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A Generational History of Environmental Law and Its Grand Themes: A Near Decade of Garrison Lectures

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Garrison Summary
**A Generational History of Environmental
Law and Its Grand Themes:**
**A Near Decade of
Garrison Lectures**

JEFFREY G. MILLER*

I have been privileged to hear, enjoy and learn from the talks of each of our Garrison Lecturers during the last eight years, as well as our discussions with them here today. In preparation for my duties as a summarizer, I studied their talks, printed in our Pace Environmental Law Review. I was delighted to find that the body of their commentary is far more than the sum of its parts. Together our lecturers take us on a grand journey through the history of modern environmental law, its heroes and villains, its accomplishments and its weaknesses. Together they sound all the grand themes of environmental law. Together they remind us where we have been and where we must go. It is no surprise their talks have been edifying and provocative, after all, they are pre-eminent environmental law scholars and environmental law actors of the first order. I suppose it should not have surprised me to see how much more weight their talks carried in the aggregate than separately, for environmental law is not the product of a few individuals, but of many environmental lawyers working in concert across the country and in successive decades. It continues to develop as a product of what is now a small army of environmental lawyers, many of them students of our lecturers and of our program here at Pace Law School.

* Professor of Law and Associate Dean for Environmental Studies, Pace University School of Law, White Plains, New York. Seven distinguished Garrison Lecturers have given presentations at Pace over the years. On February 21, 2002, they gathered at Pace to hear the presentation of the eighth and to discuss as a group the state of environmental law. James Gustave Speth, Dean of the Yale School of Forestry, led the discussion. This paper expands on my oral summary of their talks and of that discussion. I am grateful to Michelle Land, for her wise suggestions and editorial assistance.

Our lecturers complimented New York, reminding us of the importance of the state in the creation and history of environmental law. The Adirondacks Preserve, with its “forever wild” talisman, led the way to large-scale preservation of natural areas.¹ Teddy Roosevelt, a New Yorker, made our national parks, national monuments and natural forests blossom.² More recently, the *Scenic Hudson*³ litigation, pioneered by Lloyd Garrison and completed by our first Garrison Lecturer, David Sive,⁴ demonstrated that environmentalists could use litigation to prevent harmful development and preserve natural areas. David Sive, of course, was a recent colleague of ours at Pace Law School for several years. Not long after *Scenic Hudson*, the Natural Resources Defense Council (NRDC) and the Environmental Defense Fund (EDF) were born in New York City, with David Sive as one of NRDC’s original board members and Gustave Speth, our moderator today, as one of its founding members. Additionally, we should never forget the role of the quintessential New York enterprise—the national media. The *New Yorker* magazine first published Rachel Carson’s *Silent Spring*, the clarion wake-up call that heralded the modern environmental movement. The *New York Times* has been a constant reminder that environmental problems demand solutions. Without the *New York Times*, no one would have heard of Love Canal, and without Love Canal, there would be no Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁵ New York’s contribution to environmental protection, however, is but an historic footnote unless New Yorkers today continue a leadership role. We at Pace Law School hope we are continuing that tradition of leadership by training lawyers here and around the world, to build and develop environmental law in the twenty first century.

1. N.Y. CONST. art. XIV, § 1. The Forest Preserve, the state owned land in the Catskill and Adirondack State Parks, is to be kept “forever wild.” *Id.*

2. See generally EDMUND MORRIS, THEODORE REX (2001).

3. Lloyd Garrison represented the environmentalists in the landmark *Scenic Hudson Preservation Conference v. Federal Power Comm’n*, 354 F.2d 608 (2d Cir. 1965). David Sive represented them in follow-up litigation, *Scenic Hudson Preservation Conference v. Calloway*, 499 F.2d 127 (2d Cir. 1974), in which he established that the power company could not proceed with dumping rocks and debris into the Hudson while building a pump storage unit at Storm King, without a permit under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994).

4. David Sive, *The Litigation Process in the Development of Environmental Law*, 13 PACE ENVTL. L. REV. 1 (1995).

5. 42 U.S.C. §§ 9601-9675 (1994) amended by Pub. L. No. 107-118, 115 Stat. 2356 (2002).

