as high as they were in the 1970s during environmental law's formative years. Notwithstanding the passage of more than three decades of modern environmental law here in the United States, courts are still struggling to answer a host of difficult issues arising from challenges presented by environmental lawmaking. These issues pertain to: (1) the respective roles of federal, state, and tribal sovereign

93. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1764-65 (2004).

94. *Id.*

95. *Dep't of Transp. v. Pub. Citizen*, 124 S. Ct. 2204 (2004).

96. *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004).

97. *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

98. *See Cheney v. United States Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576 (2004).

authorities; (2) the respective responsibilities of the various branches of government in overseeing the work of the other branches; and (3) the extent to which private property rights in natural resources can be fairly limited.

The stakes are, however, in some respects even higher than before because the political dynamic in the federal government has dramatically shifted since the 1970s. Until the 104th Congress in the mid-1990s, Congress was a major player, especially the standing authorization committees through their increasing attention over time to the details of federal environmental law. Since that time, Congress's normal law-making ability has been dramatically circumscribed as a result of entrenched partisan stalemates. Nothing can be enacted, apart from nontransparent and nondeliberative riders attached to massive appropriations bills.⁹⁹

The upshot is more and more executive branch lawmaking at the outer edge of statutory authority. Whether it is the Clinton Administration trying to reach further than the existing law may plainly authorize, or the Bush Administration trying to do less than what existing law may plainly require, the resulting legal issues, when lawsuits are brought against the executive branch, are left to the courts.

With the resolution of these legal issues turning once again to the courts, the nation needs, more than ever, the kind of eloquent, forceful advocacy once presented by Tulane's own Louis Claiborne. And it needs the kind of brilliant, insightful judging once provided by Louisiana's own Skelly Wright to address these issues. It takes great judges and great advocates to make and to keep great law. And environmental law is no exception.

99. See LAZARUS, *supra* note 26, at 159-60.