Of course, New York's role is only part of the entire picture in the development of environmental law. The Garrison Lectures provide valuable insight into the national evolution of environmental law as well. Prof. William Rodgers described environmental law using a geologic metaphor emphasizing complexity, layering, anomalies, box canyons, and gradual erosion.⁶ Several other lecturers hinted at a biological metaphor, emphasizing its generational aspects.⁷ I like the biological metaphor better, with its complexity, constant evolution and very human failings. After all, the law and its component fields—like the biosphere with its component ecosystems and species—is a complex adaptive system; a living system that adapts to changing conditions and continually evolves.⁸ In biological systems, we cannot exist and thrive without parents. David Sive is often called the parent of environmental law because of his pioneering role, after Lloyd Garrison, as a litigator in *Scenic Hudson*, as well as his founding role in and stewardship of the Environmental Law Institute (ELI), NRDC, and the American Law Institute-American Bar Association (ALI/ABA) environmental law programs. More accurately, however, he is but one of the parents of environmental law. Prof. Richard Lazarus⁹ tells us that Professors Joseph Sax,¹⁰ William Rodgers, and Oliver Houck,¹¹ also are all among the founding generation of environmental lawyers.¹²

Parenting, by definition, involves participation in the creation of new life. *Scenic Hudson* was a creative and defining moment for the new field of environmental law. Lloyd Garrison and later,

6. William H. Rodgers, Jr., *Defeating Environmental Law: The Geology of Legal Advantage*, 15 PACE ENVTL. L. REV. 1 (1997).

7. Richard Lazarus tells us that David Sive, Joseph Sax and Oliver Houck were in the first generation of environmental lawyers and that he is among the first of the second generation. Richard Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 PACE ENVTL. L. REV. 1, 2 (1999). A. Dan Tarlock's talk, *The Future of Environmental 'Rule of Law' Litigation*, 17 PACE ENVTL. L. REV. 237 (2000), is, among other things, an examination of several generations of environmental law. His identification of the different generations is somewhat different than suggested in this paper.

8. Jeffrey G. Miller, *Evolutionary Statutory Interpretation: Mr. Justice Scalia Meets Darwin*, 20 PACE L. REV. 409 (2000).

9. Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 PACE ENVTL. L. REV. 1 (1999).

10. Joseph L. Sax, *Using Property Rights to Attach Environmental Protection*, 14 PACE ENVTL. L. REV. 1 (1996).

11. Oliver Houck, *Environmental Law and the General Welfare*, 16 PACE ENVTL. L. REV. 1 (1998).

12. Lazarus, *supra* note 9, at 2.

David Sive, convinced judges to suddenly discover that the environment and environmental values were part of the public welfare protected in many statutes. They breathed new life into old laws, stopping Consolidated Edison's plans to build a pump storage unit on Storm King Mountain that would ruin one of the most beautiful and celebrated landscapes on the east coast—our Hudson Highlands. Prof. Dan Tarlock¹³ comments that this was a paradigm environmentalist lawsuit, the beginning of what he calls environmental 'Rule of Law' litigation.¹⁴ First, the court acknowledged the unprecedented standing of a group of citizens to protect aesthetic values.¹⁵ Second, the court found that a statute enacted before widespread environmental concern could and should be read to give the implementing agency authority to consider aesthetic values in its decisions and therefore that it was mandated to do so. Finally, the result was a remand.¹⁶ The victory was procedural, but the result was sufficient delay to mobilize popular and political forces to stop the project. This set the pattern for much litigation by environmentalists, even under the major federal environmental statutes of the 1970s, many of which follow the same pattern, particularly under the National Environmental Policy Act (NEPA).¹⁷

David Sive was not the only litigator to breathe new life into old laws. Others were expanding public nuisance doctrine to protect against environmental insults. Still others were resurrecting the Refuse Act of 1899¹⁸ for use in a national program of water pollution control.¹⁹ Indeed, David Sive posits that litigation has played a more important and dominant role in the environmental

13. A. Dan Tarlock, *The Future of Environmental 'Rule of Law' Litigation*, 17 PACE ENVTL. L. REV. 237 (2000).

14. *Id.* at 244-46.

15. *Id.* at 245.

16. *Id.*

17. 42 U.S.C. §§ 4321-4370 (1994).

18. 33 U.S.C. § 401. Prof. Tarlock uses this as an example of an old statute, conceived for other purposes and later adapted for the new use of protecting the environment. Prof. Rodgers, however, uses it as an example of seventy years of neglect by the Corps of Engineers to implement a pollution control statute. Rodgers, *supra* note 6, at 4. Since widespread concern for water pollution had not begun by 1899, I suspect Prof. Tarlock has the stronger case.

19. Indeed, Prof. Houck reminds us that much of that work was done by the U.S. Attorney's office in the Southern District of New York. Houck, *supra* note 11, at 2. Moreover, much of the work there was done by Daniel Riesel, then an Assistant U.S. Attorney, and later, a long-time partner of David Sive and a frequent co-chair with David for many ALI/ABA environmental law programs.

movement than in any other social development.²⁰ While that claim may be challenged,²¹ there is no doubt that the role of litigation was a decisive and dominant one in the first generation of environmental law. It dominated the early development of environmental law however, only because of the expansion of the traditional standing doctrine achieved by Lloyd Garrison and David Sive in *Scenic Hudson*.²² That expansion empowered public interest law firms, exemplified by NRDC, whose very reason for existence was to shape environmental law by bringing court actions to protect the environment.²³ Fortunately, their efforts coincided with a high degree of judicial activism exemplifying the federal courts at that time.²⁴

Parenting is more than creating new life; parenting also is nurturing new life and raising it to be independent and successful in its own right; it is producing a new generation. David Sive was a true parent in this capacity as well, spending untold time and energy educating us in his ALI/ABA courses and helping to develop a field of law as a member or director of the ALI, ELI, NRDC and initial chair of the Legal Advisory Committee of the Council on Environmental Quality.²⁵ David Sive's efforts, and those of his founding father's generation, were focused largely on litigation, implanting environmental values among the traditional values protected by public welfare litigation. He sings psalms in praise of

20. Sive, *supra* note 5, at 3 (citing a quotation of his in *CROSSROADS: ENVIRONMENTAL PRIORITIES FOR THE FUTURE* (Peter Borelli ed., 1989)).

21. The civil rights movement, for instance, relied on litigation and demonstrations to highlight racial injustice and demand redress. Indeed, *Brown v. Board of Education*, 349 U.S. 294 (1955), played a galvanizing role for the civil rights movement analogous to the role of *Scenic Hudson* in the environmental movement. The environmental movement learned from the civil rights movement, using both litigation and demonstrations to highlight environmental problems and demand remedial legislation. If *Scenic Hudson* was an analogue of *Brown*, the Earth Day demonstrations were analogues to civil rights demonstrations. Indeed, Sive playfully admits as much, saying that he is particularly fond of the proposition because it cannot be proven one way or the other. Sive, *supra* note 4, at 3.

22. 354 F.2d 608 (2d Cir. 1965).

23. As Sive points out in his lecture, NRDC and other public interest law firms were able to develop environmental law relatively cheaply by initially concentrating on challenges to final agency actions. These appeals were on the record, requiring no witnesses or discovery. Sive, *supra* note 4, at 16-17.

24. Tarlock, *supra* note 14, at 251. See also Robert Glicksman, *A Retreat from Judicial Activism: the Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209 (1987).

25. The initial members of the Committee included Prof. Sax, and Pace's own Prof. Nicholas Robinson.

litigation, with good reason, for it is a field where David could and sometimes did defeat Goliath.

The second generation of environmental law and lawyers was fundamentally different than the first. If the first generation lived for the courtroom, convincing judges to graft environmental values on the rootstock of traditional doctrines and old (non-environmental) statutes, the second generation created and implemented statutes and regulations devoted entirely to environmental law. That generation began with the decade that saw the enactment of the modern panoply of federal environmental protection and pollution control statutes and their state analogues, starting with NEPA in 1969 and ending with CERCLA in 1980. As a result of this avalanche of legislation, environmental law today is overwhelmingly statutory and regulatory. While the length of EPA's statutes approximately equate the length of the Internal Revenue Code,²⁶ the length of EPA's regulations undoubtedly surpass those of the Internal Revenue Service.²⁷

The new legislation embodied two concepts that Prof. Houck identified as critical to the successes of environmental law: The institutionalization of transparency and the search for alternatives.²⁸ Of course, NEPA is the exemplar of both, requiring that governmental decisions affecting the environment be made in public and only after exploring the impact of the proposed action on the environment and whether alternative actions might affect the environment less. Prof. Rodgers disparages NEPA as all process and no substance, at least as interpreted by the Supreme Court.²⁹ But lawyers know that differences in procedure can be outcome determinative.³⁰ In any event, there is little doubt that transparency is one of the themes of the environmental statutes and that it has affected their implementation, allowing public participation in critical decisions and preventing them from being made behind closed doors. The statutes have a panoply of require-

26. The EPA statute pages in *SELECTED ENVIRONMENTAL LAW STATUTES* (West Publ'g educational ed. 2001-2002) contains 899 pages, while the Internal Revenue Code contains approximately 874 pages.

27. The Internal Revenue Service regulations, 26 C.F.R. §§ 1-801, contain approximately 10,660 pages. The Environmental Protection Agency regulations, 40 C.F.R. §§ 1-799 and §§ 1400-1700, contain approximately 15,990 pages.

28. Houck, *supra* note 11, at 4-7.

29. Rodgers, *supra* note 6, at 14-15.

30. I am under the impression from discussions with lawyers and professors from around the world that the greatest differences between environmental law in the common law countries and civil law countries is not in substance, but rather in implementation and procedure.

ments for public participation, but perhaps none has been as critical in the development of environmental law as the citizen suit. In citizen suits, the statutes created a new vehicle for litigation, enabling private citizens to sue the government for failure to implement the statutes and to sue the regulated public for violating the statutes. Transparency and citizen participation are characteristics of our administrative law, and greatly distinguish it from the law of other countries. Environmental law takes citizen participation to a new level with citizen suits and heightens transparency in the Toxics Release Inventory under the Emergency Planning and Community Right to Know Act (EPCRA),³¹ which requires private companies to report publicly on their use of toxic materials and their releases of them to the environment. With no regulatory program beyond annual reports, this measure has made great strides in reducing the uses, and hence the environmental release, of environmentally hazardous materials.³²

As Prof. Houck reminds us, the search for alternatives has been more successful in pollution control than in natural resource management, a conclusion with which Prof. Sax would no doubt agree. With our penchants for tinkering and invention, we have developed alternative production technologies, treatment technologies, and management practices enabling us to greatly reduce the amounts of pollutants released into our environment by industrial, commercial, and governmental establishments. However, there are no technological fixes for profligate land and natural resource use. In fact, as Prof. Houck comments, our efforts to manage land use and natural resources "have simply failed."³³ While the search for alternatives has enabled us to make wise decisions on the use of public lands, it has not helped much in infusing the public good into decisions on the use of private lands. Our efforts to achieve environmental goals through controls on private land use are greatly hampered by our constitutional protections on private property, our traditional concepts of the sanctity of private property, and our traditional views that land use controls are state and local matters best isolated from federal authority. Enter the property rights movement and its attempt to dismantle envi-

31. 42 U.S.C. §§ 11001-11050 (1994).

32. See generally U.S. ENVIRONMENTAL PROTECTION AGENCY, TOXIC RELEASE INVENTORY 1999 DATA RELEASE, at <http://www.epa.gov/tri/tridata/tri99/index.htm> (last visited April 5, 2002).

33. Houck, *supra* note 11, at 4.

ronmental law, as described by Prof. Sax.³⁴ On a more hopeful note, Prof. Sax in his remarks described how the Department of Interior used the Endangered Species Act³⁵ in several cases to achieve ecosystem management on public and private lands. He believed this could be a new paradigm in environmental law.

This spat of environmental legislation in the 1970s represented a political victory for the environmental movement, which reminds us, as does Prof. Zygmunt J.B. Plater,³⁶ that environmental protection, like all social concerns, is ultimately a political matter. Politics, however, is not a one-way street. Forces opposed to environmental protection have used politics, first by attempting to enact legislation implementing former Rep. Newt Gingrich's "Contract with America,"³⁷ as decried by David Sive,³⁸ and later by attempting to enact "property rights" legislation, decried by Prof. Sax.³⁹ Politics, of course, does not affect environmental law only through the enactment by Congress and state legislatures of pro- or anti-environmental legislation; politics also affects environmental law through the implementation of environmental statutes by Presidents and governors with pro- and anti-environmental philosophies. The environmental depredations of the Watt/Gorsuch team in the first Reagan administration are a prime example of the harm that the environment can suffer at the hands of an executive branch not attuned to environmental values.⁴⁰ Indeed, most of the examples of the neglect, diversion, acquisition and sale, abandonment, process transformation, exception, pretense, and marginalization of environmental law, which Prof. Rodgers gave us in his lecture,⁴¹ were created by the executive branch. They are what lie behind Prof. Tarlock's observation that environmental law is characterized more by irony and paradox than by unifying

34. See generally Sax, *supra* note 10.

35. 16 U.S.C. §§ 1531-1544 (1994).

36. Zygmunt J.B. Plater, *Environmental Law in the Political Ecosystem-Coping With The Reality of Politics*, 19 PACE ENVTL. L. REV. 422 (2002).

37. See generally CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION. (Ed Gillespie & Bob Schellhas eds., 1994). See also Thomas O. McGarity, *Deflecting the Assault: How EPA Survived A "Disorganized" Revolution By "Reinventing" Itself A Bit*, 31 Env'tl. L. Rep. (Env'tl. L. Inst.) 11,249 (Nov. 2001).

38. Sive, *supra* note 4, at 22-24, 29-30.

39. Sax, *supra* note 10, at 1.

40. Joel A. Mintz, *Agencies, Congress, and Regulatory Enforcement: A Review of EPA's Hazardous Waste Enforcement Effort*, 18 ENVTL. L. 683 (1988).

41. See generally Rodgers, *supra* note 6.

legal principles.⁴² We sometimes forget that politics also affects the federal judiciary, for judges are appointed through a political process. The appointment of judges by predominantly conservative administrations over the last two decades⁴³ is bound to affect environmental law. Indeed, Prof. Houck outlines how our current federal judiciary appears to be returning us to constitutional doctrines of the early twentieth century, hemming in federal powers on all sides.⁴⁴ Worse yet, Prof. Lazarus' analysis of some 250 of the Supreme Court's environmental law opinions suggests the Court actually appears to disfavor environmental protection.⁴⁵ That is bad news for environmental law, which has historically been developed in the courts and which depends on strong federal powers to flourish. Perhaps, if all else fails, we can develop the general welfare clause in the Constitution's preamble, in conjunction with the taxing and spending power⁴⁶ as Prof. Houck suggests.⁴⁷

Of course we carry the genes of the first generation, reflected in our zeal for protecting the environment and our reliance on litigation to enforce our statutes and regulations. During the second generation, the importance of litigation in developing environmental law was emphasized when forces against environmental protection copied the environmental movement by commissioning their own public interest law firms, such as the Pacific Legal Foundation, using litigation to develop an anti-environmental law. Indeed, Prof. Rodgers has a sinister view of environmental litigation, finding it most often used by anti-environmental forces to frustrate environmental goals and seeing environmental lawyers as the chief gainers from the complexity of environmental law.⁴⁸

42. Tarlock, *supra* note 13, at 238.

43. See Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM. & MARY BILL RTS. J. 103, at 104. This article chronicles the federal court selections in the Reagan, G. H.W. Bush, Clinton and G.W. Bush presidencies, noting the conservative strategy in the Reagan and Bush administrations and the consequences of those strategies. See also Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408-09. ("*Bush v. Gore* was troubling because it suggested that the Court was motivated by a particular kind of partisanship [in that] the five conservatives installed a president who would appoint their colleagues and successors and would stock the Federal judiciary with like-minded conservatives.") *Id.*

44. Houck, *supra* note 11, at 8-11.

45. *Id.* at 13.

46. U.S. CONST. art. I, § 8.

47. Houck, *supra* note 11, at 11-14.

48. Rodgers, *supra* note 6, at 2-3.

What of the third generation? Will it rely more on non-confrontational mechanisms than the first and second, as our Prof. Tarlock⁴⁹ suggests? And what about the generation of our present students? Will it be more driven by our shrinking world?

While each generation has its own unique hallmarks, carry-over to future generations is inevitable. Based on the behavior of the second generation, it looks as if the tendency to litigate is not a recessive gene and will carry on strongly in succeeding generations, although to different ends. We are fairly adept at seeing the mistakes of our parents' generation and, hopefully, at avoiding them. The strategies of the past have met their limits. We cannot have clean water without addressing non-point sources and Total Maximum Daily Loads (TMDLs).⁵⁰ We cannot have clean air without including SUVs, pickup trucks and other monster vehicles in our fuel economy standards. Command and control is not good at nuance. However, we should not forget that many of the past strategies have continuing vitality. Point sources are remarkably well controlled by Best Available Technology (BAT) standards, permits, enforcement and citizen suits. Fuel economy standards do work if they cover the right universe and are enforced. Command and control will have a role as long as we are motivated by the profit incentive and as long as it is more profitable not to comply with environmental law norms than to comply with them. More cooperative and nuanced strategies undoubtedly will bring us new successes. Still, as Enron reminds us, cooperation and nuance are unlikely to influence those most obsessed with the almighty dollar and to divert their attention and resources to less profitable or even unprofitable actions for the public good. When Enron championed energy deregulation, it did not do so for the good of the public or the environment. Would economic incentives or participation in EPA's ExCel program make a model citizen of Bin Laden Enterprises?

Each generation spends considerable energy in its formative years wondering if there is a God and, if so, what is she like? So too, each generation of environmental lawyers must spend time wondering if there is such a thing as environmental law and, if so,

49. Tarlock, *supra* note 13, at 269-72.

50. See Oliver Houck, *The Clean Water Act TMDL Program V: Afterschock and Prelude*, 32 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,385 (April 2002); see also Oliver Houck, *TMDLs IV: The Final Frontier*, 29 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,469 (Aug. 1999); Oliver Houck, *TMDLs III: A New Framework For The Clean Water Act's Ambient Standards Program*, 28 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,415 (Aug. 1998).

what is it? Fortunately, in law we save a lot time and energy of lawyers and the public by confining much of that existential activity to law school faculty members. Less than overwhelming enrollment in jurisprudence courses tells us that most lawyers believe it is just as well left to us. Well, how about it, is there a field of environmental law? Prof. Lazarus tells us the Supreme Court does not think there is and that it views environmental law as just a subset of administrative law, raising “no special issues or concerns worthy of distinct treatment as a substantive area of law.”⁵¹ Similarly, Prof. Tarlock, has difficulty finding a jurisprudential base for environmental law.⁵²

On the other hand, several environmental committees of Congress tell us there is environmental law. The Environmental Protection Agency, the Department of the Interior, and their state counterparts tell us there is. The environmental law division of the Department of Justice, and counterpart divisions of almost all states attorney’s general offices, tell us there is. The environmental law division of the ABA, every state bar association, and most metropolitan bar associations tell us there is. A section of the Association of American Law Schools (AALS) tells us there is. Casebooks for law students and treatises for practitioners tell us there is. Of course, we do not necessarily believe the Bible, the Koran, the Torah and other sacred texts when they tell us there is a God. But perhaps that is because they are so very contradictory about who they tell us God is.

I suspect the Attorneys General, the law associations and the casebook and treatise writers are in much stronger agreement on what constitutes environmental law than are the sacred texts in telling us who and what is God. The environmental authorities would mostly agree that environmental law is that body of law, primarily statutory, that manages and seeks to protect environmental resources for the health, use and enjoyment of the present public, and of succeeding generations of the public. Still, as Prof. Tarlock asks, what unity does it have as a matter of jurisprudence or legal doctrine?⁵³ Is it anything beyond a subset of administrative law, as Prof. Lazarus concludes the Supreme Court believes?⁵⁴ Prof. Tarlock proposes one possible jurisprudential basis for environmental law: The “science-based ethical stewardship ob-

51. Lazarus, *supra* note 9, at 14.

52. Tarlock, *supra* note 13, at 238-41.

53. *Id.* at 238.

54. Lazarus, *supra* note 9, at 14.

ligations to conserve natural systems for ourselves as well as for future generations.”⁵⁵ This is not far from the expanded public trust doctrine that Prof. Gerald Torres proposes.⁵⁶ Prof. Tarlock ultimately rejects the stewardship principle as a jurisprudential basis for environmental law because it is too much at odds with our philosophical and legal traditions and our behavior. He sees our traditions and behavior as reflecting fundamental social values, including property rights, which enhance the human dignity of the living, rather than placing value on protecting future generations and non-human entities.⁵⁷ Moreover, often neither statutes nor judicial decisions embrace stewardship explicitly as a legal principle. Finally, Prof. Tarlock looks primarily to judicial decisions as a basis for discerning jurisprudential principles. He finds that the signal environmental victories in the courts do not establish environmental protection principles, but rather reiterate existing principles in that the government must follow clear legislative mandates; must exercise discretion given to it by legislation or justify its failure to do so; and must follow established procedures.⁵⁸ This takes us back to the Supreme Court’s view of environmental law as simply an undifferentiated part of administrative law.

Jurisprudence and legal doctrine are not confined to judge-made law. Most of the world’s legal systems are code systems, not common law systems, and do not adhere to the *stare decisis* use of precedent as does the Anglo-American common law system. That does not mean they are without jurisprudence or legal doctrine. Our legal system is more like the civil law system than we admit, for our contemporary legal system is primarily governed by statute and regulation, not by judge-made law. And if we look within each of the two main components of statutory environmental law, we will discern a good deal of commonality. In terms of pollution control, the polluter pays and the precautionary principles are well established across most of the field. So is the derivative principle that polluters must use the best available technologies and management practices available to minimize encroachments by pollutants on public resources. So is the principle that if BAT is not sufficient to protect public resources for their designated uses,

55. Tarlock, *supra* note 13, at 238-39, 248-50.

56. Gerald Torres, *Who Owns the Sky?*, 18 PACE ENVTL. L. REV. 227, 241-44 (2000).

57. Tarlock, *supra* note 13, at 249.

58. *Id.* at 250-51.

the polluter must take further measures to do so. So are the standard setting, permitting, inspection, enforcement, and public participation mechanisms and procedures employed by the statutes. So is the complex system for sharing authority and responsibility between the federal and state governments. There is so much commonality in our pollution control statutes that judicial precedent is often applicable across several statutes. While I am not as familiar with the regimes for managing natural resources, I suspect there are similar commonalities in them. Prof. Tarlock's own water resource management casebook and treatise unify water resource management doctrines operating in our fifty states into two basic systems, both with emerging themes to reconcile private interests and public interests.⁵⁹ Although the resource management and pollution control laws seem like very different legal fields, Prof. Torres demonstrated in his aptly entitled "Who Owns the Sky?"⁶⁰ discussion, that the public trust doctrine in its broadest sense may unify them. The public trust doctrine emerges from management of public resources. Trusts exist for the benefit of future generations as well as the present one. Our primary pollution control programs center on preventing the degradation of our most necessary public resources—air and water. Even though western water use is private, the water itself is not and private use is ultimately managed for the public good. Moreover, this protection is basic to our personal dignity.

There is a certain Cassandra-like quality in parts of the lectures. The environment faces so many threats and environmental law is beset from so many quarters. When the economy takes a downturn or when the public is focused on more immediate matters such as war or terrorism, it seems that environmental protection slips a notch or two. But that has not decreased the strength or pervasiveness of environmental law over time, as it has continued to grow in all dimensions. If this is so, why are we always re-fighting the same battles? Why do we have to fend off the barbarians from our pollution control laws every few years? Why do we have to fight the robber barons every few years to keep our public lands public? Is there no public consensus behind our environmental law? If not, how can it endure?

59. See C. MEYERS ET AL., *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* (1987); see also A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* (3d ed. 1988).

60. Torres, *supra* note 56, at 227.

The Cassandra cries are wakeup calls, none more so than Rachel Carson's *Silent Spring*, which in many ways was the beginning of our present environmental movement. Professors Sax' and Rodgers' lectures were certainly such Cassandra cries. The *Scenic Hudson* suit in a way was a wakeup call to our judicial system, warning that it must respond to contemporary environmental needs. Even with the consistent and deep support that environmental protection has from the public, these reminders are necessary, for in the midst of conflicting needs we sometimes forget about the environment. So environmental lawyers remind me of Sisyphus, the ancient Greek condemned to roll the boulder to the summit, only to have it roll down again to the plain, from which he must perpetually roll it back to the summit, into eternity. There is great nobility in his dogged determination at that task, although he never wins, but only achieves an uneasy sort of stasis. Similarly, we toilers at environmental law work to the bone to achieve environmental gains, only to find them eroded during the next generation. Unfortunately, in the meantime our mountain has grown a little higher, making the summit yet harder to attain. But our children will win the gains back in the next generation, and perhaps achieve additional gains, only to have them lost and regained again. Such is the nature of the human condition. In the struggle is nobility, the victory is illusory, and, as long as we struggle, defeat is pyric.